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Disability and the Income Tax

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The federal *Income Tax Act* contains an extensive number of provisions addressing the taxation of families with disabled persons. These provisions, however, have been the subject of a series of ongoing incremental adjustments, and do not reflect a comprehensive and coherent approach to the taxation of these individuals in light of their unique financial circumstances. This article considers the existing income tax provisions regarding families with disabled persons, analyzing the relationship between disabilities and appropriate tax liabilities, and providing suggestions for reform of the current tax structure. Focussing on the goals of tax policy narrowly defined as compared to the broader social policy goals that may be pursued through the tax system, the article evaluates in turn (i) existing provisions aimed at recognizing the costs of disability for disabled individuals and their families; (ii) tax measures designed to facilitate participation by disabled persons in the paid labour force; and (iii) current tax rules on income support for disabled persons who have difficulty supporting themselves. In each of these areas, the article undertakes critical analysis of the present tax provisions and makes proposals for their improvement or replacement, bearing in mind the overriding rationale of promoting horizontal equity between individuals with and without disabilities and between persons who support disabled individuals and persons without such support obligations.

La *Loi de l'impôt sur le revenu* contient un grand nombre de dispositions visant l'imposition de familles avec des personnes handicapées. Cependant, ces dispositions ont été assujetties à une série de réajustements progressifs et ne semblent pas témoigner d'une politique d'imposition suffisamment complète et cohérente, étant donné la situation financière particulière de ces individus. Cet article passe en revue les dispositions actuelles visant les familles avec des personnes handicapées, tout en analysant le rapport entre les handicaps physiques ou mentaux et les assujettissements à l'impôt appropriés et en suggérant des moyens de réformer la structure actuelle du système d'imposition. En se concentrant sur les buts visés par la politique d'imposition, définie de façon restrictive, comparés aux buts plus larges de politique sociale pouvant être poursuivis par l'entremise du système d'imposition, l'article évalue, à tour de rôle, (i) les dispositions actuelles visant à prendre en compte les coûts de l'handicap pour les personnes handicapées et leurs familles, (ii) les mesures cherchant à faciliter l'intégration des personnes handicapées à la main d'œuvre rémunérée, et (iii) les règles actuelles portant sur l'allocation de pensions alimentaires aux personnes handicapées ayant des difficultés à subvenir à leurs propres besoins. L'auteur fait une analyse critique des dispositions actuelles dans chacun de ces domaines, et propose soit de les améliorer soit de les remplacer, tout en tenant compte du but primordial de promouvoir l'équité horizontale parmi les individus avec et sans handicap, ainsi que parmi les personnes qui subviennent aux besoins de personnes handicapées et celles qui n'ont pas de telles obligations.

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Introduction

In recent years, federal, provincial, and territorial governments have devoted increasing attention to the status of disabled Canadians, emphasizing the integration of disabled persons as equal citizens within the broader community through policies designed to promote equal access to generic programs and services, while simultaneously recognizing the need for specific measures to address the costs of disabilities, to facilitate participation by disabled persons in the paid labour force, and to provide income support for disabled persons who have difficulty supporting themselves.[1] Likewise, Canadian governments have demonstrated increasing concern about the welfare of families with dependent children, employing differing measures to alleviate the financial burden associated with the care of children to enable parents to participate in the paid labour force,[2] and agreeing on a combined strategy to combat child poverty through the National Child Benefit involving federal refundable tax credits and social assistance delivered by provincial and territorial governments. In each of these areas, the federal income tax has played a significant role in the pursuit of government policies.[3]

With respect to persons with disabilities, the *Income Tax Act* recognizes the costs of disabilities through credits for itemized medical expenses ("medical expense tax credit") and for mental or physical impairment ("disability tax credit").[4] Other provisions recognize additional costs associated with the care of disabled relatives by providing credits for infirm dependants over the age of 18 ("infirm dependants credit"),[5] and for specified relatives living in an individual's home who are over the age of 18

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[1] See *e.g.* Canada, Federal/Provincial/Territorial Ministers Responsible for Social Services, *In Unison: A Canadian Approach to Disability Issues (A Vision Paper)* (Ottawa: Human Resources Development Canada, 1998) [hereinafter *In Unison*]; Canada, Federal Task Force on Disability Issues, *Equal Citizenship for Canadians with Disabilities: The Will to Act* (Ottawa: Human Resources Development Canada, 1996).

[2] At the provincial and territorial level these measures have involved direct subsidies (as in Quebec) and tax credits (as in Ontario). At the federal level, the maximum allowable deduction for child care expenses increased from $2,000 for each eligible child in 1987 (maximum $8,000) to $7,000 or $4,000 per child (depending on the child's age and disability) for 1998 and subsequent taxation years.

[3] While disability-related policies are also pursued through federal and provincial sales taxes and provincial income taxes, the federal income tax is the most important tax instrument for the pursuit of these policies. This paper examines only the federal income tax.

[4] R.S.C. 1985 (5th Supp.), c. 1, ss. 118.2, 118.3 [hereinafter *ITA*]. S. 118.4 contains definitions relevant to the application of these and other provisions involving mental or physical impairment.

[5] *Ibid.*, s. 118(1)(d), describing B in s. 118(1). For the purpose of s. 118(1)(d), s. 118(6) defines a "dependant" as

> a person who at any time in the year is dependent on the individual for support and is
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> (a) the child or grandchild of the individual or of the individual's spouse; or
>
> (b) the parent, grandparent, brother, sister, uncle, aunt, niece or nephew, if resident in Canada at any time in the year, of the individual or the individual's spouse.

and dependent on the individual because of mental or physical infirmity ("caregiver credit");[6] additional provisions encourage private savings to support disabled persons through special tax rules for *inter vivos* trusts with disabled beneficiaries.[7] Participation by disabled persons in the paid labour force is facilitated by exempting specified disability-related employment benefits from tax,[8] by allowing individuals eligible for the disability tax credit to deduct the cost of attendant care provided to enable them to participate in the paid labour force,[9] by compensating disabled individuals who participate in the paid labour force for lost subsidies for disability-related supports under provincial social assistance,[10] and by permitting employers to claim an immediate deduction for prescribed disability-related modifications to buildings and prescribed disability-related equipment.[11] Finally, income support for disabled persons is encouraged by non-taxation of employer contributions to group sickness or accident insurance plans,[12] and enhanced by non-taxation of social assistance benefits,[13] workers' compensation,[14] and tort compensation for personal injuries.[15]

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[6] *Ibid.*, s. 118(1)(c.1), describing B in s. 118(1). This credit also applies where the individual maintains a "self-contained domestic establishment which is the ordinary place of residence of the individual" and a parent or grandparent over the age of 65.

[7] See the "election by trust and preferred beneficiary" in *ibid.*, s. 104(14), which allows income retained by the trust to be taxed as if it were received by a preferred beneficiary, and the definition of "preferred beneficiary" in s. 108(1). As a general rule, *inter vivos* trusts are taxable at the top marginal rate (29%) without any recognition of the tax credits available to beneficiaries.

[8] *Ibid.*, s. 6(16), which excludes from an individual's income benefits or reasonable allowances in respect of (a) transportation to and from work (including parking) if the individual is blind or eligible for the disability tax credit because of mobility impairment; and (b) an attendant to assist the individual in the performance of his or her duties if the individual is eligible for the disability tax credit.

[9] *Ibid.*, s. 64.

[10] See the "refundable medical expense supplement" in *ibid.*, s. 122.51.

[11] *Ibid.*, ss. 20(1)(qq), 20(1)(rr); *Income Tax Regulations*, C.R.C., c. 945, ss. 8800, 8801 [hereinafter *Regulations*]. S. 8800 specifies as prescribed disability-related modifications to buildings

> (a) the installation of
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> (i) an interior or exterior ramp; or
>
> (ii) a hand-activated electric door opener; and
>
> (b) a modification to a bathroom, elevator or doorway to accommodate its use by a person in a wheelchair.

S. 8801 prescribes as disability-related equipment

> (a) an elevator car position indicator, such as a braille panel or an audio signal, for individuals having a sight impairment;
>
> (b) a visual fire alarm indicator, a listening device for group meetings or a telephone device, for individuals having a hearing impairment; and
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> (c) a disability-specific computer software or hardware attachment.

[12] *ITA*, *ibid.*, s. 6(1)(a)(i), which excludes these contributions (among other amounts) from inclusion in the employee's income as a taxable benefit. Where an employer has made a contribution to such a plan, periodic payments received under the plan are taxable as employment income under s. 6(1)(f).

With respect to families with dependent children, the *ITA* recognizes the costs of supporting and caring for children through a credit for single parents ("wholly dependent person credit"),[16] a deduction for child care expenses incurred to enable parents to participate in the paid labour force,[17] and a refundable tax credit provided to low-income families with dependent children ("Canada Child Tax Benefit").[18] Other provisions recognize specific financial needs of dependent children by allowing tax-deferred savings to be transferred to dependent children and grandchildren on a taxpayer's death free of tax.[19] While most of these provisions are more generous regarding disabled children, the Canada Child Tax Benefit does not distinguish between disabled and other children.

Notwithstanding these many provisions, however, the pursuit of disability-related policies through the income tax appears to reflect a series of *ad hoc* adjustments rather than a comprehensive approach to the income tax treatment of disabled individuals and families with disabled persons. The medical expense tax credit, for example, is increasingly directed at disability-related expenses, while retaining a structure de-

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[13] Although social assistance benefits are included in computing the recipient's net income under *ibid.*, s. 56(1)(u), the amount so included is deductible under s. 110(1)(f) in computing the recipient's taxable income. Although the net result of these provisions is to exempt social assistance benefits from income tax, the inclusion of these payments in computing the recipient's net income can affect entitlement to a number of non-refundable and refundable tax credits, the amount of which depends on net income.

[14] Like social assistance benefits, workers' compensation is included in computing the recipient's net income under *ibid.*, s. 56(1)(v), but deductible under s. 110(1)(f) in computing the recipient's taxable income. While these provisions make worker's compensation exempt from income tax, the inclusion of these payments in computing the recipient's net income can affect the calculation of various non-refundable and refundable tax credits, the amount of which depends on net income.

[15] See *Cirella* v. *M.N.R.* (1977), [1978] C.T.C. 1, 77 D.T.C. 5542 (F.C.T.D.) [hereinafter *Cirella* cited to C.T.C.], in which the Federal Court held that tort damages for personal injury arising from an automobile accident were not taxable, even though they were payable in respect of foregone income. See also *ITA*, *ibid.*, ss. 81(1)(g.1), 81(1)(g.2), which exempt the income and capital gains derived from property acquired pursuant to an action for damages in respect of physical or mental injury where the injured person is less than 21 years old.

[16] *ITA*, *ibid.*, s. 118(1)(b). This credit is also available to individuals who support in a self-contained domestic establishment in which they live a wholly dependent relative who is either under the age of 18 or a parent or grandparent of the individual.

[17] *Ibid.*, s. 63.

[18] *Ibid.*, ss. 122.6-122.64.

[19] See *ibid.*, ss. 146(8.9), 146.3(6.2), and the definition of "refund of premiums" in s. 146(1), which exclude amounts paid to financially dependent children or grandchildren from inclusion in the income of the deceased, and s. 60(l), which allows the child or grandchild to deduct amounts so received which are contributed to a registered retirement savings plan or used to acquire an annuity. While this deduction is generally limited to children or grandchildren under 18 years of age, no such limit exists for children or grandchildren who were dependent on the deceased "by reason of mental or physical infirmity". For a detailed explanation of these provisions, see M.N.R., Interpretation Bulletin IT-500R, "Registered Retirement Savings Plans — Death of an Annuitant" (18 December 1996).

signed to recognize extraordinary costs associated with sudden and transitory illnesses.[20] Nor are these provisions always consistent with their primary rationale to promote horizontal equity between individuals with and without disabilities and between persons who support disabled individuals and persons without such support obligations.

This paper reviews and evaluates current income tax provisions and possible reforms relevant to families with disabled persons, with the goals of better recognizing the impact of disabilities on appropriate tax liabilities and bringing a greater degree of coherence to current income tax provisions bearing on families with disabled persons. For this purpose, Part I provides a framework for analysis by distinguishing between the goals of tax policy narrowly defined and broader social policy goals that may be and often are pursued through the tax system. Part II considers existing provisions and proposed reforms directed at recognizing the costs of disability, both for disabled individuals themselves and for families with disabled persons. Part III examines tax measures designed to facilitate participation by disabled persons in the paid labour force, while Part IV reviews existing and proposed tax rules regarding income support for disabled persons who have difficulty supporting themselves. Part V summarizes the main conclusions of the analysis and makes specific recommendations.

I. Tax Policy and Social Policy

As one of the most significant policy instruments available to the federal government, it is not surprising that the *ITA* might be used to pursue a variety of social policy objectives. Indeed, to the extent that a progressive income tax is designed to collect a larger proportionate share of revenue from high income taxpayers than lower-income taxpayers and exempt those with very low incomes, the tax itself can be said to serve a broad social policy objective of moderating inequalities in the pre-tax distribution of income.[21]

Nonetheless, in reviewing the characteristics of an optimal tax system, commentators generally distinguish between broad social policy goals regarding the appropriate allocation and distribution of economic resources, and the aims of tax policy more narrowly defined to raise revenue in a manner that is equitable among different taxpayers, that minimizes unintended effects on economic decisions, and that is relatively easy to understand and collect. Among those writing in the area, these more narrow tax policy goals are referred to as equity, efficiency, and simplicity.[22]

Although these criteria are often employed to discuss the merits of one kind of tax as compared with another (*e.g.*, income versus consumption), they are also used to

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[20] The medical expense tax credit is examined in detail in Part II.*A*, below.

[21] See *e.g.* N. Brooks, "Flattening the Claims of Flat Taxers" (1998) 51 Dal. L.J. 287; M.E. Kornhauser, "The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction" (1987) 86 Mich. L. Rev. 465.

[22] See *e.g.* R.W. Boadway & H.M. Kitchen, *Canadian Tax Policy*, 3d ed. (Toronto: Canadian Tax Foundation, 1999) at 52-86.

examine the various characteristics of specific taxes. With respect to the income tax, for example, efficiency considerations tend to favour a broad definition of income and relatively low rates to minimize tax-induced distortions in economic behaviour, while simplicity concerns favour a relatively straightforward and uniform set of rules to minimize the cost of administering the tax (involving government collection costs and the costs of taxpayer compliance). While some equity objectives are consistent with these efficiency and simplicity goals, others may contradict economic efficiency and administrative simplicity by supporting higher tax rates at higher income levels or special allowances to account for relevant differences in taxpayers' personal circumstances. As a result, like other areas of government policy, tax policy may involve difficult choices among different and conflicting policy goals.

When considering issues of tax equity, commentators generally distinguish between horizontal and vertical equity.[23] According to the former principle, taxpayers with the same ability to pay tax should pay the same amount of tax. According to the latter principle, taxpayers with a greater ability to pay tax should pay an appropriately greater amount of tax. In the context of the income tax, horizontal equity considerations apply to the definition of the tax base, while questions of vertical equity concern the rate structure.

Although the elaboration of these abstract tax policy principles in the actual design of a specific income tax is by no means uncontroversial, horizontal equity is often said to favour a broad or comprehensive definition of income,[24] while vertical equity is said to favour graduated or progressive rates which impose a proportionately higher tax burden at higher income levels.[25] In computing the income that is subject to progressive tax rates, however, commentators generally agree that horizontal equity requires that taxpayers be allowed to deduct all costs that are necessary to obtain this income.[26] Moreover, to the extent that a taxpayer's ability to pay is further diminished

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[23] See *e.g.* R.A. Musgrave, P.B. Musgrave & R.M. Bird, *Public Finance in Theory and Practice*, 1st Can. ed. (Toronto: McGraw Hill Ryerson, 1987) at 214; Boadway & Kitchen, *ibid.* at 52-73.

[24] See *e.g.* Boadway & Kitchen, *ibid.* at 52-56. Among the most prominent concepts of income consistent with this objective is the so-called Haig-Simons concept, according to which income is defined as the sum total of the taxpayer's consumption and increases to net wealth. See generally R.M. Haig, "The Concept of Income—Economic and Legal Aspects" in *American Economic Association Readings in the Economics of Taxation* (Illinois: Irwin, 1954) 54; H.C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago: University of Chicago Press, 1938); Canada, *Report of the Royal Commission on Taxation*, vol. 3 (Ottawa: Queen's Printer, 1966) (Commissioner: K. Carter) [hereinafter *Royal Commission on Taxation*].

[25] See *e.g.* Musgrave, Musgrave & Bird, *supra* note 23 at 214-18; Boadway & Kitchen, *supra* note 22 at 56-73. In addition to vertical equity arguments, progressive income taxation can be justified more directly on the basis that it moderates pre-tax inequalities in the distribution of income (see *e.g.* Brooks, *supra* note 21; Kornhauser, *supra* note 21; A. Warren, "Would a Consumption Tax Be Fairer than an Income Tax?" (1980) 89 Yale L.J. 1081 at 1083-93).

[26] See *e.g.* R. Goode, *The Individual Income Tax*, rev. ed. (Washington: The Brookings Institution, 1976) at 75; W.R. Thirsk, "Giving Credit Where Credit is Due: The Choice between Credits and Deductions under the Individual Income Tax in Canada" (1980) 28 Can. Tax J. 32 at 33.

by various involuntary expenses (*e.g.*, various disability-related expenses[27]), it is arguable that horizontal equity also requires that taxpayers be permitted to deduct these expenses in computing the income that is properly subject to tax.[28] Where the income tax base is determined in this manner, progressive rates ensure that taxpayers with more discretionary income pay a proportionately larger share of this income in tax.

In contrast to these tax policy goals narrowly defined, social policy addresses broader questions concerning the manner in which goods and services are allocated and economic resources distributed among members of a political community. Taking disability-related expenses as an example, social policy is concerned less with the deductibility of these expenses in computing an individual's taxable income than with the extent to which the additional costs incurred by persons with mental or physical disabilities are properly borne by the disabled person and/or supporting individuals, or by the community as a whole. Likewise, where a disability affects a person's ability to participate in the paid labour force, social policy is concerned less with the tax implications for supporting individuals or the deductibility of additional expenses that the disabled person must incur in order to earn income than with the respective roles of the private or public sectors in providing for the individual's support and with the implementation of effective measures designed to make the workplace more accessible to persons with disabilities.

As indicated at the beginning of this part, these social policy goals can be and often are pursued through the *ITA*. Where a social policy decision is made to insure half of all disability-related expenses, for example, this policy may be effected through a refundable tax credit equal to 50% of all eligible expenses.[29] Likewise, where a social policy decision is made to provide a guaranteed annual income to persons with disabilities, this policy may be implemented through a refundable tax credit the value of which diminishes as the recipient's income increases.[30] Similarly, investments in dis-

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[27] For the purposes of this explanation, I assume that these disability-related expenses are, in fact, involuntary, and do not involve an element of personal consumption. To the extent that these expenses involve a discretionary element, they should be only partly, not wholly, deductible in computing taxable income.

[28] For a persuasive articulation of this position, see P. Cloutier & B. Fortin, "Converting Exemptions and Deductions into Credits: An Economic Assessment" in J. Mintz & J. Whalley, eds., *The Economic Impacts of Tax Reform* (Toronto: Canadian Tax Foundation, 1989) 45 at 54-62. See also Boadway & Kitchen, *supra* note 22 at 131. For a similar argument with respect to the costs of supporting dependent children, see A. Sayeed, "Choosing between Tax Credits and Exemptions for Dependent Children" (1985) 33 Can. Tax J. 975.

[29] While the *ITA* does not contain such a general provision, a refundable credit provides a similar kind of insurance to low-income taxpayers participating in the paid labour force by reimbursing 25% of eligible medical expenses exceeding 3% of the claimant's net income, up to a maximum amount of $500 ($2,000 of qualifying medical expenses) (see *ITA*, *supra* note 4, s. 122.51, examined below).

[30] While the federal government provides disability benefits under the Canada Pension Plan, these depend on prior contributions and do not diminish as the recipient's income increases (although they are included in computing the recipient's taxable income and are therefore subject to tax at progressive rates). In contrast, the *ITA* is used to deliver income support to low-income individuals and fami-

ability-related equipment or modifications to a workplace may be encouraged by accelerated deductions or tax credits (refundable or non-refundable) through which these costs are shared by the public sector.[31]

Where social policy goals are pursued through the *ITA*, however, neither they nor the provisions by which they are implemented should be regarded as alternatives to tax policy goals more narrowly defined. Where a social policy decision is made to reimburse 50% of all privately borne disability-related expenses through a refundable tax credit, for example, a tax policy issue remains as to whether disability-related expenses that are not reimbursed are properly deductible in computing the payor's taxable income.[32] Correspondingly, where a refundable tax credit is paid to low-income persons with disabilities, tax policy considerations continue to apply in comparing the ability to pay of higher income individuals with or without disabilities.

Conversely, while tax policy considerations are central to the equitable distribution of income tax burdens among different taxpayers, neither they nor the basic provisions through which an equitable income tax is applied can substitute for the broader social policy goals that might also be pursued through the *ITA*. Indeed, where the income tax provides a deduction or non-refundable credit to recognize privately borne disability-related expenses, this allowance is irrelevant to individuals whose income is too low to pay any tax. As a result, although such a provision may be necessary to achieve horizontal equity among different taxpayers, it is neither an effective nor equitable method of reimbursing a share of privately borne disability-related expenses, nor a coherent way to provide income support to low-income individuals with disabilities or low-income families with disabled persons.

While this paper is concerned primarily with tax policy issues more narrowly defined, it neither disregards nor devalues broader social policy objectives that are or might be pursued through the *ITA*. In considering the costs of disability, therefore, it reviews both tax and social policy objectives, and the various tax measures through which these different goals might be best pursued. Likewise, in reviewing measures by which the *ITA* might facilitate the integration of disabled persons in the paid labour force or provide income support for disabled individuals and their families, it considers both tax and social policy considerations. Although it is important to distinguish tax and social policy goals from the specific measures by which they are best imple-

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lies through the refundable Goods and Services Tax Credit in s. 122.5 and the refundable Canada Child Tax Benefit, *supra* note 18. The Canada Child Tax Benefit is examined in Part II.*F*, below.

[31] Although the *ITA*, *supra* note 4, does not provide tax credits for investments in disability-related modifications to buildings or the acquisition of disability-related equipment, it allows businesses to deduct the cost of these investments in the year in which they are acquired, rather than capitalizing these costs and deducting them over several years (see *supra* note 11).

[32] Where disability-related expenses are fully covered through one or more social insurance programs (*e.g.*, public health care, or a refundable tax credit, or both), of course, the tax policy issue becomes moot since there cease to be any privately borne disability-related expenses for the income tax to take into account.

mented, it is possible to pursue both sets of goals through the *ITA* without sacrificing either to the other.

II. The Costs of Disability

As the Standing Committee on Human Rights and the Status of Disabled Persons has emphasized, "Disability involves costs—to governments and society as a whole, but most importantly, to disabled persons themselves."[33] For families with disabled persons, these costs are also borne by supporting individuals—both directly in the form of out-of-pocket expenses and indirectly in the form of foregone income attributable to time lost from employment or business activities in order to care for the disabled person. While these costs are partly covered through a variety of public and private programs, including social assistance, worker's compensation, public health care, and supplementary health insurance, uncompensated costs are necessarily borne by disabled individuals and their families. It is these privately borne costs that give rise to the tax policy issues discussed in Part I.

As outlined in the introduction to this paper, the *ITA* contains numerous provisions through which the costs of disabilities to disabled individuals and their families are or might be recognized. The most notable of these are the medical expense tax credit and the disability tax credit. Recent studies have recommended that these provisions be further supplemented or replaced by a separate "disability expenses tax credit".[34] In addition to these provisions, the income tax recognizes additional costs associated with the care of disabled relatives through various "personal tax credits" (the infirm dependants credit, the caregiver credit, and the wholly dependent person credit), and non-discretionary costs associated with the care of dependent children through the child care expense deduction, and the Canada Child Tax Benefit. Yet other provisions encourage private savings to support disabled persons through special trust tax provisions, and recognize financial needs of dependent children by allowing tax-deferred savings to be transferred to dependent children and grandchildren on a taxpayer's death without any immediate tax liability.

This part examines each of these provisions and their possible reform, including the introduction of a separate disability expenses tax credit as a supplement or alternative to the existing statutory scheme. While the main focus of this analysis concerns the treatment of disability-related expenses as a matter of tax policy narrowly defined, the discussion necessarily touches on broader social policy issues considered in Part I.

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[33] Standing Committee on Human Rights and the Status of Disabled Persons, "As True as Taxes: Disability and the Income Tax System" in *House of Commons Debates* (March 1993) at 3 [hereinafter Standing Committee].

[34] See *e.g. ibid.* at 14; Federal Task Force on Disability Issues, *supra* note 1 at 97-99.

A. Medical Expenses Tax Credit

1. Description

The medical expenses tax credit ("METC") provides a credit against basic federal tax otherwise payable equal to 17% of eligible medical expenses paid during any twelve-month period ending in the taxation year exceeding the lesser of 3% of the individual's net income or $1,637.[35] Taking provincial income tax into account, the combined value of this credit for taxpayers with tax otherwise payable is roughly 25 cents for each dollar of eligible medical expenses exceeding the applicable threshold.[36]

For the purposes of this provision, eligible medical expenses must be proven by filing receipts,[37] and are limited to expenses in respect of specifically defined goods and services provided to the individual, the individual's spouse, or a related dependant (the "patient").[38] Where an individual claims medical expenses in respect of a related dependant, the credit is reduced by 68% of the dependant's income exceeding $7,294.[39]

These medical expenses are defined as

- amounts paid to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to the patient;[40]
- remuneration for one full-time attendant (other than the individual's spouse or a person under 18 years of age) or full-time care in a nursing home for a patient eligible for the disability tax credit;[41]
- remuneration not exceeding $10,000 (or $20,000 if the patient dies in the year) for attendant care provided to a patient eligible for the disability tax credit by a

[35] See *ITA*, *supra* note 4, s. 118.2(1), as indexed by s. 117.1. For a detailed explanation of the METC, see D. Sherman, *Taxes, Health, and Disability* (Toronto: Carswell, 1995) at 65-125. Consistent with its announcement to restore full indexing to income tax provisions, the 2000 Federal Budget increased the dollar amount of this threshold from $1,614 (see "Tax Measures: Supplementary Information" in Stikeman Elliott, *Canadian Federal Budget 2000: Budgetary Proposals of the Hon. Minister of Finance with Comments by Stikeman Elliott* (Toronto: Carswell, 2000) [hereinafter 2000 Federal Budget] 3-1 at 3-14 – 3-15 [hereinafter "Supplementary Information 2000"]).

[36] This assumes a provincial income tax rate equal to 45% of basic federal tax payable. For 1999, basic provincial taxes range from a low of 39.5% in Ontario to a high of 69% in New Brunswick. Quebec levies its own income tax, with rates ranging from 20% of taxable income below $25,000 to 26% on taxable income over $50,000.

[37] *ITA*, *supra* note 4, s. 118.2(1).

[38] *Ibid.*, s. 118.2(2), and the definition of "patient" for the purposes of this subsection in s. 118.2(2)(a). For the purposes of this provision, a related "dependant" is defined in s. 118(6).

[39] See the description of D in *ibid.*, s. 118.2(1).

[40] *Ibid.*, s. 118.2(2)(a).

[41] *Ibid.*, s. 118.2(2)(b).

person who is neither the individual's spouse nor under 18 years of age, provided that attendant care is not claimed in respect of the patient under any other provision of the *ITA*;[42]

- remuneration for a full-time attendant in the patient's home (other than the individual's spouse or a person under 18 years of age) if the patient has been certified by a medical practitioner to be a person who, by reason of mental or physical infirmity, is and is likely to be for a long-continued period of indefinite duration dependent on others for personal needs and care;[43]
- amounts paid for the full-time care in a nursing home of a patient certified by a medical practitioner to be a person who, by reason of lack of normal mental capacity, is and in the foreseeable future will continue to be dependent on others for personal needs and care;[44]
- amounts paid for the care, or care and training, at a school, institution or other place of a patient certified by a qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specifically provided by that school, institution or other place for individuals suffering from the handicap suffered by the patient;[45]
- ambulance fees;[46]
- various kinds of transportation fees to obtain medical services;[47]
- the cost of various kinds of devices, including artificial limbs, hearing aids, kidney machines,[48] devices for incontinence,[49] eyeglasses,[50] a portion of the cost of a wheelchair-accessible van,[51] dentures,[52] and other devices designed to assist persons suffering from visual impairments, hearing impairments, breathing impairments, mobility impairments, diabetes or heart disease;[53]
- the cost to acquire and maintain an animal (*e.g.*, a guide dog) specifically trained to assist a patient who is blind or profoundly deaf or suffers from a se-

[42] *Ibid.*, s. 118.2(2)(b.1).
[43] *Ibid.*, s. 118.2(2)(c).
[44] *Ibid.*, s. 118.2(2)(d).
[45] *Ibid.*, s. 118.2(2)(e).
[46] *Ibid.*, s. 118.2(2)(f).
[47] *Ibid.*, s. 118.2(2)(g).
[48] *Ibid.*, s. 118.2(2)(i).
[49] *Ibid.*, s. 118.2(2)(i.1).
[50] *Ibid.*, s. 118.2(2)(j).
[51] *Ibid.*, s. 118.2(2)(l.7).
[52] *Ibid.*, s. 118.2(2)(p).
[53] *Ibid.*, s. 118.2(2)(m); *Regulations*, *supra* note 11, s. 5700.

vere and prolonged impairment that markedly restricts the use of his or her arms or legs;[54]

- costs associated with the transplant of bone marrow or an organ;[55]
- reasonable expenses related to renovations or alterations to a patient's home, including the driveway, for patients with severe and prolonged mobility impairments;[56]
- up to $2,000 in expenses for a patient with a severe and prolonged mobility impairment to move to a physically accessible dwelling;[57]
- reasonable expenses related to rehabilitative therapy to adjust for the patient's hearing or speech loss, including training in lip reading and sign language;[58]
- the cost of sign language services for a patient with a speech or hearing impairment;[59]
- reasonable expenses for training a caregiver who is related to the patient (other than the individual's spouse or a person under 18 years of age), and is a member of the individual's household;[60]
- the cost of drugs, medicaments or other preparations or substances prescribed by a medical practitioner or dentist;[61]
- the cost of lab tests;[62] and
- private health insurance premiums.[63]

Many of these items have been added in recent years, often in response to judicial decisions in which specific expenses were held to be ineligible for the credit.[64] According to the 1999 Federal Budget, this list is to be further supplemented by the inclusion of

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[54] *ITA*, *ibid.*, s. 118.2(2)(l).
[55] *Ibid.*, s. 118.2(2)(l.1).
[56] *Ibid.*, ss. 118.2(2)(l.2), 118.2(2)(l.6). The 2000 Federal Budget proposes to add to this item "the portion of reasonable expenses, relating to the construction of the principal place of residence of an individual who lacks normal physical development or has a severe and prolonged mobility impairment, that can reasonably be considered to be incremental costs incurred to enable the individual to gain access to, or be mobile or functional within, the individual's principal place of residence" (see "Excerpts from Budget Papers" in 2000 Federal Budget, *supra* note 35, 2-1 at 2-9 [hereinafter "Budget Papers 2000"]).
[57] *ITA*, *ibid.*, s. 118.2(2)(l.5).
[58] *Ibid.*, s. 118.2(2)(l.3).
[59] *Ibid.*, s. 118.2(2)(l.4).
[60] *Ibid.*, s. 118.2(2)(l.8).
[61] *Ibid.*, s. 118.2(2)(n).
[62] *Ibid.*, s. 118.2(2)(o).
[63] *Ibid.*, s. 118.2(2)(q).
[64] The list of cases in which expenses have been ruled ineligible for the METC or its predecessor deduction is lengthy. See *e.g.* *Morley* v. *M.N.R.* (1949), 1 Tax A.B.C. 81 (corrective eyeglasses and

- remuneration for the care or supervision in a group home of an individual eligible for the disability tax credit;
- remuneration for specific kinds of therapy administered to a person eligible for the disability tax credit; and
- remuneration for tutoring services provided to a person with a learning disability or a mental impairment who is certified by a medical practitioner to be a person who requires these services on account of the disability or impairment.[65]

2. Interpretation

In applying these provisions, the courts have tended to adopt a more liberal approach than the strict method of interpretation traditionally employed.[66] In one case, for example, the Tax Court of Canada adopted a broad interpretation of the word "care" in order to permit the taxpayer to claim as eligible medical expenses under paragraph 118.2(2)(e) of the *ITA* tuition and other fees paid by the taxpayer to a private school for the "care and training" of his learning-disabled children.[67] In other cases, courts have allowed taxpayers to claim the cost of a hot tub, whirlpool equipment, and a security alert system as eligible medical expenses on the basis that they

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ambulance services); *Brunet* v. *M.N.R.* (1955), 14 Tax A.B.C. 185 (cost of oxygen purchased for taxpayer's wife who suffered from pulmonary tuberculosis); *Witthuhn* v. *M.N.R.* (1957), 17 Tax A.B.C. 33, 57 D.T.C. 174 [hereinafter *Witthuhn* cited to Tax. A.B.C.] (attendant care for wife able to get up for a few hours and sit in specially designed rocking chair); *Cohen* v. *M.N.R.* (1957), 23 Tax A.B.C. 82 (cost of part-time institutional care for mentally handicapped son); *Balfour* v. *M.N.R.* (1961), 27 Tax A.B.C. 291 (attendant care for wife suffering from depressed nervous condition); *Stefanchuk* v. *M.N.R.*, [1968] Tax A.B.C. 511 (cost of air cleaner installed to help taxpayer's husband overcome attacks of bronchitis and asthma); *Wall* v. *M.N.R.*, [1969] Tax A.B.C. 962 (acquisition and maintenance cost of wig for taxpayer suffering from condition leading to total baldness); *Tate* v. *M.N.R.*, [1969] Tax A.B.C. 1172 (attendant care for mentally infirm son); *Stewart* v. *M.N.R.*, [1972] C.T.C. 2097, 72 D.T.C. 1092 (T.R.B.) (fees paid to school designed to enable qualified medical practitioners to provide treatment to taxpayer's schizophrenic child).

[65] "Excerpts from Budget Papers" in Stikeman Elliott, *Canadian Federal Budget 1999: Budgetary Proposals of the Hon. Minister of Finance with Comments by Stikeman Elliott* (Toronto: Carswell, 1999) 2-1 at 2-6 – 2-7 [hereinafter 1999 Federal Budget].

[66] See *e.g. Coté* v. *M.N.R.* (1996), [1997] 3 C.T.C. 2607 (T.C.C.) [hereinafter *Coté*]; *Vantyghem* v. *M.N.R.* (1998), [1999] 2 C.T.C. 2159 at para. 19 (T.C.C.) [hereinafter *Vantyghem*], in which the courts emphasized the need to interpret s. 118.2 "in its most equitable and liberal manner compatible with the attainment of [its] object … and Parliament's intent." For an example of the strict approach, see *Witthuhn*, *supra* note 64 at 37, where a claim for attendant care expenses was disallowed on the basis that the patient, who could get up for a few hours and sit in a specially designed rocking chair, was not "necessarily confined to a bed or wheelchair". On the history of the strict construction approach to the interpretation of the *ITA*, *supra* note 4, see D.G. Duff, "Interpreting the *Income Tax Act*—Part I: Interpretive Doctrines" (1999) 47 Can. Tax J. 464 at 469-85.

[67] *Rannelli* v. *M.N.R.*, [1991] 2 C.T.C. 2040 at 2044, 91 D.T.C. 816 (T.C.C.), referring to the "remedial" role of then s. 110(1)(c)(vi), which "broadened the scope of medical deductions", and concluding that, for the purposes of this provision, "care" need not be "custodial", but could also be of a nurturing or solicitous nature as provided by the school to its students.

constituted reasonable expenses relating to renovations or alterations to a dwelling within the meaning of paragraph 118.2(2)(l.2) of the *ITA*.[68]

Notwithstanding this general tendency toward a more liberal interpretation of the METC, at least some decisions continue to reflect a narrow reading of the statutory provisions. In one recent case, for example, a claim for attendant care expenses under paragraph 118.2(2)(b) of the *ITA* by an elderly disabled woman who lived in an apartment building specifically designed to cater to senior citizens was disallowed on the grounds that the building was not a nursing home, that "full-time" care must be (but had not been) provided *exclusively* to the patient, and that the monthly payments did not distinguish between rent and attendant care.[69] In another recent case, a claim for $10,184 incurred in the construction of a new residence in order to make the residence wheelchair accessible was disallowed on the basis that the expenses did not relate to "renovations or alterations to a dwelling" as required by paragraph 118.2(2)(l.2).[70]

3. History

The METC originated in 1942, at which time a deduction was introduced for a limited number of medical expenses up to a maximum of $400 for a single person, $600 for a married couple, and $100 for each dependant (up to $400), but only to the extent that these amounts exceeded 5% of the taxpayer's net income.[71] According to

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[68] See *e.g. Vantyghem*, *supra* note 66 (hot tub for taxpayer's wife who had severe and prolonged mobility impairment); *Coté*, *supra* note 66 (cost of whirlpool equipment for exercise and a security alert system to enable the taxpayer, who suffered from a severe and prolonged mobility impairment, to continue living safely alone).

[69] *Flumerfelt* v. *M.N.R.* (1998), [1999] 3 C.T.C. 2168 at paras. 6-8 (T.C.C.). In the absence of a specific statutory definition of the term "nursing home", it does not seem unreasonable to regard a building designed to cater specifically to senior citizens as a nursing home for the purposes of the provision. Nor is it obvious that the words "full-time" necessitate *exclusive* care by a single attendant as opposed to an arrangement in which staff are available to assist the patient on a full-time basis. Nor does it seem reasonable for the court to have disallowed the taxpayer's alternative claim for "part-time" attendant care under s. 118.2(2)(b.1) on the grounds that payments of $2,500 per month under the building's "attendant care package" were solely "for the rent of an apartment".

[70] *Gustafson* v. *M.N.R.*, 1999 CarswellNAT 718 (T.C.C.), online: TAXNET (TaxPARTNER Main). To the extent that the original plans were altered to make the residence wheelchair accessible, it is arguable that the expenses related to "alterations" to the dwelling that might otherwise have been constructed. While the court concluded at para. 12 that "there was never any intent" for the expenses at issue to "be included in any recognition of medical expense under paragraph 118.2(2)(l.2)," it is implausible to suggest that Parliament would have intended to exclude modifications to newly constructed dwellings, thereby creating a tax bias in favour of the acquisition and renovation of already existing dwellings. The 2000 Federal Budget proposes to reverse this decision (see *supra* note 56).

[71] *An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 5(6), adding s. 5(1)(n) to the *Income War Tax Act*, R.S.C. 1927, c. 97. This provision was modelled on a similar U.S. deduction which was also introduced in 1942. For a brief analysis of the U.S. medical expenses deduction, see Goode, *supra* note 26 at 156-60.

then Minister of Finance Mr. Ilsley, the deduction was designed to recognize the diminished ability to pay on the part of taxpayers who incurred extraordinary medical expenses, exceeding average medical expenditures (which were estimated to be approximately 5% of net income).[72] According to subsequent commentators, a threshold on deductible expenses may have reflected "a judgment that the taxation of income spent on medical care creates significant horizontal inequities only if the medical expenses are large, since a high level of medical expenditure is more likely to be non-discretionary than a low one."[73] More plausibly, such a threshold likely reflected a judgment that average medical expenses, though also involuntary, were adequately addressed through standardized personal exemptions, and need not be accounted for through a separate medical expenses deduction.

While the dollar ceilings on allowable claims were originally justified in order to prevent possible abuses,[74] these were eliminated in 1961 on the grounds that "[s]ince the whole purpose of the deduction for medical expenses is to give relief to those taxpayers whose ability to pay income tax has been reduced by extraordinary expenses, it seems both logical and fair to remove the limit entirely ..."[75]

Other post-1942 amendments lowered the threshold on deductible expenses to 4% of a taxpayer's net income in 1944 and 3% in 1953,[76] and significantly increased the categories of expenses eligible for the deduction.[77] In 1988, the deduction was converted to a credit computed at 17% of eligible expenses, and the applicable threshold was capped at a dollar amount of $1,500 (now $1,637).[78]

4. Evaluation and Recommendations

In evaluating the METC, critics have questioned the name of the credit, the definition of eligible expenses, the structure and existence of the threshold, the 1988 con-

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[72] *House of Commons Debates* (23 June 1942) at 3580.

[73] Cloutier & Fortin, *supra* note 28 at 60, citing J.E. Stiglitz, *Economics of the Public Sector* (New York: Norton & Company, 1986) at 427-28.

[74] See G. McGregor, *Personal Exemptions and Deductions under the Income Tax* (Toronto: Canadian Tax Foundation, 1962) at 18.

[75] *House of Commons Debates* (20 June 1961) at 3580.

[76] Canada, Department of Finance, *Disability Tax Credit: Evaluation of Recent Experience* (Ottawa: Department of Finance, 1992) at 11 [hereinafter *Disability Tax Credit*]. According to this report, the reduction to 3% in 1953 was "justified on the basis of a statistical study by the Department of National Health and Welfare which concluded that the new threshold provided a more accurate measure of the average medical expenses incurred by taxpayers."

[77] See *e.g. ibid.* at 10, noting that twenty new items had been added to the list of eligible expenses during the eight years from 1984 to 1992.

[78] See *An Act to amend the Income Tax Act, the Canada Pension Plan, the Unemployment Insurance Act, 1971, the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, 1977 and certain related Acts*, S.C. 1988, c. 55, ss. 77, 92, repealing former s. 110(1)(c) and adding, *inter alia*, s. 118.2, applicable to 1988 and subsequent taxation years [hereinafter *1987 Amendments*].

version of the previous deduction into a credit, the rate at which the credit is computed, and its non-refundability.

a. Name

With respect to the name of the credit, critics have suggested that the METC be renamed "to make it clearer that disability-related items are included."[79] As the Council of Canadians with Disabilities has observed: "It is plausible that many persons with disabilities and their families would not necessarily identify items and services such as home renovations, van purchases and modifications, and sign language services, as 'medical expenses'."[80] Indeed, since many of the items added to the list of eligible expenses over the last fifteen years have included disability-related expenses (*e.g.*, home renovations, van purchases and modifications, sign-language services, and various devices to assist visually or hearing impaired individuals), it is arguable that the primary purpose of the credit has evolved from recognizing extraordinary medical expenses to recognizing both extraordinary and recurring costs associated with physical or mental disabilities. For this reason, as several commentators have suggested, it seems both appropriate and desirable to rename the credit the "medical and disability expenses tax credit".[81] Alternatively, as the Standing Committee has recommended, it might make even more sense to recognize itemized disability-related expenses through a new disability expenses tax credit, separate from a more narrowly defined METC.[82] This proposal is examined more thoroughly in Part II.*C*, below.

b. Eligible Expenses

Regarding the definition of eligible medical expenses, some commentators have questioned the restriction on allowable expenses to those incurred for goods and services provided only to the individual, his or her spouse, and a related dependant.[83] Although it might be argued that tax recognition for such expenses should be limited to goods and services provided only to the individual taxpayer and others whom the taxpayer has a legal obligation to support (*e.g.*, spouses and dependent children) on the basis that only these expenses are truly involuntary, the *ITA* currently recognizes expenses incurred for goods and services provided to grandchildren, parents, grandparents, siblings, aunts and uncles, and nieces and nephews, provided that the recipient of the good or service is "dependent on the individual for support" at any time in

[79] Council of Canadians with Disabilities, *Tax Reform Positions* (Winnipeg: Council of Canadians with Disabilities, 1999) at 6. See also G. Williams, *The Tax System and the Cost of Disability Supports: A CACL Discussion Paper* (Toronto: Canadian Association of Community Living, 1996) at 18 [hereinafter *The Tax System*]; D. Baker & H. Beatty, *Consultant's Report on Taxation and Disability: Summary of Recommended Reforms* (Task Force on Disability Issues, 1997) at 7.

[80] Council of Canadians with Disabilities, *ibid.* at 6.

[81] See *e.g. The Tax System*, *supra* note 79 at 18; Council of Canadians with Disabilities, *ibid.*

[82] *Supra* note 33 at 14.

[83] See *e.g.* Council of Canadians with Disabilities, *supra* note 79 at 6.

the year.[84] Having thus expanded the scope of allowable expenses, it is difficult to understand why it should not be further extended to include payments for goods and services provided to anyone who is dependent on the individual for support at any time in the year, whether the person is a close or distant relative or simply a friend. Given the exclusion of same-sex couples from the current definition of spouse in subsection 252(4) of the *ITA*, moreover, this reform would seem particularly appropriate.

Turning to specific categories of expenses, several commentators have questioned why eligible attendant care expenses must be paid to someone other than the individual's spouse or a person under 18 years of age.[85] While the apparent policy goal of this exclusion is to prevent income-splitting,[86] this concern seems misplaced where a spouse receives a reasonable amount in exchange for qualifying attendant care.[87] Although the income tax used to contain a rule prohibiting the deduction of any amount paid to a spouse as salary,[88] this rule was repealed in 1979 as part of a series of legislative reforms to recognize the equal status of women. The exclusion of payments to a spouse from eligible attendant care expenses seems to be an anachronistic holdover from a previous era that should also be repealed.

Commentators have also questioned the characterization of "attendant care", which may not include personal services necessitated by the patient's disability, and the characterization of nursing home expenses, which Revenue Canada interprets to include the costs of the patient's room and board as well as recreational activities.[89] In order to ensure equity among taxpayers in different living situations and to prevent tax-induced distortions in the kind of care employed, it seems reasonable that attendant care should be specifically defined to include such necessary personal services, while eligible expenses for care in a nursing home should be defined to exclude basic room and board.[90] To the extent that nursing home expenses are interpreted to include the cost of recreational programs, moreover, eligible expenses should also include the cost of similar programs for disabled individuals who are not cared for in a nursing home.

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[84] See the definition of "dependant" quoted in *supra* note 5.

[85] See *e.g.* Baker & Beatty, *supra* note 79 at 10. See also Federal Task Force on Disability Issues, *supra* note 1 at 93, recommending that the METC should cover "the reasonable cost of medically necessary attendant care provided by family members"; Council of Canadians with Disabilities, *supra* note 79 at 5, adding that a caregiver spouse in receipt of such payments should qualify for the employment insurance and Canada Pension Plan benefits upon the payment of EI premiums and CPP contributions.

[86] See R. Shillington, *Taxation and Disability: A Report for the Task Force on Disability* (Ottawa: Canadian Council on Social Development, 1996) at 16.

[87] Concerns about the quality of the care provided may justify an exclusion for payments to caregivers under 18 years of age.

[88] See former s. 74(3), as rep. by *An Act to amend the statute law relating to income tax*, S.C. 1980-81-82-83, c. 48, s. 40(1), applicable with respect to fiscal periods ending after December 11, 1979.

[89] See G. Katz, "Tax Assistance for the Disabled" (1999) 47 Can. Tax J. 663 at 682, citing Revenue Canada document no. 9501515 (May 26, 1995).

[90] See Baker & Beatty, *supra* note 79 at 10.

Yet other commentators have criticized the complexity of the rules regarding attendant care, which may be claimed under several different provisions, with different implications for the patient's ability to claim the disability tax credit.[91] To the extent that these provisions create complicated planning questions as to the ideal provision under which to claim attendant care expenses, they are rightly criticized on the grounds that they increase the complexity of the tax system and favour well-advised taxpayers who are more likely to calculate the optimal claim for attendant care expenses.[92] Anticipating subsequent arguments in this paper, it is suggested that it would be preferable to allow taxpayers to deduct attendant care expenses under a single provision, without affecting their right to claim a separate disability tax credit or deduction.

In addition to these specific criticisms, the Council of Canadians with Disabilities has recommended that the following items be added to the list of allowable expenses:[93]

- the cost of repairs and maintenance to all assistive devices;
- the cost of outdoor powered lifts (as well as ramps);
- adaptations to dwellings, broadly defined (thus, include expenses for items such as shower bench, transfer bars, support bars);
- the extension of the current permitted claim of 20% of a modified van to vans modified more than six months after purchase;[94]
- the additional monthly rent on an accessible apartment;
- expenses for widening a driveway to be used by an accessible van (the current claim is limited to use by a bus);

[91] Attendant care may be claimed under *ITA*, *supra* note 4, s. 118.2(2)(b) (remuneration for one full-time attendant for a patient eligible for the disability tax credit), s. 118.2(2)(b.1) (remuneration up to $10,000 or $20,000 in the year of the patient's death where the patient is eligible for the disability tax credit and no other amount is claimed for attendant care), s. 118.2(2)(c) (remuneration for one full-time attendant for care in the patient's home if the patient has been certified by a medical practitioner to be a person who, by reason of mental or physical infirmity, is and is likely to be for a long-continued period of indefinite duration dependent on others for personal needs), s. 63 (child care expense deduction up to the lesser of $7,000 for each eligible child or two-thirds of the individual's earned income), or s. 64 (attendant care deduction up to two-thirds of the individual's earned income). Where attendant care is claimed under ss. 118.2(2)(b) or 118.2(2)(c), no amount may be claimed under the disability tax credit, nor under s. 118.2(2)(b.1). Alternatively, while the disability tax credit can be claimed by taxpayers who claim attendant care under ss. 118.2(2)(b.1), 63, or 64, the expenses that may be claimed under these provisions are capped at fixed dollar amounts (under ss. 118.2(2)(b.1), 63) and/or a percentage of earned income (in the case of ss. 63, 64). Since ss. 63 & 64 operate as deductions, while ss. 118.2 & 118.3 operate as credits, the optimal claim for attendant care expenses may also depend on the individual's marginal rate of taxation.

[92] For critical comments on the complexity of the current rules, see Katz, *supra* note 89 at 690-91.

[93] Canadian Council on Disabilities, *supra* note 79 at 7-8.

[94] See *ITA*, *supra* note 4, s. 118.2(2)(l.7).

- the extra costs of building a new accessible home;
- expenses for oral interpreters;
- the cost of readers and persons to assist learning disabled and visually impaired persons with scanning and editing to create accessible formats;
- voice-operated computer software (e.g., "Dragon Dictate") required by a person because of a disability;
- a solid base for a computer required by a person because of cerebral palsy or a related disability;
- grocery delivery required by a person because of a disability;
- clothing alterations provided to an individual with an orthesis or prosthesis, or to a little person;
- recreation programs and equipment which enhance the skills and capacity of a person with a disability;
- health care supplies related to incontinence;
- multiple vitamins when related to a disability;
- second residence (*e.g.*, cottage) accessibility;
- replacement and/or cleaning of items and home repairs when breakage or damage is disability-related;
- replacement of clothing when damage is disability-related;
- extra laundry costs related to a disability;
- extra bedding costs related to a disability; and
- extra heating costs related to a disability.

Many of these items (*e.g.*, costs of repairs and maintenance, costs of specific devices, and costs of grocery delivery), appear to be logical extensions of the current list of eligible expenses and would appear to be unproblematic for this reason. Others (*e.g.*, recreational programs) may seem like a departure from the prevailing list, but are arguably consistent with recent amendments to include the costs of various kinds of therapy and tutoring services. Yet other items (replacement and/or cleaning of damaged items, and additional laundry, bedding, and heating costs) appear to be the kind of difficult-to-itemize items that are best recognized through a separate disability tax credit or deduction.[95]

While many of these additions would improve the METC, the number of items on this list and the regular additions to the list of eligible expenses since the medical expense deduction was first introduced in 1942 suggest a more general concern that

[95] See the discussion of the disability tax credit in Part II.*B*, below.

changes in technology and prescribed therapies are certain to lead to the emergence of comparable items that are not contemplated within the existing categories. For this reason, as one commentator has suggested, it might be appropriate to supplement the categorical list in subsection 118.2(2) with a general statement of principle according to which eligible medical expenses would include all reasonable amounts to the extent that they are paid for the purpose of acquiring goods or services certified as medically necessary by a qualified medical practitioner.[96] While the existing list should be retained as an example of the kinds of expenses recognized by the provision, this amendment would allow disabled individuals to obtain a credit for novel treatments or technologies without having to lobby Revenue Canada and the Department of Finance to increase the list of eligible expenses. Indeed, to the extent that the current list of items reflects "the lobbying efforts of groups that are vocal and powerful" it has been argued that "broader definitions would be useful to assist disabled individuals who are not as well organized or represented."[97]

c. Threshold

In relation to the threshold on eligible expenses in the year (expressed as 3% of the individual's net income or $1,637, whichever is lower), a number of concerns have been raised. First, to the extent that the dollar amount caps the net income threshold for individuals with net incomes exceeding $54,567,[98] the structure of the threshold has been rightly criticized as regressive, allowing a larger share of medical expenses as a percentage of net income to be claimed by high-income taxpayers than by low-income taxpayers.[99] From this perspective, a possible reform might be to eliminate the dollar limit on the net income threshold, using the revenue saved from this amendment to finance other disability-related tax reforms.[100] A related concern involves the ability of some couples to claim a larger percentage of medical expenses by claiming the METC in computing the tax payable by the lower income spouse. To the

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[96] Shillington, *supra* note 86 at 28-29. The language in the text borrows from the phraseology in Shillington's paper and from the *ITA*, *supra* note 4, s. 18(1)(a), which prohibits any deduction in computing the income of a business "except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property," and from s. 67, which limits all deductions in respect of an outlay or expense "to the extent that the outlay or expense was reasonable in the circumstances." As explained below, where disability-related expenses are recognized under a separate disability expenses tax credit or deduction, this language would have to be modified accordingly.

[97] J.E. Magee, "Tax Planning for the Disabled and Elderly and Their Caregivers" (1992) 40 Can. Tax J. 1364 at 1370.

[98] For taxpayers with net incomes exceeding $54,567, the dollar threshold of $1,637 is less than 3% of net income.

[99] See *e.g.* Council of Canadians with Disabilities, *supra* note 79 at 6. For this reason, it is not surprising that taxation statistics demonstrate an increase in allowable medical expenses as a percentage of taxfiler income for taxfilers with income above $60,000 (see Shillington, *supra* note 86 at 13-14).

[100] This recommendation was made by the Federal Task Force on Disability Issues, *supra* note 1 at 93. See also Council of Canadians with Disabilities, *ibid.*

extent that the credit recognizes extraordinary medical expenses incurred by families rather than individuals,[101] it would seem more appropriate to set a threshold based on the aggregate net income of cohabiting spouses, rather than the net income of the individual who happens to claim the credit. As with amendments to the provisions regarding attendant care, this reform would lessen the opportunities for more sophisticated taxpayers to plan their way to a larger METC.[102]

From a different perspective altogether, one might question the level of the threshold on allowable expenses, particularly for expenses incurred in respect of an individual with a mental or physical infirmity that has lasted or may be expected to last for a lengthy period of time.[103] While the purpose of this threshold (both when the original deduction was introduced in 1942 and when the threshold was reduced to 3% in 1953) was to exclude "average" medical expenses from recognition for tax purposes, the determination of these thresholds preceded by several years the introduction of public health insurance, which might have been expected to dramatically reduce average private expenditures on medical care. Not surprisingly, therefore, some commentators have suggested a re-examination of the threshold in light of more recent data on average expenditures.[104]

Moreover, one should not forget that the primary purpose of the original deduction was to recognize catastrophic medical expenses incurred by otherwise relatively healthy individuals, not the ongoing costs associated with a prolonged disability. While an annual threshold is ideally suited for the former purpose, it is entirely inappropriate for the latter. To the extent, therefore, that the primary purpose of the METC has evolved from recognizing a limited number of extraordinary medical expenses to recognizing both extraordinary and recurring costs associated with mental or physical disabilities, it is arguable that the existing threshold should be eliminated altogether. Alternatively, by introducing a separate disability expenses tax credit or deduction, it would be possible to retain the existing threshold for a more narrowly defined medical expense tax credit or deduction, while eliminating any threshold for the tax recognition of disability-related expenses. Not surprisingly, therefore, when the Standing Committee recommended the enactment of a separate disability expenses tax credit, it also recommended that "the government should consider reducing or eliminating the

[101] This is implicit in the definition of the word "patient", *supra* note 38, which refers to the individual taxpayer, the individual's spouse and dependants.

[102] For a similar concern, see Baker & Beatty, *supra* note 79 at 8, questioning the ability to select a twelve-month period for aggregating medical expense payments that differs from the calendar year.

[103] Although the sentence in the text does not define this period of time, the *ITA*, *supra* note 4, s. 118.4(1)(a), defines a "prolonged" impairment for the purpose of the disability tax credit as an impairment that "has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months." It should be noted, however, that the sentence in the text uses the more general expression "mental or physical infirmity" rather than the more narrowly defined "severe and prolonged mental and physical impairment" used for the purpose of the disability tax credit.

[104] *The Tax System*, *supra* note 79 at 18.

three per cent limit that currently applies to the Medical Expenses Tax Credit."[105] This issue is examined more thoroughly in the discussion of the proposed disability expenses tax credit in Part II.*C*, below.

d. Credit or Deduction

With respect to the 1988 conversion of the deduction into a credit, commentators have taken different positions. To the extent that the provision is designed to recognize the reduced ability to pay of individuals who must incur extraordinary medical expenses, some have argued that a deduction in computing taxable income is a more appropriate measure than a credit computed at a flat rate of 17%.[106] Others, noting that deductions are worth more to high-income taxpayers than to low-income taxpayers are more favourably inclined to the 1988 reforms but nevertheless criticize the current non-refundable credit on the grounds that it is of little or no value to low-income taxpayers, among whom disabled individuals are statistically over-represented.[107] Yet others have criticized the rate of the credit, suggesting that it be increased from its current rate of 17% to 30% or more.[108]

In dealing with these competing proposals, it is important to distinguish questions of social policy from those of tax policy more narrowly defined. While social policy considerations might favour public reimbursement for a larger share of medical and disability-related costs than is currently the case under provincially operated health care and social assistance programs, this social insurance objective is distinct from tax policy considerations regarding horizontal equity. As a result, while a refundable tax credit for medical or disability-related expenses might be an effective way to cover a larger share of these involuntary costs,[109] such a measure should not be viewed as a substitute for a separate provision recognizing privately borne medical and disability-related expenses in computing an individual's taxable income.

To the extent that medical and disability-related expenses are not fully reimbursed, the tax policy issue more narrowly defined concerns the manner and extent to which these privately borne costs should be taken into account in determining the individual's tax liability. While deductions are often criticized on the basis that they are

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[105] *Supra* note 33 at 14 (Recommendation 8).

[106] See *e.g.* Cloutier & Fortin, *supra* note 28 at 54-62.

[107] See generally Shillington, *supra* note 86; *The Tax System*, *supra* note 79.

[108] See *e.g.* Baker & Beatty, *supra* note 79 at 7, suggesting 30-35%; Don Gallant and Associates, *Make Us Canadian: Discussion Paper for the Canadian Association for Community Living* (Winnipeg: Canadian Association for Community Living, 1998) at 20, suggesting 50%.

[109] To evaluate the merits of a social policy measure along these lines is beyond the scope of this paper, the primary focus of which is tax policy narrowly defined, not social policy more broadly understood. To evaluate such a measure properly, however, one would presumably have to consider not only the relative roles of the private and public sectors in the provision of medical care and disability supports, but also the respective roles of the federal and provincial governments in these areas.

worth more to high-income taxpayers than they are to low-income taxpayers,[110] this argument assumes that the income tax should apply not to the discretionary income that remains after deducting involuntary expenses (such as medical and disability-related expenses), but to net income from various sources without taking into account the personal circumstances of the individual taxpayer.[111] Although the federal government implicitly adopted the latter view when it converted various deductions to non-refundable credits in 1988, it did so without any explicit argument to this effect, and it has been suggested that the conversion was "a disguised way of moving the marginal rate schedule upward" in order to offset the more visible impact of an accompanying reduction in nominal tax rates.[112] In contrast, both the Royal Commission on Taxation and the Quebec *White Paper on the Personal Tax and Transfer Systems* favoured a concept of income according to which "the ability to pay of a taxpayer is reduced by his obligation to cover essential needs for himself and his dependants."[113] Moreover, as Pierre Cloutier and Bernard Fortin explain, since "one can obtain whatever degree of progressivity one desires" by changes to the rate structure, the treatment of involuntary expenses such as extraordinary medical and disability-related costs is best understood as a matter of horizontal equity (according to which taxpayers with the same ability to pay should pay the same income tax) not vertical equity (according to which taxpayers with a greater ability to pay should pay an appropriately greater amount of tax).[114]

From the latter perspective, a deduction for extraordinary medical expenses (and arguably a separate deduction for necessary costs associated with a prolonged mental or physical disability) may be justified as a necessary measure to achieve horizontal equity among taxpayers with different involuntary expenses. Although a non-refundable credit equal to the lowest marginal rate of tax might be justified on the grounds that medical and disability-related expenses are entirely involuntary for low-income taxpayers and increasingly discretionary for taxpayers subject to tax at higher rates,[115] it is implausible that discretionary and non-discretionary aspects of these expenses are perfectly correlated with the rate schedule. Moreover, inasmuch as medical or disability-related expenses involve an element of personal consumption, the prefer-

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[110] See *e.g.* T.F. Pogue, "Deductions vs. Credits: A Comment" (1974) 27 Nat. Tax J. 659; Canada, *Report of the National Council on Welfare on the Personal Income Tax System in Canada: The Hidden Welfare System* (Ottawa: National Council on Welfare, 1976).

[111] For an excellent analysis of this argument, see Cloutier & Fortin, *supra* note 28 at 54-62.

[112] *Ibid*. at 73.

[113] Quebec, Ministère des Finances, *White Paper on the Personal Tax and Transfer Systems* (Introductory Paper) (Quebec: Le Ministère, 1984) at 58. See also *Royal Commission on Taxation*, *supra* note 24 at 5-8.

[114] Cloutier & Fortin, *supra* note 28 at 58. While one might respond to this statement by questioning the *political feasibility* of obtaining "whatever degree of progressivity one desires" through changes to the rate structure, it seems patently inexcusable to compensate for these political limitations through what are in effect rate increases on specific categories of taxpayers with additional involuntary expenses such as extraordinary medical or disability-related costs.

[115] See the discussion in *ibid*. at 59.

able approach is to recognize only a fraction of these expenses, as is the case with medically necessary air conditioners for which only 50% of the cost may be claimed as an eligible medical expense.

e. Social Policy

Lastly, having defined this tax policy objective, it is important to emphasize that it cannot take the place of broader social policy goals that might also be pursued through the *ITA*. To the extent that that the federal government considers it desirable to assume a larger or more direct role in the reimbursement of medical or disability-related expenses than it currently does through the Canada Health and Social Transfer, a refundable tax credit might be appropriate for this purpose.[116] In addition or as an alternative to such a measure, the federal government might provide direct income support to low-income individuals with disabilities or low-income families with disabled children through a refundable tax credit the value of which diminishes as the income of the individual or family increases.[117] In either case, however, these social policy objectives and the tax measures through which they might be implemented should be distinguished from the more narrow tax policy goals supporting a deduction for extraordinary medical expenses and disability-related expenses.

B. Disability Tax Credit

1. Description

The disability tax credit ("DTC") provides a fixed credit against basic federal tax otherwise payable where

(1) the individual has "a severe and prolonged mental or physical impairment,"[118] the effects of which are such that the person's "ability to perform a basic activity of daily living is markedly restricted";[119]

(2) a qualified medical practitioner[120] has certified that the impairment is "a severe and prolonged mental or physical impairment the effects of which are

[116] While this paper does not examine the constitutionality of such a refundable tax credit, one might expect provincial and territorial governments to object to such a measure on the grounds that it might interfere with their primary jurisdiction in this area.

[117] The federal government currently operates various income support programs along these lines (*e.g.* Old Age Security), two of which (the Goods and Services Tax Credit and the Canada Child Tax Benefit) are delivered in the form of refundable tax credits and might serve as models for such a measure. These issues are examined more fully in this paper, below.

[118] *ITA*, *supra* note 4, s. 118.3(1)(a).

[119] *Ibid.*, s. 118.3(1)(a.1).

[120] For the purposes of this provision, the qualified medical practitioner depends on the kind of impairment (medical doctor or optometrist for a sight impairment, medical doctor or audiologist for a hearing impairment, medical doctor or occupational therapist for impairments affecting one's ability

such that the individual's ability to perform a basic activity of daily living is markedly restricted";[121]

(3) the individual has filed the certificate;[122] and

(4) no amount for attendant care or care in a nursing home in respect of the individual has been claimed as a medical expense under section 118.2, except under paragraph 118.3(2)(b.1) which limits the amount that may be claimed in a year to $10,000 or $20,000 if the patient dies in the year.[123]

The credit is also available to individuals who support a disabled relative to the extent that the credit otherwise available to the relative exceeds that person's basic federal tax payable before subtracting any non-refundable credits (other than the personal credits and the credit for employment insurance and Canada Pension Plan ("CPP") or Quebec Pension Plan ("QPP") premiums).[124] Similarly, any unused portion of a DTC in respect of a disabled person may be transferred to that person's spouse.[125]

For the purpose of these provisions, subsection 118.3(4) allows the tax authorities to "obtain the advice of the Department of Human Resources Development" with re-

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to walk, feed, or dress oneself, medical doctor or psychologist for impairment with respect to perceiving, thinking and remembering, and medical doctor with respect to any other impairment), and is further defined in *ibid.*, s. 118.4(2), as "a person authorized to practise as such … pursuant to the laws of the jurisdiction in which the taxpayer resides, of a province or of the jurisdiction in which the property is provided."

[121] *Ibid.*, s. 118.3(1)(a.2). The 2000 Federal Budget proposes to extend the DTC to persons certified by a medical doctor to be markedly restricted in their ability to perform a basic activity of daily living all or substantially all of the time "but for therapy (other than therapy that can reasonably be expected to be of benefit to persons who are not so impaired) that is (i) essential to sustain a vital function of the individual, and (ii) required to be administered at least three times each week for a total period averaging not less than 14 hours a week" (see "Budget Papers 2000", *supra* note 56 at 2-9).

[122] *ITA*, *ibid.*, s. 118.3(1)(b).

[123] *Ibid.*, s. 118.3(1)(c). For a detailed explanation of the DTC, see Sherman, *supra* note 35 at 29-63. For a more recent review, see Katz, *supra* note 89 at 666-74.

[124] *ITA*, *ibid.*, s. 118.3(2). For this purpose, the only individuals who may claim the DTC are individuals who claimed an equivalent to spouse credit in respect of the disabled person under s. 118(1), or could have done so if they were not married (as defined in the *ITA* to include opposite-sex common-law spouses); and individuals who claimed a caregiver credit or infirm dependant's credit in respect of a disabled parent, grandparent, child or grandchild, or could have done so if the disabled person had no income and had attained the age of 18 years before the end of the year. The 2000 Federal Budget proposes to expand the list of relatives who can claim the DTC to include siblings, aunts and uncles, and nieces and nephews (see "Budget Papers 2000", *supra* note 56 at 2-9). As a result, as the Budget explains, the list of relatives to whom one DTC can be transferred will be made consistent with the rules for the METC (see "Supplementary Information 2000", *supra* note 35 at 3-35). Where more than one individual is entitled to claim the disability tax credit in respect of a disabled relative under s. 118.3(2), s. 118.3(3) provides that the credit may be allocated among these supporting individuals, but may be allocated by the Minister where the supporting individuals cannot agree. For a brief discussion of this element of the DTC, see Sherman, *ibid.* at 135-38.

[125] *ITA*, *ibid.*, s. 118.8. For a brief discussion of the rules governing the transfer of the DTC to a spouse, see Sherman, *ibid.* at 134-35.

spect to whether an individual in respect of whom the DTC is claimed has "a severe and prolonged impairment, the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted," and requires individuals claiming the credit to furnish this Department with "information with respect to an individual's impairment and its effects on the individual" where requested in writing by the Department. More specifically, subsection 118.4(1) of the *ITA* provides that

> (a) an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months;
>
> (b) 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;
>
> (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,
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> (v) eliminating (bowel or bladder functions), or
>
> (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.

Where an individual (or qualifying dependant) satisfies these requirements, the individual (or supporting individual) may claim a non-refundable credit of $730 against basic federal tax otherwise payable,[126] which is worth approximately $1,060 when provincial taxes are taken into account.[127]

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[126] *ITA*, *ibid.*, s. 118.3(1), which defines the amount of the credit as 17% of $4,293 or $730. These amounts were increased pursuant to the proposal in 2000 Federal Budget, *supra* note 35, to restore full indexation.

[127] This assumes a provincial tax rate equal to 45% of basic federal tax payable. Actual provincial income tax rates are outlined at *supra* note 36. The 2000 Federal Budget proposes to introduce an additional non-refundable credit worth $500 (or approximately $725 when provincial income taxes are taken into account) for disabled children who have not attained the age of 18 before the end of the year. This supplementary amount will be reduced where the aggregate of child and attendant care expenses claimed for the year in respect of the child exceeds $2,000 (see "Budget Papers 2000", *supra* note 56 at 2-9).

2. History

Like the METC in section 118.2, the DTC originated during the Second World War, when the federal government introduced a $480 deduction for persons who were totally blind at any time in the year, provided that they did not claim an amount for attendant care under the medical expense deduction.[128] Although the deduction did not require blind persons to itemize particular expenses associated with their disability, the provision was justified on the grounds that it recognized "the additional expenses" that blind persons are required to incur.[129] According to the Department of Finance: "Given that the itemization was already permitted for the expenses paid to hire a full-time attendant, the effect of the disability deduction was to provide more complete relief for such costs, including those under the deductible expenses threshold of 5 per cent of income."[130] In addition, the Department suggests, where the cost of a full-time attendant was not claimed as a medical expense, the disability deduction "may also have been intended to compensate for time expended by unpaid family members."[131]

Although the provision was amended in 1949 to include, in addition to blind persons, individuals who were "throughout the whole of the year, necessarily confined, by reason of illness, injury or affliction, to a bed or wheel chair,"[132] the disability deduction remained largely unchanged until 1986, with the exception of increases in the dollar value of the deduction which reached $2,590 by 1985.[133] In that year, the federal government announced a major revision to the deduction to include "all severely disabled Canadians" by extending eligibility to all persons with a severe and prolonged mental or physical impairment.[134] For the purpose of this amended provision, former paragraph 110(1.3)(a) stipulated:

> [A] person shall be considered to have a severe and prolonged impairment only if by reason thereof he is markedly restricted in his activities of daily living and the impairment has lasted or can be expected to last for a continuous period of at least 12 months.

While this language endures in current paragraphs 118.3(1)(a.1) and 118.4(1)(a) of the *ITA*, it was supplemented in 1991 by the statutory definitions of a "marked restriction" on an individual's ability to perform a basic activity of daily living in paragraph 118.4(1)(b) and of "a basic activity of daily living" in paragraphs 118.4(1)(c) and (d). Otherwise, the only significant amendments since 1986 involve the conver-

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[128] See s. 5(2) of the *Income War Tax Act*, *supra* note 71, enacted applicable to 1944 and subsequent years.

[129] *House of Commons Debates* (26 June 1944) at 4178.

[130] *Disability Tax Credit*, *supra* note 76 at 10.

[131] *Ibid*.

[132] See the *Income Tax Act*, S.C. 1948, c. 52, s. 26(1)(c), which became the *Income Tax Act*, R.S.C. 1952, c. 148, s. 27(1)(d) during the revision.

[133] The deduction was increased to $1,000 in 1972, and continued to increase after 1974, through annual indexing which was introduced in that year.

[134] Department of Finance, *Budget Papers* (1985), as cited in *Disability Tax Credit*, *supra* note 76 at 67.

sion of the deduction to a credit in 1988,[135] and increases in the value of the credit from $550 during the period 1988-90 to $720 in 1991 and to $730 for the year 2000.[136]

3. Interpretation

In applying these provisions, the courts have adopted an increasingly liberal approach, emphasizing the need for a "humane and compassionate construction" to achieve "the object of Parliament … 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."[137] In one recent case, for example, the court concluded that the taxpayer's children, who suffered from cystic fibrosis, had a severe and prolonged physical impairment on the grounds that they required an inordinate amount of time "to maintain their respiratory capacity", notwithstanding that paragraph 118.4(1)(c) of the *ITA* does not include "breathing" as a "basic activity of daily living".[138] In another case, the court questioned the mandatory status of the medical certificate described in paragraphs 118.3(1)(a.2) and (b), reasoning that "[o]ne does not need a person with a degree in medicine to determine whether a claimant can walk or get dressed, or requires an inordinate amount of time to do so. These matters are within ordinary human experience."[139]

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[135] See *1987 Amendments*, *supra* note 78, ss. 77(6), 92, repealing former s. 110(1)(e) and adding s. 118.3, applicable to 1988 and subsequent years.

[136] *An Act to amend the Income Tax Act, the Canada Pension Plan, the Cultural Property Export and Import Act, the Income Tax Conventions Interpretation Act, the Tax Court of Canada Act, the Unemployment Insurance Act, the Canada-Newfoundland Atlantic Accord Implementation Act, the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and certain related Acts*, S.C. 1991, c. 49, ss. 90(1), 90(3) [hereinafter Sch. II], being Sch. II to the *Income Tax Amendments Revision Act*, S.C. 1994, c. 7 [hereinafter *1993 Amendments*], those provisions applying to 1991 and subsequent years. Additional amendments announced in the 2000 Federal Budget are outlined at *supra* notes 121, 124, 127.

[137] *Radage* v. *M.N.R.*, [1996] 3 C.T.C. 2510 at 2529, 96 D.T.C. 1615 (T.C.C.) [hereinafter *Radage* cited to C.T.C.], Bowman J.T.C.C., cited with approval by a majority of the Federal Court of Appeal in *Johnston* v. *M.N.R.*, [1998] 2 C.T.C. 262 at para. 10, 98 D.T.C. 6169 (F.C.A.) [hereinafter *Johnston*].

[138] *Fillion* v. *M.N.R.*, 1998 CarswellNAT 2907 at paras. 18, 21 (T.C.C.) [hereinafter *Fillion*], accepting the taxpayer's argument that "breathing" should be read into s. 118.4(1)(c), since "otherwise section 15 of the *Canadian Charter of Rights and Freedoms* would be violated" (at para. 18). For another case in which a taxpayer with a breathing impairment was considered eligible for the disability tax credit, see *Renken* v. *M.N.R.*, [1996] 2 C.T.C. 2687, 1996 CarswellNAT 1351 (T.C.C.), online: TAXNET (TaxPARTNER Main) [hereinafter *Renken* cited to CarswellNAT] (concluding that the taxpayer, who suffered from severe asthma, required an inordinate amount of time to walk and dress herself).

[139] *Morrison* v. *M.N.R.* (1998), [1999] 1 C.T.C. 2331 at para. 17, Bowman T.C.J. (T.C.C.). For a contrary view, emphasizing the statutory requirement for a medical certificate, see *Partanen* v. *M.N.R.*, [1998] 2 C.T.C. 2941 (T.C.C.), aff'd [1999] 3 C.T.C. 79, 99 D.T.C. 5436 (F.C.A.).

At the same time, however, courts have emphasized the limited scope of the credit, observing that the provision is designed to provide "a modest amount of tax relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons."[140] In addition, several decisions have noted the restrictive impact of the 1991 amendments, which introduced specific statutory definitions of the expressions "markedly restricted" in paragraph 118.4(1)(b) of the *ITA* and "a basic activity of daily living" in paragraphs 118.4(1)(c) and (d).[141]

[140] *Radage*, *supra* note 137 at 2528. See also *Caudle* v. *M.N.R.*, [1995] 1 C.T.C. 2815 at 2819 (T.C.C.), Sarchuk J.T.C.C., observing that the statutory provisions are "narrow and restrictive", and concluding that "it is obvious that Parliament, as a matter of policy … intended to create … an extreme level of disability in order to qualify"; *Craven* v. *M.N.R.*, [1995] 1 C.T.C. 2883, 1995 CarswellNET 304 at para. 6 (T.C.C.), online: TAXNET (TaxPARTNER Main), Bowman J.T.C.C., concluding that "the inflexible tests in section 118.4" grant the court "no room to apply either common sense or compassion in the interpretation of the disability tax credit"; *Sincock* v. *M.N.R.*, [1995] 2 C.T.C. 2449 at 2453, 95 D.T.C. 535 (T.C.C.) [hereinafter *Sincock* cited to C.T.C.], McArthur J.T.C.C., referring to "the rigorous and onerous criteria set forth in the legislation"; *Moore* v. *M.N.R.*, [1995] 2 C.T.C. 2538, 1995 CarswellNAT 522 at para. 17 (T.C.C.), online: TAXNET (TaxPARTNER Main) [hereinafter *Moore*], Sobier T.C.C.J., describing "the stringent tests laid down by Parliament which must be met by a taxpayer, even one with severe health problems, before he or she is entitled to successfully claim the disability tax credit"; *Trottier* v. *M.N.R.* (1995), [1996] 2 C.T.C. 2425, 1995 CarswellNAT 1461 at para. 34 (T.C.C.), online: TAXNET (TaxPARTNER Main), Tremblay J.T.C.C., concluding from the "restrictive nature" of the statutory provisions that "Parliament's purpose was clearly to target an extremely limited class of persons, those severely affected by their disability in their daily lives"; *Renken*, *supra* note 138 at para. 8, Mogan J.T.C.C., referring to the "stringent conditions imposed by sections 118.3 and 118.4 of the *Income Tax Act*"; *Kralik* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2147 at 2151 (T.C.C.) [hereinafter *Kralik*], Rowe D.J.T.C.C., emphasizing that the disability tax credit "is very narrow in its application."

[141] See *e.g. Jeanlouis* v. *M.N.R.*, [1995] 2 C.T.C. 2200 at 2203 (T.C.C.) [hereinafter *Jeanlouis*], Bowman J.T.C.C., observing that the 1991 amendments resulted in a "restrictive definition that leaves the Court little flexibility to apply a compassionate and common sense interpretation"; *Bérubé* v. *M.N.R.* (1996), [1999] 3 C.T.C. 2032 at para. 15 (T.C.C.), Tardif T.C.J., noting that "[s]ince 1991, the Act has contained a very narrow definition which limits the Court's ability to interpret the phrase [severe and prolonged mental or physical impairment] with compassion, especially since any assessment must take into account improvement in the condition resulting from the use of devices"; *Finegan* v. *M.N.R.*, [1996] 2 C.T.C. 2609, 1996 CarswellNAT 1322 at para. 27 (T.C.C.), online: TAXNET (TaxPARTNER Main), Sarchuk J.T.C.C., concluding that the 1991 amendments made the provision "extremely narrow and restrictive" and "could only have been made … as a result of the intention of the legislators, as a matter of policy, to tighten the availability of this section"; *Power* v. *M.N.R.*, [1996] 2 C.T.C. 2684, 1996 CarswellNAT 1347 at para. 4 (T.C.C.), online: TAXNET (TaxPARTNER Main), Bowie J.T.C.C., concluding that the 1991 amendments demonstrated Parliament's intention to limit the credit "only to individuals who suffer the most extreme disabling conditions"; *Campbell* v. *M.N.R.*, [1996] 3 C.T.C. 2022, 1996 CarswellNAT 1477 at para. 35 (T.C.C.), online: TAXNET (TaxPARTNER Main) [hereinafter *Campbell*], Rowe D.J.T.C.C., observing that the amended legislation "is designed to bar the claim for all but the most severely handicapped." Notwithstanding the statement in budgetary documents accompanying the 1991 amendments that they were not intended to "change the existing eligibility criteria," several cases have concluded that a claimant was eligible for the disability tax credit prior to 1991, but was rendered ineligible by the 1991 amendments (see *e.g.*

Most striking is the volume of litigation, which exceeds a hundred reported cases since 1994. While such a substantial number of reported cases may be attributed in part to the relatively recent enactment of the relevant statutory provisions, particularly those adopted in 1991, other factors likely include the relative imprecision of the statutory language, the importance of detailed factual determinations in the application of the rule, and widespread misunderstanding as to the purpose and scope of the credit.

With respect to the statutory language, the condition that an individual require "an inordinate amount of time" to perform an activity of daily living is particularly open-ended. Although several decisions have referred to dictionary definitions to define "inordinate" as "irregular" or "excessive",[142] courts have differed widely on how "irregular" or "excessive" the amount of time must be to qualify as a "marked restriction" on a taxpayer's ability to perform a basic activity of daily living within the meaning of the relevant statutory provisions. In one case, for example, a taxpayer who had "no control over her bowel function" was considered to have required an inordinate amount of time to perform her bowel functions on the grounds that she was "required, on a continuous and constant basis, around the clock, to attend to her elimination needs by attending at washrooms and emptying the bag."[143] In other cases involving similarly disabled individuals, however, courts have held that the amount of time devoted to elimination functions was not "inordinate".[144] Courts have also differed over the standard whereby individuals may be said to require "an inordinate amount of time" to walk,[145] or engage in other basic activities of daily living.[146] Other cases

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Grey v. *M.N.R.* (1995), [1996] 1 C.T.C. 2310 (T.C.C.); *Brushett* v. *M.N.R.*, [1996] 3 C.T.C. 2323 (T.C.C.); *Terrigno* v. *M.N.R.*, [1996] 3 C.T.C. 2801 (T.C.C.); *De Francesco* v. *M.N.R.*, [1997] 3 C.T.C. 2649 (T.C.C.) [hereinafter *De Francesco*]).

[142] See *e.g. Brookshaw* v. *M.N.R.*, [1994] 2 C.T.C. 2360 (T.C.C.) [hereinafter *Brookshaw*]; *Murphy* v. *M.N.R.*, [1995] 1 C.T.C. 2857, 1995 CarswellNAT 299 (T.C.C.), online: TAXNET (Taxport or Main) [hereinafter *Murphy*]. See also *Johnston*, *supra* note 137 at para. 18, where Létourneau J.A. defined "an inordinate amount of time" as "an excessive amount of time, that is to say one much longer than what is usually required by normal people. It requires a marked departure from normality."

[143] *Brookshaw*, *ibid.* at 2360. See also *Bearss* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2642 at 2644, 97 D.T.C. 190 (T.C.C.), where the court regarded the time devoted by the taxpayer to her elimination functions (estimated at 10-15 minutes approximately 13 times a day for a total of 2.5 to 3 hours per day, plus an additional 45 minutes every 2 days to change her colostomy pouch) as "inordinate".

[144] See *e.g. Ratzlaff* v. *M.N.R.*, [1995] 1 C.T.C. 2927 (T.C.C.) (1.5 hours a day plus 10 to 20 minutes twice a day for 5 out of 7 days considered not an "inordinate" or "excessive" amount of time); *Virage* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2392 (T.C.C.) [hereinafter *Virage*] (3 to 4 minutes, 12 to 15 times a day, not an "inordinate amount of time"); *Armit* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2393 (T.C.C.) [hereinafter *Armit*] (3 to 4 minutes, 15 times per day, not an "inordinate amount of time"); *Stewart* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2394 (T.C.C.) [hereinafter *Stewart* 1995] (3 to 5 minutes, 10 to 15 times a day, not an "inordinate amount of time").

[145] See *e.g. Conner* v. *M.N.R.* (1994), [1995] 1 C.T.C. 2371 at 2372, 95 D.T.C. 198 (T.C.C.) (a taxpayer required to rest after walking for 100 meters took an inordinate amount of time to walk); *Murphy*, *supra* note 142 at para. 23 (the taxpayer who suffered from chronic fatigue syndrome required an inordinate amount of time to walk because she could not "keep up a normal pace", was required to "stop periodically and rest", had to "monitor her fatigue level so that she does not injure herself

have grappled with the meaning of the words "perceiving, thinking, and remembering" in subparagraph 118.4(1)(c)(i)[147] and the words "feeding and dressing oneself" in subparagraph 118.4(1)(c)(ii),[148] and with the requirement in paragraph 118.4(1)(b) that

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physically," so that she "performs the activity with difficulty and in considerable pain and with fatigue"); *Jeanlouis*, *supra* note 141 (the taxpayer, who took 30 minutes to walk a distance normally covered in 7 to 8 minutes, was markedly restricted in ability to walk based on inordinate amount of time test); *Wodak* v. *M.N.R.*, [1996] 2 C.T.C. 2333 (T.C.C.) (the taxpayer, who took four times a normal amount of time to walk 100 to 200 yards, was markedly restricted in ability to walk); *Wilson* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2652 (the taxpayer, who was required to rest for 1 minute after walking 25 meters, did not take "an inordinate amount of time" to walk); *Noseworthy* v. *M.N.R.*, [1996] 2 C.T.C. 2006 at 2007 (T.C.C.) (the taxpayer who took 30 minutes to travel a distance "which shouldn't take more than five or ten minutes" took "an inordinate amount of time" to walk); *St. Pierre* v. *M.N.R.*, [1996] 2 C.T.C. 2709 (T.C.C.) (the taxpayer not markedly restricted in ability to walk even though he was sometimes unable to walk 10 feet and was generally unable to walk more than 50 yards); *Marshall* v. *M.N.R.*, [1996] 3 C.T.C. 2475 (T.C.C.) (the taxpayer, who took 25 minutes to cover a distance normally covered in 4 to 5 minutes, took "an inordinate amount of time" to walk); *Spence* v. *M.N.R.*, [1996] 3 C.T.C. 2921 (T.C.C.) (the taxpayer able to walk 50 meters without assistance, though having to stop every 50 or 60 feet, was markedly restricted in an activity of basic living on the basis that he took an inordinate amount of time to walk); *Valley* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2618 (T.C.C.) (the taxpayer did not require an inordinate amount of time to walk, even though he walked with crutches and took four times the normal amount of time to walk 2 city blocks); *Peters* v. *M.N.R.* (1996), [1997] 2 C.T.C. 2071 at 2074 (T.C.C.) (the taxpayer took "an inordinate amount of time to walk any distance that would allow him to operate independently in every day life"); *De Francesco*, *supra* note 141 (the taxpayer, who was able to walk 100 yards with the aid of a leg brace, was not markedly restricted in his ability to walk); *Cameron* v. *M.N.R.* (1997), [1998] 2 C.T.C. 2081 (T.C.C.) [hereinafter *Cameron*] (the taxpayer, who took about 20 minutes to walk 100 to 200 meters, did not take "an inordinate amount of time" to walk); *Morin* v. *M.N.R.*, [1998] 2 C.T.C. 2722 at 2724 (T.C.C.) (the taxpayer who suffered from severe back pain and was unable to walk more than 25-30 feet without resting was markedly restricted in ability to walk); *Johnston*, *supra* note 137 at para. 26 (5 minutes to cover a distance of only 50 feet considered "inordinate").

[146] See *e.g. Mantle* v. *M.N.R.*, [1995] 1 C.T.C. 2918 at 2922 (T.C.C.), Kempo J.T.C.C., concluding that the juvenile diabetes affecting the taxpayer's son impaired all of his activities of basic living by requiring an inordinate or excessive amount of time for them to be performed. For contrary decisions in which juvenile diabetes did not qualify as an eligible disability under ss. 118.3 & 118.4, see *Salvail* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2680 (T.C.C.); *Moore*, *supra* note 140; *Sanders* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2617 (T.C.C.); *Oliver* v. *M.N.R.*, [1996] 3 C.T.C. 2271 (T.C.C.); *McGonegal* v. *M.N.R.*, [1997] 2 C.T.C. 2646 (T.C.C.).

[147] See *e.g. Radage*, *supra* note 137 at 2526-27, Bowman J.T.C.C., concluding that "perceiving" involves "the *reception* and *recognition* of sensory data in a manner that conforms reasonably to common human experience"; that "thinking" involves "a rational comprehension, marshalling, organization and analysis of that which the person has perceived and the formulation of conclusions therefrom that are of practical utility or theoretical validity"; that "remembering" involves "both the acquisition of the memory and its retrieval" and that although s. 118.4(1)(c)(i) uses the words disjunctively, "the activities of perceiving, thinking and remembering are closely connected."

[148] See *e.g. Hodgin* v. *M.N.R.*, [1995] E.T.C. 515 at para. 6, 1995 CarswellNAT 2038 (T.C.C.), online: TAXNET (TaxPartner Main) [hereinafter *Hodgin*], Bonner T.C.J., interpreting the words "feeding oneself" to involve "something more than eating a meal prepared by another person" but also "the ability to prepare a reasonable range of food and not just to prepare and set out snacks, junk foods or frozen dinners"; *Johnston, supra* note 137 at para. 32, where Létourneau J.A., affirming this interpre-

an individual's ability to perform a basic activity of daily living be restricted "all or substantially all of the time."[149]

In addition to the broad phraseology of the statutory language, the application of the provision to the circumstances of individual claimants involves detailed factual questions regarding the existing and likely duration of their impairment, and the effects of their impairment on one of the basic activities of daily living specified in paragraph 118.4(1)(c). Not surprisingly, given the applicable statutory tests, courts must devote considerable time and effort to determining whether, with therapy and the use of appropriate devices and medication, claimants are unable or require an inordinate amount of time to perceive, think and remember,[150] to feed and dress themselves,[151] to speak or hear so as to be understood by or understand a familiar person in a quiet setting,[152] to eliminate (bowel or bladder functions),[153] or to walk.[154]

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tation, added that "[t]he notion of feeding … also involves the ability to prepare a meal which conforms to a medically prescribed diet and medication which maintains one's state of health or prevents its deterioration" and further concluded (at para. 37) that "the notion of dressing oneself includes the ability to perform basic and elementary personal hygiene associated with it, such as shaving and bathing".

[149] See *e.g. Sarkar* v. *M.N.R.*, [1995] 2 C.T.C. 2750 at paras. 20, 21, 1995 CarswellNAT 583 (T.C.C.), online: TAXNET (TaxPartner Main), Sarchuk J.T.C.C., accepting that the taxpayer took an inordinate amount of time to walk when subject to a bout of chronic fatigue syndrome, but disallowing the taxpayer's claim on the basis that she did not experience this restriction "all or substantially all of the time" during the relevant year. Defining the words "substantially all of the time" as "almost all or essentially all of the time", the Court held that "intermittent bouts of illness, even causing a severe impairment on a sporadic basis" do not satisfy the requirements of the disability tax credit. For a similar result, relying on the decision in *Sarkar*, see *Campbell*, *supra* note 141.

[150] See *e.g. Radage*, *supra* note 137. See also *Larivière* v. *M.N.R.*, [1995] 2 C.T.C. 2742 (T.C.C.); *Maillet* v. *M.N.R.*, [1996] 2 C.T.C. 2656 (T.C.C.); *Thomas* v. *M.N.R.*, [1996] 2 C.T.C. 2714 (T.C.C.); *Friis* v. *M.N.R.*, [1996] 3 C.T.C. 2172 (T.C.C.); *Lamothe* v. *M.N.R.*, [1996] 3 C.T.C. 2423 (T.C.C.); *Luxton* v. *M.N.R.*, [1996] 3 C.T.C. 2449 (T.C.C.); *Parsons* v. *M.N.R.*, [1996] 3 C.T.C. 2672 (T.C.C.); *Bradbury* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2051 (T.C.C.); *Kralik*, *supra* note 140; *Hill* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2477 (T.C.C.); *Desbiens* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2653 (T.C.C.); *Robillard* v. *M.N.R.* (1996), [1997] 2 C.T.C. 2067 (T.C.C.); *Dallaire* v. *M.N.R.* (1996), [1997] 3 C.T.C. 2480 (T.C.C.); *Shaw* v. *M.N.R.*, [1997] 3 C.T.C. 2623 (T.C.C.); *Lever* v. *M.N.R.*, [1998] 4 C.T.C. 2460 (T.C.C.); *Stewart* v. *M.N.R.*, 1999 CarswellNAT 1097 (T.C.C.), online: TAXNET (TaxPartner Main).

[151] In addition to *Hodgin*, *supra* note 148, and *Johnston*, *supra* note 137, see *Sincock*, *supra* note 140; *Edwards* v. *M.N.R.*, [1995] 2 C.T.C. 2574 (T.C.C.); *Farkas* v. *M.N.R.*, [1996] 3 C.T.C. 2054 (T.C.C.); *Dippel* v. *M.N.R.*, [1996] 3 C.T.C. 2202 (T.C.C.); *Corbisiero* v. *M.N.R.*, [1997] 3 C.T.C. 2108 (T.C.C.); *Lareau* v. *M.N.R.* (1995), [1997] 3 C.T.C. 2704 (T.C.C.); *Hagen* v. *M.N.R.*, [1997] 3 C.T.C. 3128 (T.C.C.); *Lacroix* v. *M.N.R.* (1996), [1998] 1 C.T.C. 2213 (T.C.C.); *McMaster* v. *M.N.R.* (1998), [1999] 1 C.T.C. 2658 (T.C.C.).

[152] See *e.g. Da Silva* v. *M.N.R.* (1994), [1995] 1 C.T.C. 2255 (T.C.C.); *Labelle* v. *M.N.R.* (1994), [1995] 1 C.T.C. 2576 (T.C.C.); *Laforce* v. *M.N.R.* (1995), [1996] 1 C.T.C. 2696 (T.C.C.); *Adams* v. *M.N.R.* (1994), [1995] 1 C.T.C. 2801 (T.C.C.); *Rioux* v. *M.N.R.* (1994), [1996] 1 C.T.C. 2139 (T.C.C.); *Cooper* v. *M.N.R.*, [1996] 3 C.T.C. 2189 (T.C.C.); *Bowles* v. *M.N.R.* (1996), [1997] 1 C.T.C. 2045 (T.C.C.).

With respect to misunderstanding about the purpose and scope of the credit, courts themselves have raised questions about the extent to which taxpayers and medical practitioners appreciate the limited categories of disabled persons for which the credit is intended.[155] In one case, for example, the court found it necessary to explain that a person may be "in receipt of a disability pension regarding her work and not be entitled to the disability tax credit provided for in subsection 118.3(1) of the *Act*."[156] While evidence suggests that many disabled Canadians do not claim the DTC either because they are not aware of the credit or believe that they would be refused,[157] the number of reported cases in which courts have dismissed the taxpayer's appeal also suggests that a number of Canadians whose disabilities do not satisfy the specific requirements of the statutory provision continue to claim credits for which they are ineligible.

4. Evaluation and Recommendations

In evaluating the DTC, commentators have tended to focus on the eligibility criteria in sections 118.3 and 118.4, the manner in which the credit is administered, the dollar value of the credit, and its non-refundability. The Council of Canadians with Disabilities, for example, has made the following proposals for reform:

(1) Eligibility for the credit should be liberalized by

(a) reconsidering the requirement in paragraph 118.4(1)(b) that a "marked restriction" in a basic activity of daily living be determined only after taking into account "therapy and the use of appropriate devices and medication";[158]

(b) amending the statutory definitions of speech and hearing impairments to eliminate the "artificial" tests based on communication in "a quiet setting" with "another person familiar with the individual";[159]

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[153] See the cases cited at *supra* notes 143, 144.

[154] See the cases cited at *supra* note 145.

[155] See *e.g. Virage*, *supra* note 144; *Armit*, *supra* note 144; *Stewart* 1995, *supra* note 144.

[156] *Cameron*, *supra* note 145 at 2087.

[157] Federal Task Force on Disability Issues, *supra* note 1 at 90.

[158] See Council of Canadians with Disabilities, *supra* note 79 at 2, observing that this test "does not allow for the possibility that the 'appropriate devices and medication' may actually not be available to the person, or (with respect to the medication) may involve a significant risk to the person's health." See also Shillington, *supra* note 86 at 25, suggesting that this requirement "seems contrary to the factor which we [the disability tax credit] are trying to measure; cost implications." The 2000 Federal Budget, *supra* note 35, responds to this recommendation by making the DTC available to persons who would be markedly restricted in their ability to perform a basic activity of daily living all or substantially all of the time but for certain kinds of essential therapy (see *supra* note 121).

[159] Council of Canadians with Disabilities, *ibid.* at 2, suggesting that "[t]he test should be whether the person can speak or hear satisfactorily in typical situations from day to day life, where not all settings are quiet and people have to speak with and hear strangers."

(c) repealing the qualification in paragraph 118.4(1)(d) that "no other activity [other than those listed in paragraph 118.4(1)(c)], including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living";[160]

(d) repealing the qualification in paragraph 118.3(1)(c) which renders an individual ineligible for the disability tax credit where remuneration for an attendant or care in a nursing home in respect of the individual is claimed as a medical expense under section 118.2 (other than under paragraph 118.2(2)(b.1));[161] and

(e) allowing the credit to be claimed by any supporting person, regardless of their relationship with the disabled individual.[162]

(2) The form (T2201) by which qualifying medical practitioners are to certify that "the individual's impairment is a severe and prolonged impairment the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted" should be amended to

(a) refer to the key condition in paragraph 118.4(1)(b) that an individual's ability to perform an activity of daily living is "markedly restricted"

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[160] *Ibid.*, explaining that this paragraph "directly excludes many people from the DTC who are severely limited in their day-to-day functioning by their disabilities, although their disabilities do not fit easily into any of the categories listed in [paragraph (c)]." See also Federal Task Force on Disability Issues, *supra* note 1 at 89, observing that the list of "Activities of Daily Living" in s. 118.4(1)(c) does not include "breathing". Notwithstanding the absence of any such amendment, the Tax Court decision in *Fillion*, *supra* note 138, interpreted the statutory rules as if "breathing" were a basic activity of daily living.

[161] Council of Canadians with Disabilities, *ibid.* at 4 [emphasis in original], explaining that

> this rule penalizes people who have very significant disabilities, and who are making high expenditures out of their own pockets to keep themselves or their family members in the community, as opposed to being in institutions at much greater public expense. Individuals who have attendant care costs over $10,000 [the maximum amount that may be claimed under paragraph 118.2(2)(b.1) without disqualifying the individual from the disability tax credit] have *other* disability-related expenses which are equal to or higher than other persons with disabilities. Accordingly, they should be allowed to claim the DTC.

[162] *Ibid.* at 5, explaining that the current limitation to specified relatives is "unfair to other relatives and friends who provide actual support to the person." See also Federal Task Force on Disability Issues, *supra* note 1 at 90, recommending that the DTC should be transferable to "any supporting person." As indicated earlier, the 2000 Federal Budget, *supra* note 35, extends the list of relatives who may claim the DTC to include siblings, aunts and uncles, and nieces and nephews (see *supra* note 124).

where the individual requires "an inordinate amount of time" to perform the basic activity of daily living;[163] and

(b) delete the example of unimpaired walking as "at least 50 meters on level ground."[164]

(3) The dollar value of the credit should be increased to compensate for inflation over the last eight years and should be fully indexed to offset future inflation.[165]

(4) The DTC should be made fully refundable, beginning with a measure like the refundable medical expense supplement which is available only where individuals earn at least $2,500 in the year through employment or business.[166]

Other commentators have suggested more significant amendments to the eligibility criteria for the DTC, such as replacing the current "severe and prolonged mental or physical impairment" standard with the less restrictive "mental or physical infirmity" criterion utilized in several other provisions of the *ITA*.[167]

a. Purpose

In order to evaluate these and other possible reforms, it is essential to reconsider the purpose of the DTC, not only as part of the current income tax, but also under a restructured system in which itemized disability-related expenses might be recognized under a separate disability expenses tax credit or deduction without any threshold. As

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[163] Council of Canadians with Disabilities, *ibid.* at 3 [emphasis in original], noting that "[m]ost of the questions are phrased in an 'all-or-nothing' manner which implies, to the health professional, that someone who can do these activities *at all* is not eligible."

[164] *Ibid*. at 3, observing that "[i]n the real world, people have to walk more than 50 meters as part of their activities of daily living, and they have to walk up and down stairs. These implied limitations have clearly been put by Revenue Canada into the T2201 form to limit eligibility more narrowly than the statutory language would indicate."

[165] *Ibid*. at 4. See also Shillington, *supra* note 86 at 26-27; Federal Task Force on Disability Issues, *supra* note 1 at 90; Don Gallant and Associates, *supra* note 108 at 17. Although the 2000 Federal Budget announced a return to full indexing for income tax provisions like the DTC, it did not increase the value of the credit to compensate for inflation in the 1990s.

[166] Council of Canadians with Disabilities, *ibid.* at 3-4. For other proposals to make the DTC refundable, see Standing Committee, *supra* note 33 at 13-14; Shillington, *ibid.* at 22-24; *The Tax System*, *supra* note 79 at 18; Don Gallant and Associates, *ibid.* at 17.

[167] *The Tax System*, *ibid.* at 13-14. Other provisions employing this criterion include the infirm dependants credit in the *ITA*, *supra* note 4, s. 118(1)(d), the definition of an "eligible child" for the purpose of the child care expense deduction in s. 63, and the medical expense credit for remuneration paid to a full-time attendant in a patient's home in s. 118.2(2)(c). See also Baker & Beatty, *supra* note 79 at 4, recommending that the eligibility criteria for the DTC be reviewed "in consultation with the disability community, aimed at making persons eligible who have indirect, hidden or cumulative costs of disability."

the Department of Finance explains, the original disability deduction was designed to provide "more complete relief" than did the medical expense deduction at the time for the additional expenses that blind persons must incur "including those under the deductible [medical] expenses threshold of 5 per cent of income."[168] In addition, it suggests, the deduction "may also have been intended to compensate for time expended by unpaid family members" instead of paid attendants whose remuneration could be claimed as a medical expense.[169] The Royal Commission on Taxation, however, opposed the existence of a separate disability deduction, questioning "the need for the alternative treatment" to that provided under the medical expense deduction, and noting that the deduction "is used only when the actual deductible expenses are less than $500."[170]

The argument that a separate disability deduction or credit provided more complete relief than the general deduction or credit for medical expenses may have justified a separate provision at a time when eligible medical expenses were more limited in scope. Today, however, this justification is much less persuasive as the list of eligible medical expenses has expanded to cover numerous disability-related expenses, including those involving a significant element of personal consumption, such as air and water filters or purifiers,[171] air conditioners,[172] wheelchair-accessible vans,[173] expenses to move to a physically accessible dwelling,[174] and allowable home renovations.[175] Likewise, since a separate credit was recently introduced for in-home care of an aged or disabled relative,[176] the second argument that a separate disability credit or deduction is necessary to compensate for time expended by unpaid family members is also questionable. Moreover, it is arguable that the rationale for such a provision would

[168] *Disability Tax Credit*, *supra* note 76 at 10.

[169] *Ibid*.

[170] *Royal Commission on Taxation*, *supra* note 24 at 220.

[171] *Regulations*, *supra* note 11, s. 5700(c.1), applicable to 1992 and subsequent years.

[172] "Excerpts from Budget Papers" in Stikeman Elliott, *Canadian Federal Budget 1997: Budgetary Proposals of the Hon. Minister of Finance with Comments by Stikeman Elliott* (Toronto: Carswell, 1997) [hereinafter 1997 Federal Budget] 2-1 at 2-3, proposing to allow taxpayers to claim "the lesser of 50% of the cost of an air conditioner prescribed by a medical practitioner as being necessary to assist an individual in coping with the individual's severe chronic ailment, disease or disorder, and $1,000."

[173] *ITA*, *supra* note 4, s. 118.2(1)(l.7), added by the *Income Tax Amendments Act, 1997*, S.C. 1998, c. 19, s. 23(2), applicable to 1997 and subsequent years [hereinafter *1997 Amendments*].

[174] *ITA*, *ibid.*, s. 118.2(1)(l.5), added by *1997 Amendments*, *ibid.*, applicable to 1997 and subsequent years.

[175] *ITA*, *ibid.*, s. 118.2(1)(l.2), added by *An Act to amend the Income Tax Act, the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, the Old Age Security Act, the Public Utilities Income Tax Transfer Act, the War Veterans Allowance Act and a related Act*, S.C. 1990, c. 39, s. 25, applicable to 1988 and subsequent years [hereinafter *1989 Amendments*]. For cases dealing with the application of this provision, see *supra* notes 68, 70.

[176] *ITA*, *ibid.*, s. 118(1)(c.1), added by *Income Tax Amendments Act, 1998*, S.C. 1999, c. 22, s. 32(2), applicable to 1998 and subsequent years [hereinafter *1998 Amendments*]. This provision is examined below.

disappear altogether if the *ITA* were amended to introduce a separate disability expenses tax credit or deduction without any threshold and (as recommended earlier) to allow disabled individuals to claim remuneration for attendant care provided by a spouse or other family member.[177]

Notwithstanding this possible conclusion, there is a further rationale for the existence of a separate disability credit or deduction even if these amendments were made: to the extent that disabilities impose various kinds of costs, some of which are indirect and difficult to itemize, these are appropriately recognized through a credit or deduction equal to a fixed dollar amount.[178] Where, for example, a disability necessitates extra laundry, bedding or heating costs, or results in greater wear and damage to clothing or household items, these additional undocumented costs are effectively recognized through a fixed credit or deduction. Likewise, to the extent that restricted access to the marketplace and society at large causes disabled persons to incur higher costs for basic goods and services like groceries, a fixed credit or deduction recognizes these additional costs.[179] In this respect, the disability tax credit can be likened to an additional personal exemption to recognize non-discretionary but difficult-to-itemize costs associated with a mental or physical disability. For this reason, it might be more appropriate to include the disability tax credit along with the other "personal credits" found in section 118, rather than with the other non-refundable tax credits in sections 118.1 (charitable donations) to 118.7 (employment insurance and CPP/QPP premiums).[180]

Having identified this rationale for a separate provision recognizing the indirect and non-itemized costs associated with mental or physical disabilities, it remains to reconsider the eligibility criteria for this recognition, the appropriate dollar amount, and whether these additional costs should be recognized through a non-refundable credit, a refundable credit, or a deduction. Further comments address the administration of the provision.

b. Eligibility

Beginning with the eligibility criteria, the basic purpose of the provision to recognize indirect and non-itemized costs associated with a mental or physical disability suggests that paragraph 118.3(1)(c) (excluding from the DTC individuals in respect of whom an amount is claimed as a medical expense for attendant or nursing home care under any of paragraphs 118.2(2)(b), (c), or (d)) should be repealed, that the statutory

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[177] See text accompanying notes 85-88.

[178] See *e.g. Disability Tax Credit*, *supra* note 76 at 15, explaining that the disability tax credit "recognizes expenses that are difficult to itemize."

[179] See *e.g. The Tax System*, *supra* note 79 at 7, observing that "a disabled person might rely heavily on a local grocer because of the difficulty in travelling to larger more competitively priced retailers" and explaining that one rationale for the DTC is "to offset these [indirect] costs through a non-itemized, flat tax credit."

[180] These personal credits are examined in Part II.*D*, below.

definition of a "basic activity of daily living" in paragraphs 118.4(1)(c) and (d) should be revised, and that the definition of a "marked restriction" in an individual's ability to perform a basic activity of daily living in paragraph 118.4(1)(b) should also be amended. As well, since these undocumented disability-related costs may be borne by supporting individuals as well as by disabled persons themselves, the earlier analysis of the METC suggests that these individuals should be able to claim any unused portion of the disabled person's DTC regardless of their relationship with this person.[181]

With respect to paragraph 118.3(1)(c), an exclusion for individuals in respect of whom attendant or nursing home care expenses are claimed under any of paragraphs 118.2(2)(b), (c), or (d) seems inconsistent with the modern purpose of the provision to recognize indirect and difficult-to-itemize costs associated with a mental or physical disability. Although the exclusion might be justified on the grounds that these additional costs are minimal or non-existent where the individual is cared for by a full-time attendant or in a nursing home, this assumption is highly uncertain. On the contrary, there is no reason why these individuals might not incur even higher undocumented disability-related expenses (*e.g.*, for extra laundry, bedding or heating costs, or for wear and damage to clothing or household items) than those incurred by individuals who are not cared for by a full-time attendant or in a nursing home.[182]

Turning to the statutory definition of a "basic activity of daily living", one can question the definition of speech and hearing impairments in subparagraphs 118.4(1)(c)(iii) and (iv), the failure to mention other activities that might reasonably be included in paragraph 118.4(1)(c), and the specific exclusion of other activities in paragraph 118.4(1)(d). Regarding speech and hearing impairments, it seems unreasonable to establish a statutory test based on communication in "a quiet setting" with "another person familiar with the individual", rather than everyday situations which are likely to give rise to additional undocumented costs which the DTC is designed to recognize. For this reason, as the Canadian Council for Disabilities has suggested, "The test should be whether the person can speak or hear satisfactorily in typical situations from day to day life, where not all settings are quiet and people have to speak and hear strangers."[183]

As for other activities of daily living, it seems reasonable to add "breathing" to the list in paragraph 118.4(1)(c) on the ground that individuals with these kinds of

[181] See the earlier discussion at text accompanying notes 83-84. This recommendation was made by the Federal Task Force on Disability Issues, *supra* note 1 at 90. See also Council of Canadians with Disabilities, *supra* note 79 at 5. While the 2000 Federal Budget proposes to expand the list of eligible relatives who may claim the DTC, eligibility continues to depend on a qualifying relationship with the disabled person.

[182] See *e.g.* Council of Canadians with Disabilities, *ibid.* at 4 [emphasis in original], explaining that individuals with attendant care expenses over $10,000 (the amount that may be claimed as a medical expense under s. 118.2(2)(b.1) without disqualifying the individual from the disability tax credit) "have *other* disability-related expenses which are equal to or higher than other persons with disabilities."

[183] *Ibid*. at 2.

impairments are also likely to incur undocumented costs which should be recognized for tax purposes.[184] Likewise, although paragraph 118.4(1)(b) stipulates that an individual's ability to perform a basic activity of daily living is markedly restricted where the individual is blind, it seems appropriate to add "seeing" to the list in paragraph 118.4(1)(c) to include individuals whose ability to see is markedly restricted even though they are not blind within the meaning of paragraph 118.4(1)(b).

Regarding paragraph 118.4(1)(d), it seems odd to specifically exclude from the "basic activities of daily living" recognized by the *ITA* all other activities "including working, housekeeping or a social or recreational activity." On the contrary, to the extent that the purpose of the credit is to recognize additional but undocumented non-discretionary costs incurred by disabled persons on account of their disabilities, there is no reason why it should not apply where an impairment results in a marked restriction in the individual's ability to perform any one of these activities as much as it does where the disability affects the individual's ability to perform the specific "activities of daily living" listed in paragraph 118.4(1)(c). For this reason, it seems reasonable to repeal paragraph 118.4(1)(d) altogether, to add "working", "housekeeping", and "social or recreational activities" to paragraph 118.4(1)(c), and to replace the word "means" in the opening words of paragraph 118.4(1)(c) with the word "includes" to make it clear that the statutory list of basic activities of daily living is not exhaustive but merely illustrative.

With respect to the concept of a "marked restriction" in an individual's ability to perform a basic activity of daily living, the stipulation in paragraph 118.4(1)(b) that this exists "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 an activity of daily living" seems overly restrictive. Although the purpose of the provision to recognize additional undocumented disability-related expenses suggests that a "marked restriction" should be determined only after taking into account "therapy and the use of appropriate devices and medication" the costs of which are properly recognized as itemized medical or disability-related expenses,[185] the other requirements seem certain to exclude persons incurring otherwise unrecognized disability-related costs. While these costs might be expected to be somewhat less for individuals who are neither wholly "unable" nor require "an inordinate amount of time" to perform a basic activity of daily living but are significantly restricted in their abilities to perform one or more activities of daily liv-

[184] Although the Tax Court decision in *Fillion*, *supra* note 138, recognized this activity in any event, it would be preferable to make this inclusion explicit in the statute.

[185] For this reason, the objection expressed by Shillington, *supra* note 86 at 25, that this requirement "seems contrary to the factor which we [the disability tax credit] are trying to measure; cost implications" appears to be misplaced. With respect to the concern expressed by the Council of Canadians with Disabilities, *supra* note 79 at 2, that appropriate devices or medication "may not actually be available to the person, or (with respect to the medication) may involve a significant risk to the person's health," these concerns seem adequately addressed by the use of the adjective "appropriate" to qualify the words "devices and medication".

ing, or for individuals whose ability to perform a basis activity of daily living is restricted not "all or substantially all of the time" but on a recurring but intermittent basis, they are no less real nor any less deserving of tax recognition. For this reason, paragraph 118.4(1)(b) might be amended to provide that an individual's ability to perform an activity of daily living is markedly restricted where, even with therapy and the use of appropriate devices and medication, the individual is blind or significantly restricted in his or her ability to perform an activity of daily living a substantial amount of the time.

c. Dollar Amount

Turning to the appropriate dollar amount, the rationale for a separate provision recognizing indirect and non-itemized costs associated with mental or physical disabilities suggests that it should be set at a level reflecting a reasonable estimate of the annual non-itemized costs generally associated with different kinds of disabilities. To the extent that these costs are likely to differ based on the severity of the disability, one approach might be to establish different dollar amounts for mild, moderate, and severe disabilities.[186] Instead of attempting to define different categories of disabilities, an alternative approach might vary the dollar amount based on the extent to which the individual's ability to perform a basic activity of daily living is restricted (*e.g.*, "noticeably", "substantially", or "extremely"), and/or the amount of time during which the individual is so restricted (*e.g.*, "some of the time", "a substantial amount of the time", or "all or substantially all of the time"). Under yet another approach, the dollar amount might differ according to the number of basic activities of daily living that the individual is markedly restricted in his or her ability to perform.[187]

In incorporating one of these differentiated approaches, such an amended provision would reduce the tendency of the current DTC to "undercompensate in many cases and overcompensate in others,"[188] and would also lessen the tax consequences of disputes at the margin, thereby reducing incentives for litigation. Once these amounts are established, of course, they should be fully indexed for any loss in real value through inflation.

d. Credit or Deduction

With respect to the manner in which these additional non-itemized costs should be recognized for tax purposes, the logic of the earlier analysis of the METC suggests

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[186] For a recommendation to this effect, see Shillington, *ibid.* at 35. Although these categories might be difficult to define, they are used in Statistics Canada's Health and Activity Limitation Survey ("HALS"). This survey was employed to estimate the size of the severely disabled population in a study of the disability tax credit by the Federal Department of Finance (see *Disability Tax Credit*, *supra* note 76 at 17-27).

[187] This alternative has been suggested by Cam Crawford of the Roeher Institute.

[188] Standing Committee, *supra* note 33 at 13.

that this should be in the form of a deduction in computing taxable income, as was the case prior to the conversion of the disability deduction to a non-refundable credit in 1988.[189] While deductions are often criticized on the basis that they are worth more to high-income taxpayers than they are to low-income taxpayers and worth nothing to taxpayers whose income is too low to pay any tax, the appropriate tax treatment of disabled individuals is a matter of horizontal equity, not vertical equity. In order to determine the taxable income of disabled individuals, it is appropriate to deduct all non-discretionary costs associated with their disabilities, both itemized and direct and non-itemized and indirect.

e. Social Policy

As for the question of refundability, the analysis in Part I of this paper suggests that this is properly viewed as a matter of social policy rather than tax policy more narrowly defined. To provide refundable credits for disability-related expenses, whether itemized or not, is to provide a form of social insurance for these expenses based on the rate of the credit, not to recognize non-discretionary disability-related expenses in computing an individual's taxable income. While it may be desirable to reimburse disabled persons or supporting individuals for some part or all of these disability-related expenses, this social insurance goal must be distinguished from the tax policy objective to levy an equitable income tax based on taxpayers' relative abilities to pay. Likewise, while it might be desirable to implement a guaranteed annual income for disabled individuals in the form of a refundable tax credit the value of which diminishes as the recipient's income increases, this social policy measure cannot fulfill the tax policy goals of a separate deduction for non-itemized disability-related expenses in computing taxable income. While all of these objectives might be pursued through the *ITA*, they and the specific provisions by which they are implemented should be clearly distinguished.

f. Administration

Having set out the structure of an amended provision recognizing non-itemized disability-related expenses, it is useful to make two final comments regarding the administration of this proposed provision. First, assuming as this proposal does that the provision would continue to require a qualifying medical practitioner to certify that "the individual's impairment is a severe and prolonged impairment the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted,"[190] the form by which this certification is made would have to be revised to reflect amended definitions for a "basic activity of daily living" and a

[189] See the discussion in the text accompanying notes 106-17.

[190] As alternatives to this method, neither centralized administration nor self-assessment seem particularly attractive, since the former is likely to be intrusive and costly while the latter is vulnerable to a large number of illegitimate claims. For an evaluation of the cost implications of a more centralized administration of the DTC, see *Disability Tax Credit*, *supra* note 76 at 37.

"marked restriction" on an individual's ability to perform a basic activity of daily living.[191] Second, where employed individuals have a severe and prolonged impairment the effects of which can reasonably be expected to last throughout the year, it should be possible to obtain an adjustment to income taxes withheld by the employer at source in order to account for the expected tax reduction resulting from the credit or deduction. A similar adjustment might also be available where the individual is able to establish a continuous pattern of disability-related expenses which can reasonably be expected to continue throughout the year.

C. Disability Expenses Tax Credit

1. Description

After examining the way in which the Canadian income tax deals with disabled individuals, at least two government reports have recommended the introduction of a disability expenses tax credit as a supplement or replacement to the existing medical expense and disability tax credits. According to the Standing Committee, this credit should be separate from the METC, based on a more general list of expenses than those available under the METC, available without any threshold, and refundable.[192] According to the 1996 Federal Task Force on Disability Issues, such a credit should be refundable at a rate of 17% in general but 29% for low-income taxpayers, and should "combine the best features" of the medical expenses and disability tax credits by comprising a "base amount" reflecting "an 'across-the-board' estimate of undocumented costs," and a supplementary amount "based on disability-related "out-of-pocket' expenditures" including "medically-necessary expenses and increases in employment-related expenses due to disability."[193]

2. Evaluation and Recommendations

Based on the earlier analysis of the METC, the recommendation for a separate disability expenses tax credit or deduction would appear to have considerable merit. Abandoning a narrowly medical model of disability, these proposals rightly emphasize the additional involuntary costs of disabilities as appropriate subjects for tax recognition. For this reason, such a provision might reasonably include a more general list of allowable expenses (such as a share of transportation costs made necessary by an individual's disability), the full amount of which should presumably be recognized for tax purposes without any annual threshold. Having settled on this basic characteristic of a disability expenses tax credit or deduction, additional issues concern the criteria by which an individual would be eligible to claim these amounts, the relationship

[191] For this reason, there is no need to address specific criticisms of the current form (T2201) by the Council of Canadians with Disabilities, *supra* note 79 at 3. See also text accompanying notes 163-64.

[192] *Supra* note 33 at 14.

[193] Federal Task Force on Disability Issues, *supra* note 1 at 97-99.

between this measure and a disability tax credit or deduction designed to recognize non-itemized expenses, the question of refundability, and the rate at which eligible expenses might be claimed.

a. Eligibility

In many cases, the eligibility criteria could be based on the provisions of the current METC. Full-time attendant care in a disabled individual's home, for example, could continue to be recognized under a new provision where

> the [individual] is, and has been certified by a medical practitioner to be, a person who, by reason of mental or physical infirmity, is and is likely to be for a long-continued period of indefinite duration dependent on others for the [individual's] personal needs and care and who, as a result thereof, requires a full-time attendant.[194]

Likewise, expenses for the full-time care of an individual in a nursing home might be recognized where the individual "has been certified by a medical practitioner to be a person who, by reason of lack of normal mental capacity, is and in the foreseeable future will continue to be dependent on others for … personal needs and care,"[195] while expenses "for the care, or the care and training" of a disabled individual "at a school, institution or other place" could be recognized where the individual

> 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 [individual].[196]

Since other METC provisions recognizing the costs of attendant or nursing home care, remuneration for the care or supervision of an individual in a group home, and remuneration for specific kinds of therapy depend on the patient's eligibility for the DTC,[197] recognition of these expenses under a separate disability expenses tax credit or deduction might also depend on the individual's eligibility for an amended disability tax credit or deduction as outlined earlier.[198]

In addition to the costs of attendant or nursing home care, other expenses currently included in the METC that might be recognized under a separate disability expenses tax credit or deduction include

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[194] See *ITA*, *supra* note 4, s. 118.2(2)(c)(i).
[195] *Ibid.*, s. 118.2(2)(d).
[196] *Ibid.*, s. 118.2(2)(e).
[197] See *ibid.*, ss. 118.2(2)(b), 118.2(2)(b.1); 1999 Federal Budget, *supra* note 65.
[198] See text accompanying notes 181-85.

- the cost to acquire and maintain an animal specifically trained to assist an individual who is blind or profoundly deaf or suffers from a severe and prolonged impairment that markedly restricts the use of his or her arms or legs;[199]
- reasonable expenses related to renovations or alterations to an individual's home, including the driveway, for individuals with severe and prolonged mobility impairments;[200]
- up to $2,000 in expenses for an individual with a severe and prolonged mobility impairment to move to a physically accessible dwelling;[201]
- reasonable expenses related to rehabilitative therapy to adjust for the individual's hearing or speech loss, including training in lip reading and sign language;[202]
- the cost of sign language services for an individual with a speech or hearing impairment;[203]
- reasonable expenses for training a caregiver who is related to the individual and is a member of the individual's household, if the training relates to the mental or physical infirmity of the individual;[204]
- remuneration for tutoring services provided to a person with a learning disability or a mental impairment who is certified by a medical practitioner to be a person who requires these services on account of the disability or impairment;[205] and
- the cost of various kinds of disability-related devices, including artificial limbs, kidney machines,[206] devices for incontinence,[207] a portion of the cost of a wheelchair-accessible van,[208] and other devices designed to assist individuals who are blind or suffer from diabetes, heart disease, or specified kinds of speaking, hearing, breathing, or mobility impairments.[209]

While the cost of other devices (*e.g.*, eyeglasses) as well as prescribed drugs or substances might be included only under a medical expenses tax credit or deduction,[210] these costs might also be recognized as disability-related expenses where the patient is

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[199] *ITA*, *supra* note 4, s. 118.2(2)(l).
[200] *Ibid.*, ss. 118.2(2)(l.2), 118.2(2)(l.6).
[201] *Ibid.*, s. 118.2(2)(l.5).
[202] *Ibid.*, s. 118.2(2)(l.3).
[203] *Ibid.*, s. 118.2(2)(l.4).
[204] *Ibid.*, s. 118.2(2)(l.8).
[205] See 1999 Federal Budget, *supra* note 65.
[206] *ITA*, *supra* note 4, s. 118.2(2)(i).
[207] *Ibid.*, s. 118.2(2)(i.1).
[208] *Ibid.*, s. 118.2(2)(l.7).
[209] *Ibid.*, ss. 118.2(2)(i), 118.2(2)(k), 118.2(2)(m); *Regulations*, *supra* note 11, s. 5700.
[210] *ITA*, *ibid.*, ss. 118.2(2)(j), 118.2(2)(u).

eligible for the disability tax credit or deduction, provided that the costs are not otherwise claimed for tax purposes. Other expenses, such as disability-related transportation expenses and those identified by the Council of Canadians with Disabilities,[211] would have to be specifically defined.

In addition to these specific items, moreover, a separate disability expenses tax credit or deduction might also include a more general criterion of eligibility for all reasonable amounts to the extent that they are paid for the purpose of ameliorating the effects of a severe and prolonged mental or physical impairment and/or enabling the disabled individual to perform one or more of the amended basic activities of daily living suggested earlier.[212] As with the addition of a more general criterion of eligibility for the METC,[213] such a general statement of principle would allow disabled individuals to obtain tax recognition for novel therapies or technologies without having to lobby Revenue Canada and the Department of Finance to expand the list of eligible expenses. Still, in order to illustrate the kinds of expenses included and confirm the inclusion of specific categories of expenses, the provision should retain a specific list of eligible disability-related expenses.

As a final matter, it seems reasonable to allow these disability-related expenses to be claimed not only by the disabled person or specified relatives, but also by any supporting individual who incurs the expenses. Although it might be argued that tax recognition for such expenses should be limited to amounts spent on behalf of disabled persons whom the taxpayer has a specific legal obligation to support on the basis that only these expenses are truly involuntary, the earlier analysis of the METC suggests a broader recognition of expenses reflecting moral as well as legal obligations.[214]

b. Relationship to Disability Tax Credit or Deduction

Considering the relationship between a credit or deduction for itemized disability expenses and a credit or deduction for non-itemized costs of disabilities, it is difficult to see much merit in the recommendation of the 1996 Federal Task Force on Disability Issues that these provisions be combined. Since recognition of itemized expenses depends on a variety of specific disability criteria,[215] it seems unnecessary and confusing to combine these criteria with those employed for general recognition of non-

[211] See the list of recommended items at text accompanying note 93.

[212] This formulation is based on a suggestion by Cam Crawford of the Roeher Institute.

[213] See the discussion at text accompanying notes 96-97.

[214] See the discussion at text accompanying notes 83-84.

[215] While some items depend on eligibility for the current disability tax credit (requiring that the individual has a severe and prolonged mental or physical impairment the effects of which are such that the individual's ability to perform an activity of daily living is markedly restricted), for example, others depend on the less onerous standards of "mental or physical infirmity" (ss. 118.2(2)(c), 118.2(2)(l.8)), "lack of normal mental capacity" (s. 118.2(2)(c)), "physical or mental handicap" (s. 118.2(2)(e)), "illness, injury or affliction" (s. 118.2(2)(i.1)), or lack of normal physical development (ss. 118.2(2)(l.2), 118.2(2)(l.5)).

itemized expenses. To the extent that a disability tax credit or deduction for non-itemized disability-related expenses is viewed as a supplement to the personal exemptions, moreover, it is more appropriate to recognize itemized and non-itemized disability-related costs through different statutory provisions.[216]

c. Refundability and Rates: Social Policy and Tax Policy

With respect to refundability and applicable rates, the analysis in Part I of this paper suggests that these issues are properly regarded as questions of broad social policy rather than tax policy more narrowly defined. Where a disability expenses tax credit is made refundable, for example, the credit functions as a social insurance program which reimburses a portion of otherwise privately borne disability-related expenses based on the rate of the credit. From this perspective, the 1996 Federal Task Force on Disability Issues recommendation to introduce a refundable disability expenses tax credit computed at 17% for high-income taxpayers and 29% for low-income beneficiaries amounts to a social policy proposal to reimburse 17% of otherwise privately borne disability-related expenses of high-income taxpayers and 29% of privately borne disability-related expenses of low-income taxpayers.

While social policy considerations might favour a larger and more direct federal role in the reimbursement of disability-related expenses than is currently the case through the Canada Health and Social Transfer, this purpose and the refundable tax credit through which it might be implemented should be distinguished from the more narrow tax policy goal of achieving horizontal equity among taxpayers with and without disability-related expenses. For the latter purpose, as this paper has argued earlier, a deduction in computing taxable income is the most appropriate policy response.

D. Personal Tax Credits

1. Description

In computing basic federal income tax payable, the *ITA* allows individuals to deduct non-refundable "personal credits" in addition to other non-refundable credits such as the medical expenses and disability tax credits. These credits (set out in subsection 118(1) of the *ITA*) include the infirm dependants credit, the caregiver credit, and the wholly dependent person credit. According to this provision, individuals may claim as a personal tax credit an amount equal to 17% of an aggregate amount depending on the individual's marital status, living arrangements, and support for dependent relatives.[217] Taking provincial income tax into account, the combined value of

[216] See notes 178-80 and accompanying text.

[217] See the descriptions of A and B in *ITA*, *supra* note 4, s. 118(1), and the definition of the words "appropriate percentage" in s. 248(1).

the credit for individuals with tax otherwise payable is roughly 25% of the aggregate amount determined.[218]

According to paragraph 118(1)B(c) of the *ITA*, the basic personal amount for a single individual is $7,231 for 2000, resulting in a basic personal credit of $1,245.[219] For individuals who are "married" within the extended meaning of the *ITA* and support a cohabiting spouse,[220] the basic amount is increased by up to $6,140, resulting in an additional credit of $1,044 for a combined credit of $2,289.[221] As an alternative to this "married status" credit, individuals who are either "unmarried" within the extended meaning of the *ITA*, or who neither lived with nor supported their spouse and were not supported by the spouse at any time in the year, may claim an equivalent "wholly dependent person" credit where they (alone or with one or more other persons) maintain a self-contained domestic establishment in which they support a person who is

> (A) except in the case of a child of the individual, resident in Canada,
>
> (B) wholly dependent for support on the individual, or the individual and the other person or persons, as the case may be,
>
> (C) related to the individual, and
>
> (D) except in the case of a parent or grandparent of the individual, either under 18 years of age or so dependent by reason of mental or physical infirmity.[222]

In addition to these amounts, other provisions allow individuals to claim additional amounts if they support infirm dependants over the age of 18 (infirm dependants credit),[223] or share accommodation with parents or grandparents over the age of 65 or specified relatives who are over the age of 18 and dependent on the individual

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[218] As before, this assumes a provincial tax rate equal to approximately 45% of basic federal tax. Actual provincial income tax rates are outlined at note 36.

[219] This amount was increased pursuant to the announcement in 2000 Federal Budget, *supra* note 35, restoring full indexing to selected income tax provisions.

[220] See *ITA*, *supra* note 4, s. 252(4), which defines spouses to include persons of the opposite sex who cohabit at the relevant time in a "conjugal relationship". Either they have so cohabited throughout a twelve-month period before that time or are parents of a child so that it defines marriage to include such "common law" relationships.

[221] *Ibid.*, s. 118(1)(a). Where the spouse's income exceeds $614, the additional amount on which this "married status" credit is calculated is reduced on a dollar-for-dollar basis, disappearing when the spouse's income reaches $6,754. As with the basic personal amount, these amounts were increased pursuant to the announcement in 2000 Federal Budget, *supra* note 35, restoring full indexing to selected income tax provisions.

[222] *ITA*, *ibid.*, s. 118(1)(b). Where the dependant's income exceeds $614, the additional amount on which this credit is calculated is reduced on a dollar-for-dollar basis, disappearing when the dependant's income reaches $6,754. As with the basic personal amount and the "married status" credit, these amounts were increased by the announcement in 2000 Federal Budget, *ibid.*, regarding indexation. For a brief discussion of this credit, see Sherman, *supra* note 35 at 133-34.

[223] *ITA*, *ibid.*, s. 118(1)(d). For a detailed discussion of this credit, see Sherman, *ibid.* at 127-32.

because of mental or physical infirmity (caregiver credit).[224] In these circumstances, the individual may claim an additional amount of up to $2,386 for each qualifying dependant or co-resident, resulting in an additional credit of $406.[225]

2. History

Although the caregiver credit was introduced in 1998,[226] most of these credits have much earlier origins and are traceable to personal exemptions found in the first version of the 1917 *Income War Tax Act*.[227] According to this statute, individuals who were either single or widowed and without dependent children were exempt from tax on the first $1,500 of income, while those who were married or had dependent children were exempt from tax on the first $3,000 of income.[228]

While the statutory language and dollar amounts of these exemptions have varied considerably over the last eighty years, throughout most of this period the Canadian income tax has contained a basic exemption for single individuals and additional amounts for individuals supporting spouses and related dependants.[229] In 1986, for example, the *ITA* allowed individuals to deduct the following amounts in computing their taxable income:

- $1,600 in the case of a single individual;[230]
- an additional amount of up to $1,400 in the case of married individuals supporting a spouse or unmarried persons supporting a wholly dependent related person;[231] and
- a further amount of up to $710 for each dependant under the age of 18, up to $550 for each infirm dependant aged 18 years or older, and up to $1,420 for each other dependant over the age of 18 years.[232]

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[224] *ITA*, *ibid.*, s. 118(1)(c.1). For the purpose of this credit, s. 118(1)B(c.1)(ii) specifies the qualifying relatives as (A) the individual's children or grandchildren, or (B) the individual's parents, grandparents, siblings, aunts, uncles, nieces and nephews, provided that they are resident in Canada.

[225] In the case of the infirm dependants credit, this amount is reduced on a dollar-for-dollar basis to the extent that the dependant's income exceeds $4,845, disappearing when the dependant's income reaches $7,231. In the case of the caregiver credit, this amount is reduced on a dollar-for-dollar basis to the extent that the qualifying co-resident's income exceeds $11,661.

[226] See "Tax Measures: Supplementary Information" in Stikeman Elliott, *Canadian Federal Budget 1998: Budgetary Proposals of the Hon. Minister of Finance with Comments by Stikeman Elliott* (Toronto: Carswell, 1998) [hereinafter 1998 Federal Budget] 3-1 at 3-25, proposing the introduction of "a new tax credit for caregivers" intended "[t]o provide additional tax assistance to Canadians providing in-home care for elderly or infirm relatives."

[227] S.C. 1917, c. 28.

[228] See *ibid.* at para. 4(1)(a).

[229] For a detailed history of these provisions up to the early 1960s, see McGregor, *supra* note 74.

[230] *ITA*, *supra* note 4, former s. 109(1)(c).

[231] *Ibid.*, former ss. 109(1)(a), 109(1)(b).

Like the medical expenses and disability deductions in former paragraphs 110(1)(c) and (e), these deductions were converted to non-refundable credits in 1988.[233] With the introduction of the child tax benefit in 1993,[234] the dependants credit was amended to apply only where the dependant is 18 years of age or older and is dependent by reason of mental or physical infirmity.[235] As a result, except for parents eligible for the child tax benefit and single parents eligible for the wholly dependent person credit, the Canadian income tax no longer recognizes basic costs of supporting dependent children in computing the tax payable by their parents. Nor does it recognize the basic costs of supporting a disabled child, except where these costs are incurred by a single parent (in which case the parent can claim the wholly dependent person credit) or in respect of an infirm dependant over the age of 18 (in which case the parent can claim the infirm dependants credit and the caregiver credit if the child lives with the parent).[236]

3. Evaluation and Recommendations

a. Purpose

In order to evaluate the personal credits and their potential reform, it is necessary to consider the purpose of these credits and the deductions that they replaced. Although personal exemptions contribute to the progressivity of the income tax and also simplify tax administration by excluding low-income individuals from the tax rolls,

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[232] *Ibid.*, former s. 109(1)(d). For the purpose of this paragraph, former s. 109(6) defined a "dependant" as a person who, during the year, was

> (a) dependent upon the individual for support;
>
> (b) in respect of the individual or his spouse,
>
> (i) his child or grandchild,
>
> (ii) his niece or nephew, if resident in Canada,
>
> (iii) his brother or sister, if resident in Canada, or
>
> (iv) his parent, grandparent, aunt or uncle, if resident in Canada; and
>
> (c) either
>
> (i) under 21 years of age, or
>
> (ii) 21 years of age or over and
>
> (A) dependent by reason of mental or physical infirmity, or
>
> (B) a person referred to in paragraph (b) (other than subparagraph (iv) thereof) in full-time attendance at a school or university.

[233] See the *1987 Amendments*, *supra* note 78, ss. 76, 92, repealing former s. 109 and enacting s. 118.

[234] This provision is examined later in Part II.*F*, below.

[235] See *An Act to amend the Income Tax Act, to enact the Children's Special Allowances Act, to amend certain other Acts in consequence thereof and to repeal the Family Allowances Act*, S.C. 1992, c. 48, s. 8(1), amending *ITA*, *supra* note 4, s. 118(1)(d), applicable to 1993 and subsequent years, being Sch. VII to the *1993 Amendments*, *supra* note 136 [hereinafter Sch. VII].

[236] This 2000 Federal Budget proposal to provide a DTC supplement for disabled children under 18 years of age may provide further recognition for these costs (see *supra* note 127).

the primary rationale for these exemptions is to adjust each individual's tax burden in accordance with his or her personal circumstances.[237] As a result, like credits or deductions for medical and disability-related expenses, these provisions are designed to recognize non-discretionary expenses incurred both to provide for one's own subsistence and to support dependants to whom one is legally or morally obliged.

b. Credit or Deduction

Given this purpose, it follows that this recognition should, like that for medical and disability-related expenses, take the form of a deduction in computing taxable income rather than a credit in computing tax payable. Although the conversion of the basic personal amount from a deduction to a credit is equivalent to a downward shift in the marginal rate brackets and does not affect the relative position among different taxpayers,[238] the conversion of other personal exemptions from deduction to credits undermines the horizontal equity of the income tax by failing to properly recognize non-discretionary expenses in determining each individual's ability to pay.

c. Amounts

Having determined the appropriate structure of a personal exemption, it remains to determine an appropriate amount necessary to provide for an individual's basic subsistence, and which (if any) expenses beyond this basic amount are properly regarded as non-discretionary costs in computing the individual's ability to pay. Moreover, to the extent that the individual supports a disabled person it is necessary to consider the extent to which any additional costs incurred by the supporting person on account of this person's disability should be recognized in computing the supporting individual's personal exemption.

Beginning with the amount necessary to provide for an individual's basic subsistence, this would appear to depend on a view regarding the minimum standard of living considered socially acceptable in contemporary circumstances.[239] Taking Statistics Canada's "low-income cut-offs" ("LICOs") as a possible standard, 1998 figures suggest that individuals living on their own require approximately \$12,000 to \$17,500 per year, depending on geographical location, to escape "straitened circumstances".[240] While these amounts may be higher than necessary for a basic personal exemption, since low-income individuals may be expected to reduce living costs by sharing ac-

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[237] See *e.g.* McGregor, *supra* note 74 at 9; Goode, *supra* note 26 at 214-21.

[238] See Cloutier & Fortin, *supra* note 28 at 57-58.

[239] Goode, *supra* note 26 at 215.

[240] Canadian Council on Social Development ("CCSD"), "Canadian Low-Income Cut-Offs" online: CCSD <http://www.ccsd.ca/factsheets/fs_lic98.htm> (last modified: 16 February 2000) [hereinafter "Low-Income Cut-Offs"].

commodation,[241] a basic amount in the range of $10,000 seems more appropriate than the current amount of $7,231.[242] Once established, of course, any such amount should be fully indexed for inflation on an annual basis.

With respect to the categories of persons in respect of whom an individual's support obligations might reasonably be regarded as non-discretionary, emphasis is generally placed on spouses and dependent children. Indeed, to the extent that family law regimes impose legal responsibilities on individuals to support spouses and dependent children, these expenses would appear to be clearly non-discretionary. Notwithstanding this analysis, however, critics have questioned the involuntary nature of each of these categories, characterizing the cost of supporting a stay-at-home spouse as the product of a personal choice by the spouse or couple for that spouse to leave the paid labour force,[243] and viewing the cost of supporting a dependent child as the product of a personal choice to have the child in the first place.[244]

While changing patterns of female participation in the paid labour force suggest that the costs of supporting an otherwise employable stay-at-home spouse might reasonably be regarded as voluntary,[245] it is difficult to view the decision to have children as discretionary in the same way.[246] Where an individual's spouse or child is disabled,

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[241] *Ibid.* For a two-person household, for example, the LICOs range from approximately $15,000 to $22,000, depending on geographic location, or $7,500 to $11,000 per person.

[242] This paper does not consider whether the exemption should vary based on geographical location.

[243] See *e.g.* N. Brooks, "The Irrelevance of Conjugal Relationships in Assessing Tax Liability" in J.G. Head & R. Krever, eds., *Tax Units and the Tax Rate Scale* (Melbourne: Australian Tax Research Foundation, 1996) 35 at 73, arguing that "as a matter of tax justice, there is no reason why someone who voluntarily undertakes to support a spouse at home should be considered to have a reduced ability to pay."

[244] See *e.g.* Simons, *supra* note 24 at 140, concluding that "it would be hard to maintain that the raising of children is not a form of consumption on the part of parents—whether one believes in the subsidizing of such consumption or not."

[245] To the extent that the stay-at-home spouse provides domestic services (*e.g.*, cleaning and meal preparation) the cost of which would not be recognized if paid to a third party by the "breadwinning" spouse, it is inappropriate to allow the breadwinner to claim a credit or deduction for what are in effect in-kind payments in exchange for these services. Where the stay-at-home spouse provides child care which enables the breadwinner to participate in the paid labour force, it seems reasonable to allow the breadwinner to deduct amounts (up to statutory limits) paid to the caregiving spouse. Although the current rule in the *ITA*, *supra* note 4, s. 63, disallows the deduction of child care expenses paid by one spouse to another, a reform along these lines would be consistent with the proposal made earlier in this paper to allow individuals to claim as eligible medical expenses under s. 118.2(2) attendant care expenses paid to a patient's spouse. This proposal is examined more thoroughly in the discussion of the child care expense deduction in Part II.*E*, below.

[246] In addition to any biological imperative that individuals might experience to have children, the decision to have children reflects a dominant norm in our society. Furthermore, to the extent that the taxpayer's religious convictions preclude the use of birth control, the birth of a child may not be the result of a voluntary choice—unless one is prepared to consider celibacy the norm or regard the parents' religious convictions as a personal choice in their own right. Moreover, to the extent that birth control is not foolproof, the decision to have a child may not be deliberate even for parents who use

moreover, the involuntary nature of support obligations seems indisputable. Likewise, where an individual supports a disabled or elderly person, the moral obligation underlying this support suggests that it should also be recognized for tax purposes.[247] Based on this analysis, therefore, it is recommended that the amounts included in the current personal credits be amended by restoring a separate amount for dependent children, and by replacing the married status amount, the wholly dependent person amount, the caregiver amount, and the adult infirm dependants amount with separate amounts for disabled adults and elderly persons who are dependent on one or more individuals for support.

A final set of issues concerns the appropriate dollar value of exemptions for dependent children and disabled adults and the extent to which the former should be increased in the case of disabled children. Research conducted in the United States suggests that basic subsistence costs of supporting a dependent child are in the range of U.S. $2,500-$4,000.[248] Studies also suggest that these subsistence costs are greater for older children than for younger children, but decrease as the number of children increases as families benefit from economies of scale.[249] Assuming that basic subsistence costs in Canada are roughly comparable to those in the United States, but ignoring exchange rate differentials, these studies suggest that exemptions for dependent children should be in the range of $2,500 to $4,000, should increase as the child's age increases, and should be greater for the first child than for the second child and greater for the second child than for the third and subsequent children.[250]

Although a precisely calibrated dependants exemption might track these estimated subsistence costs perfectly, any practical income tax reform must take into account the additional complexity associated with any differentiation between the exemption that may be claimed for different categories of children. In particular, since parents with taxable incomes are likely to claim deductions for dependent children throughout the period during which they are responsible for their support, it may be reasonable to ignore differences in the child's age in setting the amount of the deduction. Given economies of scale, however, it makes sense to reduce the size of the exemption for a second child and for subsequent children living in the same residence. Bearing in mind the research suggesting that the subsistence cost per child decreases by 25% when a second child is added to a family and by a further 20% when a third

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birth control—unless one accepts the view that the decision not to have an abortion converts an otherwise unplanned pregnancy into a deliberate choice. Finally, even if the initial decision to have a child is voluntary and deliberate, the existence of the child creates a continuing legal obligation for the parents to provide for the support the child—an obligation that cannot easily be disowned.

[247] See the discussion at text accompanying notes 83-84, 181, 214.

[248] A.J. Samansky, "Tax Policy and the Obligation to Support Children" (1996) 57 Ohio State L.J. 329 at 366-68.

[249] *Ibid*. at 368.

[250] These figures are not significantly different from those suggested by Statistics Canada's LICOs, which indicate increased living expenses of approximately $3,500 to $5,500 for a third and fourth member of a household, and roughly $3,000 to $4,000 for a fifth and sixth member (see "Low-Income Cut-Offs", *supra* note 240).

child is added,[251] it might thus be reasonable to permit a deduction of $4,000 for the first child, $3,000 for a second child, and $2,400 for each additional child. Like other dollar amounts in the *ITA*, these figures should be indexed for annual increases in inflation.

In the case of disabled children, supporting individuals are likely to incur various non-discretionary costs in addition to those that are necessary for the child's basic subsistence. Since supporting individuals can claim many of these expenses under the medical expenses or disability tax credits, however, it might be argued that a disability-related supplement to an exemption for dependent children is unnecessary. Nonetheless, since these additional costs also take the form of foregone income-earning opportunities for supporting individuals,[252] it is arguable that these undocumented costs should be recognized in part through such a supplement.[253] To the extent that personal exemptions are designed to address actual out-of-pocket expenses, on the other hand, recognition of these opportunity costs might be considered inappropriate.[254]

As for disabled adults and elderly persons who are dependent upon an individual for support, it is difficult to see why the additional exemption available to a supporting individual should be anything less than the basic personal amount, subject to a reduction based on the dependant's income. While a lower amount might be supported on the basis that two individuals can live more cheaply together than they can apart,[255] these economies of scale may not exist in the case of disabled or elderly dependants. Furthermore, since the basic personal amount is insufficient to enable individuals to live at an adequate standard of living on their own,[256] it seems unreasonable to assume such independent living in determining the additional exemption available for individuals supporting a disabled adult or elderly person. Moreover, to the extent that an individual with a disabled or elderly dependant incurs additional undocumented costs in the form of foregone income-earning opportunities, it seems that these additional costs should be recognized through an additional amount that is higher than the basic personal amount. On the other hand, it is arguable that these opportunity costs are not

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[251] Samansky, *supra* note 248 at 368.

[252] According to a recent survey of parents of disabled children, 39% worked reduced hours, 46% altered their work schedules, 68% turned down overtime, 27% passed up promotions, and 64% of two-parent families with one parent unemployed reported their children's special needs as the major factor in losing the job (see Canadian Association for Community Living, *Preliminary Proposal to Create an Enhanced National Child Benefit Supplement (NCBS) for Families who have Children with a Disability* (Winnipeg: Canadian Association for Community Living, 1998) at 2-3).

[253] For this argument, I am indebted to Connie Laurin-Bowie of the Canadian Association for Community Living. The 2000 Federal Budget introduces a supplement of this nature in the form of an additional amount for disabled children in computing the DTC (see *supra* note 127).

[254] As a general rule, the income tax takes into account only actual income and expenses, not imputed income and opportunity costs.

[255] This explains why the additional amounts for the current married status and wholly dependent person credits ($5,718) are less than the basic personal amount ($6,794).

[256] See text accompanying notes 239-42.

properly taken into account through personal exemptions or in the income tax more generally.[257]

E. Child Care Expense Deduction

1. Description

Although the Canadian income tax does not generally recognize non-discretionary costs of supporting dependent children in computing the tax payable by their parents, it does recognize basic costs of caring for dependent children to enable parents to participate in the paid labour force through the child care expense deduction ("CCED"). Under subsection 63(1) of the *ITA*, "supporting persons" who incur qualifying "child care expenses" in respect of an "eligible child" may deduct these expenses up to a maximum amount equal to the lesser of two-thirds of the taxpayer's "earned income" for the year, or the sum of $7,000 for each eligible child who is under 7 years of age at the end of the year or qualifies for the disability tax credit and $4,000 for each other eligible child, provided that the expenses are proven by filing receipts containing the recipient's Social Insurance Number. In general, however, the deduction must be claimed by the supporting person with the lower income.[258]

For the purpose of this provision, subsection 63(3) defines an "eligible child" as a child of the taxpayer or the taxpayer's spouse or a dependent child whose income does not exceed $7,294, if at any time in the year the child is under 16 years of age or dependent on the taxpayer or the taxpayer's spouse and has a mental or physical infirmity. A "supporting person" is defined as a parent of the child, the taxpayer's spouse, or an individual who claims a personal tax credit for the year in respect of the child, provided that the person resided with the child at any time during the year and at any time within 60 days after the end of the year. A taxpayer's "earned income" is defined as the sum of the taxpayer's employment and business income, scholarships and research grants, and disability payments under the CPP or QPP. Lastly, qualifying "child care expenses" are defined as expenses for "child care services including baby

[257] See *supra* note 253 and accompanying text.

[258] See *ITA*, *supra* note 4, s. 63(2), which creates an exception to this general rule for "the number of weeks in the year during which the child care expenses were incurred and throughout which the supporting person was" a qualifying student as defined in ss. 63(2)(b)C(i)(A), s. 63(2)(b)C(ii), disabled according to s. 63(2)(b)C(i)(B), confined to a prison or similar institution as set out in s. 63(2)(b)C(i)(C), or living separate and apart because of marriage breakdown at the end of the year and for a period of at least 90 days beginning in the year (s. 63(2)(b)C(i)(D)). For a year in which a supporting person does not qualify under any of these provisions, the effect of s. 63(2) is to disallow any deduction for child care expenses incurred by a taxpayer whose income for the year exceeds the income of the supporting person. In these circumstances, the supporting person may deduct the child care expenses under s. 63(1) in computing his or her own income. The 2000 Federal Budget proposes to increase the dollar ceiling on deductible child care expenses for each child eligible for the DTC from $7,000 to $10,000 (see "Budget Papers 2000", *supra* note 56 at 2-10).

sitting services, day nursery services or services provided at a boarding school or camp," if the services were (i) provided to enable the taxpayer or supporting person to participate in the paid labour force or attend a qualifying educational institution, and (ii) provided by a person other than the child's father or mother, another supporting person, a person related to the taxpayer who is under 18 years of age, or a person in respect of whom the taxpayer or another supporting person claimed a personal tax credit.[259]

In general, therefore, the CCED is available to single parents and lower income-earning parents who obtain child care from third party providers to enable them to work or attend school. While the deduction is generally available only for children under the age of 16, it may be claimed for any dependent child with a mental or physical infirmity regardless of age, up to $10,000 per year for each child eligible for the DTC, $7,000 for each child under the age of 7 at the end of the year, and $4,000 for other eligible children.

2. History

Unlike the personal tax credits, the origins of which may be traced back to the earliest version of the Canadian income tax, the CCED was introduced in 1972, when the *ITA* was amended to allow a woman, and in limited circumstances a man, to deduct child care expenses up to $500 per child up to a maximum of $2,000 per family each year, subject to various limitations. In 1976, the maximum deductible amounts were increased to $1,000 per child per year and $4,000 per family per year.[260] In 1983, these amounts were increased yet again to $2,000 per child per year and $8,000 per family per year,[261] the deduction was limited to children under 14 years of age or over 13 years of age and dependent on the taxpayer by reason of mental or physical infirmity,[262] and the provision was amended to eliminate gender distinctions that had been found to be discriminatory by the Canadian Human Rights Tribunal.[263]

In 1988, the maximum deduction for children under 7 years of age or eligible for the DTC was increased from $2,000 to $4,000, and the maximum amount per family

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[259] See *ITA*, *ibid.*, ss. 63(3), 63(3)(a), 63(3)(b), the definition of "child care expense". See also ss. 63(3)(c), 63(3)(d), which specifically exclude payments for a child's attendance at a boarding school or camp to the extent that they exceed a weekly maximum, eligible medical expenses described in s. 118.2(2), and "any other expenses that are paid for medical or hospital care, clothing, transportation or education or for board and lodging, except as otherwise expressly provided in this definition."

[260] *An Act to amend the statute law relating to income tax,* S.C. 1976-77, c. 4, s. 21(1), applicable to 1976 and subsequent years.

[261] *An Act to amend the statute law relating to income tax and to make related amendments to the Canada Pension Plan and the Unemployment Insurance Act, 1971*, S.C. 1984, c. 1, s. 25(1), applicable to 1983 and subsequent years.

[262] *Ibid.*, s. 25(6), applicable to 1983 and subsequent years.

[263] *Bailey* v. *M.N.R.* (1980), 1 C.H.R.R. 193 (C.H.R.T.).

was repealed.[264] In 1993, the maximum deduction per child was increased from $4,000 to $5,000 for children under 7 years of age or eligible for the DTC, and from $2,000 to $3,000 for other eligible children.[265] In 1996, the deduction was extended to apply to children under 16 years of age,[266] and was made available for the purpose of attending a secondary school or designated educational institution.[267] In 1998, the maximum deduction was increased yet again from $5,000 to $7,000 for children under 7 years of age or eligible for the DTC, and from $3,000 to $4,000 for other eligible children.[268] Other than these amendments, and the 2000 Federal Budget proposal to increase the deductible amount for children eligible for the DTC to $10,000,[269] the basic structure of section 63 has remained the same since 1983.

3. Evaluation and Recommendations

a. Purpose

While the CCED is often criticized on the grounds that it is worth more to high-income taxpayers than low-income taxpayers and worth nothing to parents whose income is too low to pay any tax,[270] this objection ignores the argument that necessary costs of child care services that enable a parent to engage in various kinds of income-earning pursuits (*e.g.*, employment, business, research, or training) are properly deductible in computing the parent's net income as a cost of earning that income.[271] Indeed, a deduction like that in section 63 of the *ITA*, which is capped at a stipulated dollar amount per child, is ideally structured to recognize essential child care expenses as a cost of earning income without recognizing additional expenses for goods and services of a more discretionary character.

With this purpose in mind, the current CCED may be subject to three specific objections: the first concerning the dollar ceilings, the second regarding the further limit on allowable deductions based on two-thirds of the claimant's earned income, and the third concerning the requirements that the expenses must be claimed by the lower income-earning parent and must be for services provided by a third party pro-

[264] *1987 Amendments*, *supra* note 78, ss. 39(1), 39(2), applicable to 1988 and subsequent years.

[265] *An Act to amend the Income Tax Act, the Canada Pension Plan, the Income Tax Conventions Interpretation Act, the Tax Rebate Discounting Act, the Unemployment Insurance Act and certain related Acts*, S.C. 1993, c. 24, ss. 23(2), 23(3), applicable to 1993 and subsequent years, being Sch. VIII to the *1993 Amendments*, *supra* note 136 [hereinafter Sch. VIII].

[266] *Income Tax Budget Amendments Act, 1996*, S.C. 1997, c. 25, s. 12(5), applicable to 1996 and subsequent years [hereinafter *1996 Amendments*].

[267] See *ITA*, *supra* note 4, s. 63(3)(a)(v), added by *1996 Amendments*, *ibid.*, s. 12(4), applicable to 1996 and subsequent taxation years.

[268] *1998 Amendments*, *supra* note 176, ss. 18(1), 18(2), applicable to 1998 and subsequent years.

[269] See *supra* note 258.

[270] See *e.g.* Ontario Fair Tax Commission, *Working Group Report: Women and Taxation* (Toronto: Fair Tax Commission, 1992); C. Young, "Child Care: A Taxing Issue?" (1994) 39 McGill L.J. 539.

[271] See *e.g.* Goode, *supra* note 26 at 155-56.

vider. For families with disabled persons, a further issue concerns the ability to deduct the cost of caring for a disabled child, but not the cost of caring for a disabled adult to enable the supporting individual to engage in income-earning pursuits.

b. Dollar Ceilings

The purpose of the deduction suggests that dollar ceilings should be set at an amount necessary to obtain a socially acceptable standard of child care. Although evidence suggests that the deduction for school-aged children is roughly comparable to actual child care costs, the deduction for pre-schoolers appears to be substantially lower than actual costs.[272] With respect to disabled children, moreover, it is likely that the current ceilings of $7,000 or $4,000 for dependent children with a mental or physical infirmity (depending on their age) are inadequate.[273] While parents may also claim attendant care expenses in respect of a disabled child under the METC,[274] tax recognition for these expenses is subject to a more restrictive set of eligibility criteria and takes the form of a 17% credit in computing basic federal tax payable rather than a deduction. As a result, to the extent that the cost of caring for disabled children exceeds average child care expenses for other children, it seems desirable to increase the maximum amount that may be deducted for mentally or physically infirm children under section 63 in addition to the increases in allowable amounts for children eligible for the DTC. Like other dollar amounts in the *ITA*, these amounts should be indexed for annual increases in inflation.[275]

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[272] See Ontario Fair Tax Commission, *supra* note 270 at 32, reporting that infant care costs about $13,000 per year while school-aged care costs about $4,200 per year.

[273] The proposal in 2000 Federal Budget, *supra* note 35, to increase the allowable deduction to $10,000 for each child eligible for the DTC is, however, a welcome improvement.

[274] *ITA*, *supra* note 4, s. 118.2(2)(b) (remuneration for full-time attendant to care for patient eligible for the disability tax credit); s. 118.2(2)(c) (remuneration for full-time attendant in patient's home to care for patient "certified ... to be a person who, by reason of mental or physical infirmity, is and is likely to be for a long-continued period of indefinite duration dependent on others for the patient's personal needs and care and who, as a result thereof, requires a full-time attendant"); s. 118.2(2)(b.1) (remuneration up to $10,000 or $20,000 if the individual dies in the year for attendant to care for patient eligible for the disability tax credit). While attendant care expenses cannot be claimed under s. 118.2(2)(b.1) if an amount in respect of the patient has been claimed as a child care expense under s. 63, attendant care expenses may be claimed under either ss. 118.2(2)(b) or 118.2(2)(c) even if child care expenses in respect of the patient are claimed under s. 63. However, according to s. 63(3)(d), expenses that are described in s. 118.2(2) are not child care expenses. As a result, provided that child care expenses are distinguished from attendant care expenses, it appears as though parents could deduct the former under s. 63 up to the dollar limits, and claim the full-time attendant care expenses as eligible medical expenses under s. 118.2.

[275] The 2000 Federal Budget, *supra* note 35, does not appear to include these amounts among those subject to full indexation.

c. Income-Related Limit

As for the income-related limit on allowable deductions, one might question the need for any further restriction on allowable deductions given the dollar ceilings otherwise applicable. Where otherwise permissible child care expenses exceed the income which child care services enable a taxpayer to earn, however, it is arguable that the excess expenses are not incurred for the purpose of earning income and are economically inefficient. For these reasons, a rule prohibiting taxpayers from deducting otherwise allowable child care expenses exceeding their earned income for the year makes more sense than a rule limiting the deduction of these expenses to two-thirds of this earned income.

d. Claimants and Providers

Turning to the requirements that child care expenses must be claimed by the lower income-earning parent and must be for services provided by a third party provider, it appears as though these rules reflect a traditional view according to which child care is properly the responsibility of a stay-at-home parent and should be recognized for tax purposes only where this parent incurs expenses to engage in income-earning activities. To the extent that child care is viewed as a joint responsibility of both parents, however, which may be accomplished through payments to a third party or by a division of labour in which one parent works in the paid labour force while the other becomes the primary caregiver, it is arguable that the income tax should recognize alternative child care arrangements by permitting supporting persons to allocate the deduction between them as they see fit, and allowing a parent participating in the paid labour force to deduct amounts paid to a caregiving parent up to the maximum amount permitted by the dollar ceilings. In addition to recognizing the economic partnership underlying this division of labour, this reform could enhance gender equality by encouraging transfers of income from higher income-earning breadwinners (who tend to be male) to lower income-earning caregivers (who tend to be female),[276] and enable stay-at-home spouses who care for dependent children to accumulate independent Registered Retirement Savings Plan ("RRSP") contribution room and qualify more easily for CPP/QPP benefits and employment insurance. It is also consistent

[276] While these payments to the caregiving parent would be subject to income tax, employment insurance premiums, and CPP/QPP contributions, the combined taxes on these amounts would generally be less than the tax saving to the income-earning parent from the availability of the deduction—both because the caregiving parent is apt to be subject to tax at a lower marginal rate than the breadwinning parent and because the single status tax credit available to a caregiving parent with independent income exceeds the additional amount of the "married status" credit otherwise available to the breadwinning spouse. Moreover, to the extent that the "married status" credit is repealed (as recommended earlier in this paper), the tax advantage to this limited form of income-splitting would be even greater.

with the earlier recommendation to recognize as eligible medical expenses amounts paid to an individual's spouse for qualifying attendant care.[277]

e. Other Dependants

Considering families with disabled persons, finally, it appears inequitable to allow taxpayers to deduct the cost of caring for a disabled child, but not the costs of caring for a disabled adult to enable a supporting individual to engage in income-earning pursuits. Although attendant care expenses may be claimed as eligible medical expenses under section 118.2 of the *ITA*, this is the case only where the disabled person qualifies for the disability tax credit or requires a full-time attendant by reason of mental or physical infirmity.[278] As well, tax recognition through this provision takes the form of a 17% credit in computing basic federal tax payable rather than a deduction. For these reasons, it seems reasonable to allow supporting individuals to deduct the cost of caring for disabled adults to enable them to engage in income-earning pursuits. Although such a deduction might be introduced through amendments either to the child care expense deduction in section 63 or to the attendant care expense deduction in section 64,[279] the objectives of this deduction might be achieved more directly through a separate provision. To the extent that attendant care expenses are claimed under one of these deductions, however, the expense should not be recognized as an eligible medical or disability-related expense for the purposes of separate medical or disability expense deductions or credits.

F. Child Tax Benefit

1. Description

The Canada Child Tax Benefit ("CCTB") provides financial support to low-income families with dependent children in the form of a refundable tax credit worth an annual amount of up to slightly more than $2,000 per child. According to subsection 122.61(1) of the *ITA*, the annual amount of the benefit includes a basic amount comprising $1,034 per child, an additional $76 for each child in excess of two, and $216 for each child under age 7 less 25% of child care expenses deducted under section 63 of the *ITA*; there is also a supplementary amount of $966 for the first child, $763 for the second child, and $687 for each additional child. The basic amount is reduced to the extent that the aggregate parental income of cohabiting spouses exceeds

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[277] See the earlier discussion in the text accompanying notes 85-88.
[278] *ITA*, *supra* note 4, ss. 118.2(2)(b), 118.2(2)(b.1), 118.2(2)(c).
[279] This provision is examined in Part III.*A*, below.

$30,004, while the supplementary amounts are reduced to the extent that this aggregate income exceeds $21,214.[280]

2. History

The CCTB was introduced in 1993, at which time the federal government repealed the non-refundable credit for dependent children,[281] a refundable child credit enacted in 1978,[282] the *Family Allowances Act*[283] and a clawback on family allowances introduced in 1989.[284] While the introduction of this refundable credit increased the role of the federal government in providing income support to low-income families with dependent children, it also marked the end of universal family benefits and general tax recognition of the costs of supporting dependent children.

3. Evaluation and Recommendations

Although the purposes of this paper make it unnecessary to consider arguments for or against universal family benefits, it has already recommended the restoration of a separate credit or deduction for dependent children, arguing that a deduction of $4,000 for the first child, $3,000 for a second child, and $2,400 for each additional child would recognize the non-discretionary costs of supporting dependent children.[285] While such a deduction would be worth more to high-income taxpayers than low-income taxpayers and worth nothing to taxpayers whose income is too low to pay any tax, the purpose of the deduction is to achieve horizontal equity among taxpayers with different incomes but similar ability to pay. This tax policy objective, more narrowly defined, must be distinguished from broader social policy objectives underlying the payment of universal family benefits or income-tested benefits to low- and modest-income families with dependent children.

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[280] These amounts are effective July 1, 2000, pursuant to the announcement of full indexing in the 2000 Federal Budget. The Budget proposes to increase maximum benefits to $2,400 by the year 2004 (see “Supplementary Information 2000”, *supra* note 35 at 3-16 – 3-20).

[281] *ITA*, *supra* note 4, s. 118(1)B(d), as it read prior to 1993.

[282] See *ibid.*, former s. 122.2, repealed by Sch. VII, *supra* note 235, s. 10(2), applicable to 1993 and subsequent years.

[283] R.S.C. 1985, c. F-1, rep. 1993.

[284] See Canada, Department of National Health and Welfare, *The Child Benefit: A White Paper on Canada’s New Integrated Child Tax Benefit* (Ottawa: Department of National Health and Welfare, 1992). For explanations of the evolution and structure of the child tax benefit, see J.R. Kesselman, “The Child Tax Benefit: Simple, Fair, Responsive?” (1993) 19 Can. Pub. Pol. 109; K. Battle & M. Mendelson, *Child Benefit Reform in Canada: An Evaluative Framework and Future Directions* (Ottawa: Caledon Institute of Social Policy, 1997); F. Stairs, “The Canada Child Tax Benefit: Income Support and the Tax System” (1999) 14 J. L. & Soc. Pol’y 123; K. Battle, “Child Benefit Reform: A Case Study in Tax/Transfer Integration” (Canadian Tax Foundation Tax Policy Conference, 9-10 May 1999).

[285] See text accompanying notes 248-51.

As for the CCTB itself, the broad social policy objectives underlying its design caution against any general conclusions in a paper devoted primarily to disability issues and tax policy more narrowly understood. Nonetheless, from this perspective, one might venture the following two comments about the CCTB.

First, as the earlier description of subsection 122.61(1) illustrates, the structure of the CCTB is extremely complex, including two different phase-out provisions and various dollar amounts, the purposes of which are neither clear nor mutually consistent. For example, while the basic amount appears to reward families with more than two children by providing an additional $76 per child in excess of two, the supplementary payments appear to recognize economies of scale by providing a lower amount for the second child than the first and still lower amounts for children in excess of two. While the various elements of the credit appear to reflect the different programs and tax provisions that the CCTB replaced, it should be possible to rationalize the formula to reduce its complexity.

Second, to the extent that the costs of supporting and caring for disabled children exceed those for other children, it seems appropriate to provide a supplement to the CCTB for children with mental or physical disabilities.[286] While eligibility for this supplement might be based on eligibility for an amended disability tax credit or deduction, the broader category of mental or physical infirmity might be more appropriate to the extent that the CCTB is designed to compensate for various costs (*e.g.*, child or attendant care or tutoring services for dependent children with a mental or physical infirmity) for which higher-income taxpayers with disabled children might obtain a deduction or credit. In order to ensure that any additional federal benefits are not diminished by offsetting reductions in social assistance, finally, implementation of such a supplement would require agreement with provincial governments.

G. Private Savings

1. Description

In addition to the other provisions examined in this part, the Canadian income tax encourages private savings to support disabled persons through special trust tax provisions, and recognizes specific financial needs of dependent children by allowing tax-deferred savings to be transferred to dependent children and grandchildren on a taxpayer's death without immediate tax liability. Each of these measures suggests a broader examination of the role that tax provisions can play in the encouragement of private savings to support disabled persons.

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[286] For a specific proposal to this effect, see generally Canadian Association for Community Living, *supra* note 252.

Although *inter vivos* trusts are generally taxable at the top marginal rate of 29% without any allowance for personal credits available to beneficiaries of the trust,[287] subsections 104(12) and (14) of the *ITA* allow income retained by an *inter vivos* trust to be taxed as if it were received by a "preferred beneficiary" and not the trustee, where the trustee and the preferred beneficiary file an election to this effect. For this purpose, subsection 108(1) defines a "preferred beneficiary" as an individual who is

(a) either eligible for the disability tax credit or at least 18 years of age, dependent on another individual because of mental or physical infirmity, and with an income (without taking the election into account) no greater than $6,456; and

(b) the settlor of the trust, the spouse or former spouse of the settlor, or a child, grandchild, or great grandchild of the settlor of the trust or the settler's spouse.

Where the preferred beneficiary election is filed, the designated income is taxed under the rate schedule applicable to individuals, with allowance for personal tax credits otherwise available to the specific beneficiary.

Other rules allow RRSPs and Registered Retirement Income Funds ("RRIFs") to be distributed to a financially dependent child or grandchild on a taxpayer's death without any immediate tax liability; this is done by treating the distribution as a "refund of premiums" to the child or grandchild who may deduct amounts contributed to an RRSP or used to acquire an annuity, thereby offsetting tax otherwise payable on the initial distribution.[288] For this purpose, the *ITA* stipulates that "it is assumed, unless the contrary is established, that a dependant was not financially dependent" on the deceased if the dependant's income for the year preceding the deceased's death exceeded $7,294.[289] While the deduction under paragraph 60(l) is generally available only for children or grandchildren under 18 years of age, this restriction does not apply where the child or grandchild was dependent on the deceased "by reason of mental or physical infirmity". In this respect, this measure, like the preferred beneficiary election, encourages private savings to support disabled relatives.

2. Evaluation and Recommendations

Although these provisions provide valuable tax relief under specific circumstances, they may be criticized in several ways. With respect to the preferred beneficiary election, one might wonder why tax relief is limited to trusts established only for the benefit of the settlor, the settlor's spouse, or a child, grandchild or great grandchild

[287] *ITA*, *supra* note 4, ss. 122(1), 122(1.1).

[288] See *ibid.*, ss. 146(8.9), 146.3(6.2), and the definition of "refund of premiums" in s. 146(1), which exclude amounts paid to financially dependent children or grandchildren from inclusion in the income of deceased if the deceased has no spouse at the time of death, and s. 60(1), which allows the child or grandchild to deduct amounts so received which are contributed to an RRSP or used to acquire an annuity.

[289] See *ibid.*, s. 146(1)(b).

of the settlor or the settlor's spouse. To the extent that the measure is designed to encourage private savings to support disabled persons, it is arguable that the categories of preferred beneficiaries in subsection 108(1) of the *ITA* should be expanded to include other relatives such as parents and grandparents, aunts and uncles, and nieces and nephews, or any disabled person regardless of his or her relationship with the settlor.

Similarly, where a taxpayer dies, it is unclear why the "rollover" on tax-deferred savings should be limited to transfers to a financially dependent child or grandchild, as opposed to any person who at the time of the deceased's death was financially dependent on the deceased and either under the age of 18 or dependent by reason of mental or physical infirmity. Nor is it clear that a disabled individual should be presumed to be financially independent where his or her income exceeds $7,294. As well, by requiring a disabled recipient to include the "refund of premiums" in income and claim an offsetting deduction for the acquisition of an annuity or contributions to an RRSP, the current rules necessitate a complicated process that may be especially difficult for severely disabled individuals and may affect the recipient's eligibility for social assistance.[290] Instead, on the death of an individual holding RRSPs or RRIFs, these amounts should be directly transferable to a tax-exempt trust governed by a registered savings plan in the name of a disabled beneficiary. While payments from such a plan should be taxable to the beneficiary, the existence of the plan should not affect the beneficiary's entitlement to social assistance.[291]

With this recommendation in mind, one might imagine a more comprehensive approach to disability-related savings, such as the introduction of registered disability savings plans ("RDSPs") designed to encourage private savings to support individuals with a mental or physical infirmity.[292] Ideally, such plans would operate much like an RRSP, with contributions deductible up to a maximum amount,[293] investment income exempt from tax, and withdrawals taxable to the disabled beneficiary. Alternatively,

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[290] *The Tax System*, *supra* note 79 at 27.

[291] While this result can be achieved if the trust is a discretionary trust, since the beneficiary has no legal entitlement to any of the funds, it would be preferable to amend social assistance legislation to create incentives for private disability-related savings by exempting specific disability savings plans from clawbacks based on liquid assets.

[292] For a similar idea on which this proposal builds, see the recommendation for a registered disadvantaged residential savings plan ("RDRSP") in *The Tax System*, *supra* note 79 at 25-27. While the RDRSP could be used only for the purpose of acquiring a residential unit, furniture, and appliances for a disabled person, payments from an RDSP could be used for any purpose selected by the disabled person or a legal guardian. On the other hand, while the RDRSP proposal imagined that withdrawals used solely for the purpose of acquiring a residential unit would not be taxable, the RDSP contemplated here assumes that withdrawals would be taxable to the beneficiary.

[293] This maximum amount could be independent of existing limits on deferred savings plans or coordinated with these limits, so that individuals could contribute to an RDSP instead of, but not in addition to, allowable contributions to RRSPs, Registered Savings Plans, and Deferred Profit Sharing Plans. Given the separate purpose of the RDSP, a separate contribution limit would seem more appropriate.

such plans could be structured along the lines of the current Registered Education Savings Plans ("RESPs"), with investment income tax-exempt and withdrawals taxable to the beneficiary, but with no deduction for contributions.[294] If the RESP approach is selected, however, the federal government might provide additional assistance in the form of direct contributions to the plan such as the Canada Education Savings Grants, which are designed to encourage contributions to RESPs.[295] In either event, the effect of RDSPs on social assistance benefits would have to be carefully considered to prevent any reduction in these benefits from discouraging private savings in this form.

III. Labour Market Integration

Beyond recognizing the costs of disabilities, recent studies have emphasized the importance of measures designed to enhance the ability of disabled persons to participate in the paid labour force.[296] One such study estimates the participation rate of working age individuals with disabilities in the paid labour force at 71% for persons with mild disabilities, 45% for persons with moderate disabilities, and 26% for persons with severe disabilities,[297] while another estimates the economic benefits of including these people in the workforce at approximately $4.6 billion.[298] Additional studies emphasize the importance of paid work both as a source of income and for the sense of dignity, accomplishment, and belonging that it provides.[299]

Although integration of disabled persons into the labour market has measurable benefits both to disabled persons themselves and to society as a whole, participation by disabled persons in the paid labour force may also involve additional costs in excess of those incurred by other participants in the paid labour market. If a person is blind or mobility-impaired, for example, participation in the paid labour market may necessitate additional costs necessary for transportation to and from work. Disabled persons may also require attendant care, either to provide various household services in order to participate in the paid labour force or to assist in the performance of work responsibilities. Yet other costs involve the loss of subsidies for various disability-related supports (services, drugs, and technical devices) otherwise available under provincial social assistance plans as individuals obtain additional income from em-

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[294] See *ITA*, *supra* note 4, s. 146.1, which allows individuals to contribute an aggregate of $4,000 per year for each beneficiary.

[295] As announced in the 1998 Federal Budget, these grants are equal to 20% of the amount contributed for each beneficiary in a year, up to a maximum amount of $7,200 over 18 years (see 1998 Federal Budget, *supra* note 226).

[296] See *e.g.* Standing Committee, *supra* note 33 at 6-8; Federal Task Force on Disability Issues, *supra* note 1 at 50-84; *In Unison*, *supra* note 1 at 5-6, 11-12.

[297] G. Fawcett, *An Analysis of the Economic Circumstances of Canadians with Disabilities* (Ottawa: Canadian Council on Social Development, 1996), cited in Shillington, *supra* note 86 at 2.

[298] Canadian Association for Community Living, *The Cost of Doing Nothing: A Submission to the Standing Committee on Human Rights and the Status of Disabled Persons* (30 May 1996) at 3.

[299] See *e.g.* Federal Task Force on Disability Issues, *supra* note 1 at 50.

ployment or a business. Likewise, for employers, the integration of disabled employees may involve additional physical and personnel costs, for disability-related equipment and modifications to buildings and to train disabled employees and their coworkers.

While measures to facilitate the integration of disabled persons in the paid labour force may include educational programs, vocational rehabilitation and training programs, employment counselling programs, and human rights guarantees, the income tax also has an important role to play by recognizing additional costs of this participation both to disabled persons themselves as well as their employers. Other provisions might encourage labour market participation by subsidizing disabled persons or their employers through the income tax.

This part considers existing and proposed income tax provisions designed to facilitate integration of disabled persons in the paid labour force, looking at measures affecting the tax liability both of disabled persons themselves and of their employers. Among measures directed at disabled persons themselves, it considers the non-taxation of disability-related benefits provided by employers, the deduction of additional work-related expenses incurred by disabled persons themselves, and tax-delivered assistance to mitigate the loss of provincial disability-related supports. With respect to measures directed at employers, it examines existing and potential tax measures to encourage investments in disability-related equipment and building modifications and to hire disabled employees.

A. Measures Directed at Disabled Persons

1. Description

At present, the *ITA* contains three provisions designed to alleviate different kinds of costs incurred by disabled persons who participate in the paid labour force. Under subsection 6(16) of the *ITA*, a disabled individual is exempt from tax on the value of employer-provided benefits or allowances in respect of expenses incurred by the individual for

(a) the transportation of the individual between the individual's ordinary place of residence and the individual's work location (including parking near that location) if the individual is blind or eligible for the disability tax credit (or would be but for claiming remuneration for full-time attendant or nursing home care as a medical expense) on account of a mobility impairment; or

(b) an attendant to assist the individual in the performance of the individual's employment duties, if the individual is eligible for the disability tax credit (or would be but for claiming remuneration for full-time attendant or nursing home care as a medical expense).

Under the attendant care expense deduction ("ACED") in section 64, taxpayers who are eligible for the DTC may deduct unreimbursed amounts paid for attendant care to enable them to perform the duties of an office or employment, carry on a business either alone or as a partner actively engaged in the business, or carry on research or any similar work in respect of which the taxpayer received a grant, up to a maximum of two-thirds of the taxpayer's income from employment, business or research.[300] This deduction is allowed provided that the amounts are not claimed as a medical expense under section 118.2, are paid to someone other than the taxpayer's spouse or a person under 18 years of age, and are proven by filing receipts containing the recipient's Social Insurance Number. Under the refundable medical expenses supplement ("RMES") in section 122.51, taxpayers aged 18 or older who earn at least $2,535 through employment or a business may claim a refundable tax credit equal to 25 cents for each dollar of eligible medical expenses exceeding the threshold stipulated in the METC, up to a maximum of $500 (maximum medical expenses of $2,000 above the threshold), and reduced by 5% of the amount by which the combined income of the individual and his or her cohabiting spouse exceeds $17,664.

2. History

Each of these provisions is of recent origin, reflecting increasing federal concern about the integration of disabled persons in the paid labour market. Subsection 6(16), for example, was enacted in 1991,[301] with the express purpose of superseding rules that would otherwise "tend to discourage disabled Canadians from participating in the work force."[302] Section 64 was enacted in 1989,[303] in order to "lower the employment barrier" to participation by disabled persons in the paid labour force created by unreimbursed attendant care expenses, and to "create greater equity between able-bodied earners and those who incur additional expenses owing to a disability."[304] Although the

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[300] The 2000 Federal Budget proposes to extend this deduction to disabled persons enrolled in qualifying educational programs (see "Budget Papers 2000", *supra* note 56 at 2-9 – 2-10).

[301] Sch. II, *supra* note 136, s. 3(5), applicable to 1991 and subsequent years.

[302] "Excerpts from Supplementary Information" in Stikeman Elliott, *Canadian Federal Budget 1991*: *Budgetary Proposals of the Hon. Minister of Finance with Comments by Stikeman Elliott* (Toronto: Carswell, 1991) 4-1 at 4-3. According to the Budget:

> Allowances provided to employees for taxi fares, para-transport, and parking will no longer be considered as taxable benefits for those who are eligible for the disability tax credit by reason of a severe and prolonged mobility or sight impairment. In addition, where an employer provides an allowance in respect of attendant care required to enable an employee who qualifies for the disability tax credit to perform employment duties (*e.g.*, readers for the blind, signers for the deaf, coaches for the mentally handicapped), no taxable benefit will be imputed (*ibid.*).

[303] *1989 Amendments*, *supra* note 175, s. 14, applicable to 1989 and subsequent years. This provision effectively reversed the Tax Appeal Board decision in *Benton* v. *M.N.R.* (1952), 6 Tax A.B.C. 230, 52 D.T.C. 196, in which the disabled taxpayer was unable to deduct the cost of the housekeeping services that enabled him to engage in the business of farming.

[304] "Excerpts from Supplementary Information" in Stikeman Elliott, *Canadian Federal Budget 1989: Budgetary Proposals of the Hon. Minister of Finance with Comments by Stikeman Elliott* (Toronto: Carswell, 1989) 3-1 at 3-4.

deduction was originally limited to $5,000,[305] this ceiling was repealed in 1997,[306] also to “reduce barriers to work for people with disabilities.”[307] Section 122.51 was enacted in 1997,[308] in order to lessen “an important barrier to participation in the labour force by Canadians with disabilities” caused by “[t]he loss of subsidies for disability-related supports under provincial social assistance.”[309]

3. Evaluation and Recommendations

a. Purposes

In evaluating these provisions, it is important, as outlined earlier, to distinguish between social policy objectives and tax policy considerations more narrowly defined. Whereas non-taxation of employer-provided benefits or allowances and deductions for additional expenses incurred by disabled persons to participate in the paid labour force reflects a tax policy concern to exclude from a taxpayer’s net income all necessary costs to earn this income, the RMES reflects a social policy concern to lessen the impact of lost subsidies for disability-related supports under provincial social assistance plans on disabled persons who participate in the paid labour force by reimbursing a share of privately borne expenses.

Having identified the distinct policy objectives of these various provisions, it is possible to consider possible reforms consistent with these separate purposes. While tax policy addresses the additional out-of-pocket expenses incurred by disabled individuals in order to participate in the paid labour force, social policy addresses the extent to which these costs should be borne privately or publicly and the impact of lost subsidies for disability-related supports under provincial social assistance plans.

b. Direct Costs of Earning Income

As indicated in Part I of this paper, horizontal equity suggests that taxpayers, in computing their net income, should be allowed to deduct all privately borne costs that are necessary to obtain this income. Where disabled individuals incur additional necessary expenses to participate in the paid labour force, horizontal equity demands that these expenses also be deductible. While a progressive rate structure and personal exemptions mean that these deductions are worth more to high-income taxpayers than low-income taxpayers and worth nothing to disabled persons whose incomes are too low to pay any tax, this result reflects a prior tax policy concern about the appropriate definition of the tax base.

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[305] *ITA*, *supra* note 4, former s. 64(c).

[306] *1997 Amendments*, *supra* note 173, s. 11.

[307] “Tax Measures: Supplementary Information” in 1997 Federal Budget, *supra* note 172, 5-1 at 5-14 [hereinafter “Supplementary Information 1997”].

[308] *1997 Amendments*, *supra* note 173, s. 32, applicable to 1997 and subsequent years.

[309] “Supplementary Information 1997”, *supra* note 307.

As for the specific provisions through which these additional costs might be recognized for tax purposes, either a deduction for privately borne expenses incurred by disabled individuals themselves or an exclusion for employer-provided benefits or allowances in respect of these expenses is appropriate. While a deduction recognizes these costs directly in computing the disabled individual's income, an exclusion for employer-provided benefits or allowances in respect of these expenses recognizes these expenses indirectly to the extent that the employer is able to deduct amounts that are not included in the employee's income. As a result, the exclusion in subsection 6(16) of the *ITA* should be regarded as an appropriate complement to the deduction of these expenses elsewhere in the *ITA*.

From this perspective, however, an obvious criticism of the current statutory scheme is the non-deductibility of certain kinds of expenses the reimbursement of which is exempt from tax under subsection 6(16). In particular, while employees who are blind or mobility-impaired are not subject to tax on employer-provided benefits or allowances in respect of expenses to travel to and from work (*e.g.*, taxi fares, para-transport, and parking), these expenses appear to be non-deductible in computing the income of a similarly disabled employee whose employer does not provide a benefit or allowance in respect of identical commuting expenses.[310] Nor does it appear, where a disabled individual carries on a business either alone or as a partner actively engaged in the business, that the individual can deduct commuting expenses in respect of which a similarly disabled employee is exempt from tax under paragraph 6(16)(a) of the *ITA*.[311] In contrast, by allowing disabled individuals to deduct the cost of attendant care to enable them to perform the duties of an office or employment or carry on a business either alone or as a partner actively engaged in the business, section 64 prevents a similar inequity that might otherwise result from the non-inclusion of employer-provided benefits or allowances in respect of these expenses under paragraph 6(16)(b) of the *ITA*. In order to eliminate any inequity in the treatment of commuting expenses, these might be explicitly allowed as a separate deduction along the lines of the ACED in section 64.

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[310] Although the *ITA*, *supra* note 4, s. 8, provides for various amounts that may be deductible in computing an employee's income, none of these deductions includes commuting expenses of disabled employees; s. 8(2) stipulates that "no deductions shall be made in computing a taxpayer's income for a taxation year from an office or employment" other than those specifically listed in s. 8. On the other hand, Revenue Canada appears to interpret the deduction for "attendant care" in s. 64 to include the cost of an attendant to provide transportation to work (M.N.R., Interpretation Bulletin IT-519R2, "Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction" (6 April 1998) at para. 69). However, it is uncertain whether this deduction would cover other commuting expenses, such as taxi fares, gasoline, and parking, in respect of which an employer-provided benefit or allowance would appear to be excluded under s. 6(16)(a). For a review of Revenue Canada guidelines on the meaning of "attendant care", see Sherman, *supra* note 35 at 98-99. For a discussion of the exemption for disability-related employment benefits under s. 6(16), see *ibid*. at 170-72.

[311] See *e.g. Henry* v. *M.N.R.*, [1969] C.T.C. 600, 69 D.T.C. 5395 (Ex. Ct.), aff'd (1971), [1974] S.C.R. 155, [1972] C.T.C. 33, 23 D.L.R. (3d) 571, in which commuting expenses were held to be a non-deductible "personal or living expense".

Turning to section 64 itself, consistency with other statutory provisions and earlier recommendations in this paper suggests at least two specific reforms. First, consistent with earlier comments on the METC and the CCED,[312] the ACED should be available notwithstanding the fact that attendant care expenses are incurred in the form of remuneration to a taxpayer's spouse. Provided that the deduction in respect of this remuneration is reasonable in the circumstances, as required by section 67 of the *ITA*, there is no reason why it should be any less deductible than if it were paid to a third party.

Second, where attendant care is necessary to enable a disabled taxpayer to earn income from various sources, it seems unreasonable to limit the allowable deduction for attendant care expenses to two-thirds of the taxpayer's income from these sources. Instead, consistent with the earlier analysis of the CCED,[313] the maximum deductible amount might be limited to the total of all amounts that the attendant care enables the taxpayer to earn.

More generally, one might question the requirements in both subsection 6(16) and section 64 of the *ITA* that the individual in respect of whom employment benefits are exempt or attendant care expenses are deductible must be eligible for the DTC.[314] Given the purpose of these provisions to recognize additional costs incurred by disabled individuals in order to participate in the paid labour force, a broader definition of disability such as "mental or physical infirmity" would appear to be more appropriate than the highly restrictive eligibility criteria for the DTC. If eligibility for the DTC is reformed along the lines suggested earlier, however, these criteria might be appropriate for the purposes of subsection 6(16) and section 64 of the *ITA*.[315]

c. Loss of Social Assistance Subsidies

With respect to the RMES in section 122.51, the design of this provision should be measured against its stated social policy purpose to offset the loss of subsidies for disability-related supports under provincial social assistance that results when disabled individuals earn additional income from participation in the paid labour force.[316] From this perspective, it suffers from the same deficiencies as the METC, both as a

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[312] See the earlier discussion above, at text accompanying notes 85-88 and in Part II.*E*.3.*d*, above.

[313] See the discussion in Part II.*E*.3.*c*, above.

[314] See *e.g. The Tax System*, *supra* note 79 at 22.

[315] See text accompanying notes 181-85.

[316] Although one might begin by questioning the merits of such a *federal* social policy measure designed to correct acknowledged deficiencies in *provincial* social assistance programs (which should be amended by provincial governments themselves), this paper accepts this policy as a basis for analysis of the RMES. It is interesting to note, however, that federal, provincial, and territorial social services ministers have agreed on a framework for social policy reform that would separate access to disability-related supports from eligibility for social assistance (see *In Unison*, *supra* note 1). To the extent that provincial programs are amended along these lines, the social policy need for the RMES may disappear.

method of recognizing privately borne disability-related expenses for the purposes of computing income tax and as an instrument for reimbursing a share of these expenses as a matter of social policy. These deficiencies are a tendency to define eligible expenses according to a narrow medical model and a threshold on eligible expenses based on 3% of the individual's net income or $1,637, whichever is lower.

Although the current METC makes it difficult to achieve the stated purpose of the RMES to compensate for lost disability-related supports, this social policy goal might be achieved more directly if the refundable credit applied to a separate measure of disability-related expenses without any annual threshold. Since the earlier recommendation for a separate disability expenses tax credit or deduction is based on just such a measure,[317] the introduction of such a provision would provide a much better foundation for a refundable credit designed to offset the loss of provincial subsidies for disability-related supports. Such an amended provision, which would be based on eligible disability-related expenses for this non-refundable credit or deduction, might more appropriately be described as a refundable disability expenses supplement (RDES).

B. Measures Directed at Employers

1. Description

In addition to tax provisions directed at disabled persons themselves, the income tax might also encourage the participation of disabled persons in the paid labour force through measures directed at employers. Indeed, recent amendments allow businesses to deduct amounts spent for prescribed disability-related modifications to buildings and prescribed disability-related equipment in the year in which they are paid,[318] rather than "capitalizing" these costs and claiming deductions in subsequent years, as is generally the case for investments in physical assets.[319] According to the *Regulations*, the disability-related investments that are prescribed for the purposes of these provisions are

- the installation of an interior or exterior ramp or a hand-activated electric door opener;[320]

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[317] See the earlier discussion in the text accompanying notes 83-97 and 192-216.

[318] *ITA*, *supra* note 4, s. 20(1)(qq), formerly s. 20(1)(gg), added by Sch. II, *supra* note 136, s. 15(3), applicable with respect to renovations or alterations made after 1990; s. 20(1)(rr), added by Sch. VIII, *supra* note 265, s. 9(2), applicable with respect to amounts paid after February 25, 1992. See also the *Regulations*, *supra* note 11, ss. 8800, 8801.

[319] See *ITA*, *ibid.*, s. 18(1)(b), which prohibits the deduction of "an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted" by Part I of the *ITA*; s. 20(1)(a), which allows taxpayers to deduct "such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation". For this purpose, the *Regulations* specify various capital cost allowances for different categories of capital assets.

[320] *Supra* note 11, s. 8800(a).

- a modification to a bathroom, elevator, or doorway to accommodate its use by a person in a wheelchair;[321]
- the purchase of an elevator car position indicator, such as a braille panel or an audio signal, for individuals having a sight impairment;[322]
- the purchase of a visual fire alarm indicator, a listening device for group meetings, or a telephone device for individuals having a hearing impairment;[323] and
- the purchase of a disability-specific computer software or hardware attachment.[324]

In the United States, investments in disability-related equipment and building modifications are encouraged by immediate deductions up to specified amounts as well as tax credits for small businesses.[325] In addition to these provisions, the United States *Internal Revenue Code* provides a Targeted Jobs Tax Credit equal to 40% of the first $6,000 of a disabled employee's salary during the first year of the employee's employment.[326]

2. Evaluation and Recommendations

a. Purpose

Although it might be argued that these measures are designed to recognize additional expenses incurred by employers in order to facilitate participation by disabled persons in the paid labour force, these provisions appear to depart from this narrow tax policy goal by not merely recognizing the additional costs associated with investments in disability-related equipment and building modifications and the hiring of disabled employees, but by specifically *encouraging* these kinds of expenditures through accelerated deductions and tax credits. As a result, they are properly evaluated not as measures designed to achieve horizontal equity among differently situated employers, but as tax incentives or tax expenditures designed to serve a broader social policy objective of integrating persons with disabilities in the paid labour market. From this perspective, policymakers should evaluate these tax provisions as they would any other spending program, examining their efficacy in achieving their intended objectives, their distributive impact, the efficiency with which they are administered, and their transparency for purposes of budgeting and public policy analysis.[327]

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[321] *Ibid.*, s. 8800(b).
[322] *Ibid.*, s. 8801(a).
[323] *Ibid.*, s. 8801(b).
[324] *Ibid.*, s. 8801(c). For a brief discussion of these provisions, see Sherman, *supra* note 35 at 172-74.
[325] See *The Tax System*, *supra* note 79 at 23.
[326] *Ibid.*
[327] See generally S.S. Surrey & P.R. McDaniel, *Tax Expenditures* (Cambridge, Mass.: Harvard University Press, 1985).

b. Efficacy

With respect to the efficacy of these provisions in achieving their intended objectives, detailed empirical studies are unavailable. According to data released by the U.S. Census Bureau, however, approximately 800,000 more severely disabled Americans were working in 1994 than in 1991, and the employment rate among disabled Americans increased from 23% in 1991 to 26% in 1994.[328] Nonetheless, the extent to which these figures are attributable to new tax provisions, as opposed to more general economic conditions, is difficult to determine.

In evaluating these tax provisions, moreover, it might be more appropriate to compare them not to the absence of any such measure altogether but rather to a direct spending program designed to achieve the same objective. For example, although the Canadian income tax does not offer a tax credit to encourage employers to hire disabled employees, the Human Resources Investment Fund ("HRIF") established under the *Employment Insurance Act* offers a wage subsidy to assist in the hiring of disabled employees.[329] Compared to a tax credit that an employer claims at the end of a taxation year, such a direct subsidy has an obvious cash-flow advantage in making the additional funds to encourage such hiring available to the employer as needed throughout the year. Likewise, direct government grants to encourage employer investments in disability-related equipment and building modifications are likely to be more efficacious than deductions or credits which provide tax relief at the end of the year. Unfortunately, there do not appear to be any studies in this area on the relative efficacy of direct grants and tax incentives.

With respect to the design of these kinds of incentives, finally, commentators have raised two sets of concerns. First, by limiting the immediate deduction for disability-related investments to those specifically listed in the *Regulations*, the current Canadian incentive ignores other investments that may also be necessary to improve workplace accessibility for disabled employees (*e.g.*, other modifications to buildings, communications systems, furniture, and vehicles used in the business).[330] While additional items might be added to the list, the *ITA* might also be amended by establishing a more general criterion of eligibility, according to which incentives for investments in disability-related physical assets might be available for reasonable amounts to the extent that they are expended for the purpose of making the workplace accessible to persons with mental or physical disabilities. Consistent with earlier recommendations regarding the METC and a proposed disability expenses tax credit or deduction,[331] this approach would allow for the recognition of different kinds of disability-related investments without having to lobby Revenue Canada and the Department of Finance to

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[328] Federal Task Force on Disability Issues, *supra* note 1 at 64.

[329] S.C. 1996, c. 23. For a brief discussion of this program and the HRIF under which it is administered, see *ibid*. at 54-61, 64.

[330] See *e.g.* Baker & Beatty, *supra* note 79 at 16.

[331] See the earlier discussion in the text accompanying notes 96-97, 212-13.

expand the list, and would also encourage investments in novel strategies of improving workplace accessibility.

Second, where the hiring of disabled employees is encouraged through a jobs tax credit or wage subsidy, concern is rightly expressed that an incentive directed at the first year of a disabled person's employment might create a "revolving door effect" in which employers hire disabled individuals for the duration of the credit without creating sustainable long-term employment for disabled persons.[332] As one commentator has suggested, this deficiency could be addressed by adopting "a credit that accrued in value over time or was at least available for a period past the first year of employment."[333]

c. Distributive Impact

As for the distributive impact of these tax provisions, one might question whether they should be in the form of accelerated deductions and non-refundable credits, rather than refundable credits which provide the same tax benefit for employers irrespective of their marginal tax rate or whether tax is payable. Although deductions are an appropriate way to recognize necessary costs of earning income, refundable credits are a more equitable way to achieve social policy objectives, since the amount of the subsidy can be based on the specific policy goal pursued rather than the amount of income the employer happens to earn. If refunds or reduced tax installments were computed throughout the year, moreover, a refundable tax credit for investments in disability-related equipment or building modifications or for hiring a disabled employee might address the cash-flow disadvantage of most tax incentives as compared with direct spending programs.

d. Administration and Transparency

Regarding questions of administration and transparency, it may be noted that tax credits tend to be much simpler and less costly to administer than direct spending programs but less transparent for purposes of budgeting and public policy analysis. To the extent that the federal government accounts for tax expenditures on a regular basis, however, it is arguable that the advantages of efficient administration outweigh whatever reduction ensues in terms of public transparency.

e. Conclusion

While the limited analysis of these tax provisions and direct spending alternatives in this paper makes any conclusions on their relative merits extremely tentative, this analysis suggests that the integration of disabled persons into the paid labour force

[332] G. Williams, *Health and Disability Related Costs and the Income Tax* (Toronto: Canadian Association for Community Living, 1996) at 5.

[333] *Ibid.*

might be facilitated by tax provisions designed to encourage employers to invest in disability-related equipment and building modifications and to hire disabled employees. Ideally, these tax expenditures should be designed to encourage sustainable employment for disabled persons, should take the form of refundable credits, should be made available to employers throughout the year, and should be reviewed in annual tax expenditure accounts. On this basis, they might be preferable to direct spending programs intended to achieve the same purpose.

IV. Income Support

Where disabled individuals have difficulty supporting themselves, income support may be available in a variety of forms in addition to the financial support provided by family and friends.[334] For the most part, the sources and level of this support depend on the cause of the individual's disability and his or her prior attachment to the paid labour force.

For individuals whose disability is caused by a workplace injury, support is generally available under provincial workers' compensation schemes to which employers pay mandatory premiums. Persons injured in an automobile accident may receive compensation under fault-based or no-fault automobile insurance which licensed drivers are required to obtain. Individuals who are otherwise injured as a result of someone's negligence may be able to obtain compensation through the tort system.

For individuals who were employed prior to the onset of a particular disability, support may be available in the form of continued remuneration during a period of sick leave or as long-term disability benefits under an insurance plan to which the individual's employer has contributed. Short-term support for previously employed individuals may also be available as sick leave benefits under the Employment Insurance program to which employers and employers are required to pay mandatory premiums, while long-term disability benefits are payable under the Canada and Quebec Pension Plans to severely disabled individuals who have made contributions (related to employment or self-employment) in four of the six years before they became disabled.[335] Otherwise, individuals who have purchased long-term disability insurance themselves may be eligible for benefits under these plans, while other individuals may be entitled to disability benefits provided under provincial social assistance plans.[336]

Numerous studies have criticized the lack of co-ordination among these income support arrangements, questioning the extent to which a disabled individual's entitlement to support as well as the amount of support depend on the cause of the individ-

[334] For a useful overview of various public income security programs in Canada, see C. Clark, *Canada's Income Security Programs* (Ottawa: Canadian Council on Social Development, 1998).

[335] For a brief explanation of these federal programs, see Boadway & Kitchen, *supra* note 22 at 418-25.

[336] For a recent review of Ontario's Disability Support Program, see H. Beatty, "Ontario Disability Support Program: Policy and Implementation" (1999) 14 J. L. & Soc. Pol'y 1.

ual's disability and the individual's prior participation in the labour force.[337] Where a person is born with a disability, for example, income support is likely to be limited to basic amounts available under provincial social assistance programs. Other criticisms concern the lack of incentives for disabled persons to participate in the paid labour market under these income support arrangements, which tend to reduce benefits sharply as individuals derive income from remunerative activities. For these reasons, the federal, provincial, and territorial governments have considered the introduction of a more comprehensive disability income plan administered by the federal government.[338] Indeed, the 1996 Annual Premiers' Conference proposed that the federal government should take the lead role in reforming Canada's disability income system to establish "a single, national program to address gaps and overlaps, to streamline administration, and to improve client service."[339]

While a detailed analysis of these proposals to create a comprehensive national disability income plan is beyond the scope of this paper,[340] this part examines the role of the *ITA* with respect to different kinds of disability income. The first section examines existing and potential tax rules regarding both the taxation of disability income from various sources and contributions to the plans from which much of this income is derived. The following section considers the use of the income tax to provide comprehensive income support to low-income persons with disabilities.

A. Tax Treatment of Disability Income and Contributions

1. Description

The tax treatment of disability income and contributions to various income support arrangements is almost as varied as these arrangements themselves.[341] With respect to workers' compensation, these benefits are included in computing the recipient's net income,[342] but offset by a corresponding deduction in computing the recipient's taxable income.[343] While this arrangement renders these payments effectively exempt from tax, the initial inclusion may affect the computation of refundable and non-

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[337] See *e.g.* Federal Task Force on Disability Issues, *supra* note 1 at 72-78. See also S. Torjman, *Income Insecurity: The Disability Income System in Canada* (Toronto: Roeher Institute, 1988); H. Beatty, "Comprehensive Disability Compensation in Ontario: Towards an Agenda" (1991) 7 J. L. & Soc. Pol'y 100.

[338] Federal Task Force on Disability Issues, *ibid.* at 75.

[339] *Ibid*. at 76.

[340] See Beatty, *supra* note 337.

[341] For a useful overview of the taxation of regarding disability income and contributions, see D. Schulze, "Obstacles to Equity: An Analysis of the Taxation of Disability Income in Canada and Proposals for Reform" (1994) 14 Windsor Y.B. Access Just. 135 at 138-40. See also Sherman, *supra* note 35 at 139-53.

[342] *ITA*, *supra* note 4, s. 56(1)(v).

[343] *Ibid.*, s. 110(1)(f)(ii).

refundable credits for the recipient and a supporting individual.[344] Employer-paid premiums are deductible to employers and not considered taxable benefits to employees.

In contrast to workers' compensation, automobile accident insurance and tort compensation for personal injuries are fully exempt from tax, pursuant to case law which has endured without challenge for over twenty years.[345] While premiums and damage payments are generally non-deductible, businesses may deduct liability insurance premiums and payments for tort claims related to the business.[346] Other kinds of compensation provided by the federal government (*e.g.*, veterans benefits and disability benefits paid to RCMP officers) are also exempt from tax, but under specific statutory rules to this effect.[347] While investment income on lump-sum damage payments is generally subject to tax, a specific exemption exists for income and capital gains derived from such property where the injured individual is less than 21 years of age.[348]

Where disabled individuals receive remuneration during a period of sick leave, this income is fully taxable as employment income.[349] Likewise, where an individual receives long-term disability benefits under an insurance plan to which a former employer contributed, these benefits are also taxable as employment income, subject to a deduction for premiums paid under the plan by the individual.[350] Employer contributions to the plan, however, are not taxable as an employment benefit.[351] Where indi-

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[344] See M.N.R., Interpretation Bulletin IT-202R2, "Employees' or Workers' Compensation" (19 September 1985).

[345] *Cirella*, *supra* note 15 at 5, concluding that a damage award arising from an automobile injury was a capital receipt attributable to a loss of the recipient's earning capacity, not lost income *per se*. To the extent that such damage awards are capital receipts, however, it is arguable that the payments should be subject to capital gains tax; this issue was not considered in *Cirella* since the facts of the case preceded the introduction of capital gains tax in 1972. On the other hand, while the damage award may be characterized as "proceeds" for the involuntary disposition of the recipient's earning capacity, it might be difficult to determine the cost of this earning capacity in order to compute the amount of any gain. As a general rule, the income tax does not account for investments in or depreciation of human capital. For Revenue Canada's views on the non-taxation of tort compensation, see M.N.R., Interpretation Bulletin IT-365R2, "Damages, Settlements and Similar Receipts" (8 May 1987). On the non-taxation of automobile insurance, see Private Opinion Letter 9321057, "Treatment of No-Fault Insurance Benefits" (29 September 1993) [archived with author], which states that payments under Manitoba's no-fault automobile insurance plan are "not required to be included in the income of the recipient."

[346] *Imperial Oil* v. *M.N.R.*, [1947] C.T.C. 353, 3 D.T.C. 1090 (Ex. Ct.).

[347] *ITA*, *supra* note 4, ss. 81(1)(d), 81(1)(e), 81(1)(f), 81(1)(i).

[348] *Ibid.*, ss. 81(1)(g.1), 81(1)(g.2).

[349] *Heydom* v. *M.N.R.*, [1997] 2 C.T.C. 3088 at 3090 (T.C.C.).

[350] *ITA*, *supra* note 4, s. 6(1)(f). For Revenue Canada's views on the application of this provision, see M.N.R., Interpretation Bulletin IT-428, "Wage Loss Replacement Plans" (30 April 1979) [hereinafter I.B. IT-428].

[351] *ITA*, *ibid.*, s. 6(1)(a)(i), which excludes from the definition of a taxable benefit the value of which is otherwise included in an employee's income any benefit "derived from the contributions of the taxpayer's employer to or under a … group sickness or accident insurance plan ..."

viduals receive sick leave benefits under the Employment Insurance program or long-term disability benefits under the CPP and QPP, these payments are also fully taxable.[352] While employer contributions to these programs are deductible and are not included in the employee's income as a taxable benefit, employee and self-employed contributions are not deductible but are eligible for a non-refundable tax credit computed at the lowest marginal rate of tax.[353]

In contrast to long-term disability benefits under the CPP or QPP or a private plan to which the recipient's employer has made a contribution, benefits under a private plan to which an employer has not contributed are fully exempt;[354] this applies even where the premiums for the plan were actually paid by the recipient's employer, provided that these amounts were included in the recipient's income as a taxable benefit during the years in which the premiums were paid.[355] Contributions to these plans, however, are not deductible.[356]

Like worker's compensation, social assistance payments are also exempt under statutory provisions that include these amounts in computing the recipient's net income,[357] but provide for a corresponding deduction in computing taxable income.[358] As with workers' compensation, the initial inclusion may affect the computation of refundable and non-refundable tax credits.

2. Evaluation and Recommendations

a. *Purposes*

As with other provisions examined in this paper, it is useful to distinguish between tax and social policy considerations when evaluating the various income tax rules governing both the taxation of disability income and the treatment of contributions to various disability income arrangements. While some commentators have pro-

[352] *Ibid.*, ss. 56(1)(a)(iv) (Employment Insurance), 56(1)(a)(i)(B) (Canada Pension Plan).

[353] *Ibid.*, s. 118.7. The combined federal and provincial value of this credit is roughly 25 cents for each dollar of EI premiums and CPP/QPP contributions. Until 1988, these contributions were deductible in computing the income of the contributing employee or self-employed individual (see *ibid.*, former ss. 8(1)(k), 8(1)(l), 60(h)).

[354] See I.B. IT-428, *supra* note 350 at paras. 14 & 16.

[355] *Landry* v. *M.N.R.*, [1998] 2 C.T.C. 2712, 98 D.T.C. 1416 (T.C.C.).

[356] For employees, the non-deductibility of these payments is established by the absence of any provision allowing such a deduction in the *ITA*, *supra* note 4, s. 8, and the prohibition in s. 8(2) against deductions other than those expressly allowed in s. 8. For taxpayers carrying on a business alone or in a partnership, non-deductibility is premised on the judicial conclusion that premiums are not incurred for the purpose of gaining or producing income from the business, as required by s. 18(1)(a) (see *M.N.R.* v. *MacIntyre*, [1975] C.T.C. 429, 75 D.T.C. 5240 (F.C.A.); Interpretation Bulletin IT-223, "Overhead Expenses versus Income Insurance" (26 May 1975)).

[357] *ITA*, *ibid.*, s. 56(1)(u).

[358] *Ibid.*, s. 110(1)(f).

posed that disability income should be generally exempt from tax,[359] the following analysis questions the merits of such a general exemption from the perspectives of tax and social policy. Instead, it suggests, tax policy and social policy would be better served if contributions were generally deductible and disability income were generally taxable.

b. Tax Policy

Beginning with questions of tax policy narrowly defined, a key consideration involves horizontal equity—both in the treatment of contributions that individuals are required to make to various kinds of income support arrangements, and in the taxation of amounts received from each of these sources.

With respect to contributions, tax policy considerations suggest that the appropriate treatment depends on whether these payments are viewed as necessary costs of earning income or as discretionary expenses out of income already earned.[360] Where the payments are mandatory, as in the case of Employment Insurance premiums and CPP/QPP contributions, characterization as a necessary cost of earning income seems relatively straightforward. For this reason, it would be desirable to restore the deductions for these payments that existed prior to their conversion into non-refundable credits in 1988.[361] Such a reform would also be consistent with the non-taxation of mandatory employer-paid workers' compensation premiums as taxable benefits to employees.

Where an employer makes contributions to a long-term disability insurance plan or requires employees to contribute to such a plan themselves as a condition of employment, these contributions might also be regarded as a necessary cost of earning income.[362] More generally, to the extent that these contributions, as well as premiums for other private disability insurance plans, are paid in order to obtain a regular stream of income in the event of a future disability, they might reasonably be regarded as necessary costs to obtain this future income.[363] For this reason, a rule excluding employer contributions to such plans as a taxable benefit to employees and allowing individuals to deduct the cost of premiums they paid themselves would be preferable to the current rule under which employer-paid contributions are non-taxable benefits but

[359] See *e.g.* Schulze, *supra* note 341; Shillington, *supra* note 86 at 18-22.

[360] See the discussion in Part I, above.

[361] See former ss. 8(1)(k), 8(1)(l), 60(h), repealed by the *1987 Amendments*, *supra* note 78, s. 2(1), applicable to 1988 and subsequent years.

[362] To the extent that employees bargain for these plans individually or collectively, however, it is arguable that contributions should be regarded as a discretionary expenditure rather than a necessary cost of earning employment income.

[363] This approach would exclude a deduction for liability insurance premiums, except where they are incurred for the purpose of gaining or producing income from a business. To the extent that automobile insurance premiums provide disability and liability insurance, this approach would require a distinction between these components.

employees and self-employed individuals are unable to deduct premiums paid themselves.[364]

With respect to the taxation of disability income, horizontal equity would appear to require that all such payments should be fully taxable. To the extent that these amounts contribute to the recipient's ability to pay, an exemption for some or all of this income would be inequitable between individuals receiving some or all of their income in this tax-exempt form and individuals whose income is subject to tax. For this reason, the Royal Commission on Taxation recommended the taxation of private long-term disability benefits as well as public benefits through employment insurance and workers compensation.[365]

Notwithstanding this general approach, however, there are at least three reasons why certain kinds of disability payments might reasonably be excluded from a recipient's income. First, to the extent that payments are designed to compensate for medical or disability-related expenses, it is doubtful that they increase the recipient's ability to pay tax. Although such payments might be included in the recipient's income under a system in which these expenses were fully offset through a corresponding deduction,[366] any limitation on this deductibility suggests that these payments should be excluded in computing the recipient's income.[367] Second, where a disability payment includes compensation for pain and suffering, it is questionable whether this component should be regarded as taxable income. While it is arguable that monetary payments for this purpose increase the recipient's ability to pay tax, their character as recompense for the involuntary loss of non-economic assets like personal health and well-being suggests that they should not be regarded as taxable additions to the recipient's net wealth.[368] Third, where a disabled individual receives income support under a so-

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[364] This approach was recommended by *Royal Commission on Taxation*, *supra* note 24 at 436-39. While it might be argued that any such deduction should be allowed only against disability income actually received, as is the case with employer contributions to a long-term disability insurance plan to which an employer has contributed, this approach would depart from the traditional tax principle that expenses are deductible where they are incurred for the purpose of earning income, regardless of whether income is actually produced (see *e.g. Royal Trust* v. *M.N.R.*, [1957] C.T.C. 32, 57 D.T.C. 1055 (Ex. Ct.)).

[365] *Ibid.* at 437, 525-26. The Commission addressed neither the taxation of CPP/QPP benefits, which did not exist at the time that it reported, nor the taxation of payments under provincial social assistance programs, which were greatly expanded after the introduction of the Canada Assistance Plan, following the report of the Royal Commission.

[366] See *e.g.* L.A. Frolik, "Personal Injury Compensation as a Tax Preference" (1985) 37 Maine L. Rev. 1 at 22, arguing that "[t]he use of income, not the source of income, should give rise to tax relief."

[367] To the extent that the *ITA* is amended to make these expenses fully deductible, therefore, compensation in respect of these expenses should be fully included in computing the recipient's income.

[368] For arguments along these lines, see J.J.S. Brooks, "Developing a Theory of Damage Recovery Taxation" (1988) 14 Wm. Mitchell L. Rev. 759 at 760-80. For contrary arguments that such payments should be fully taxable as dispositions of assets with zero cost for tax purposes, see Frolik, *supra* note 366 at 20-23; J.M. Dodge, "Taxes and Torts" (1992) 77 Cornell L. Rev. 143 at 182-87.

cial assistance program, it is arguable that these payments should be exempt from income tax as part of a "negative income tax" designed to provide income support to persons in financial need.

Where disabled individuals receive lump-sum payments, horizontal equity suggests that these payments should be subject to a special set of rules to lessen the burden of progressive rates on amounts that are received in a single taxation year.[369] To the extent that a portion of a lump-sum payment refers to lost income for previous years, these amounts are properly taxable at the rate applicable to the taxation years in respect of which they are payable.[370] To the extent that some or all of a lump-sum payment refers to expected reductions in earned income in future years, the impact of progressive rates can be lessened through a forward averaging mechanism allowing amounts to be brought into income over several years,[371] or through rules allowing recipients to contribute these amounts on a tax-deferred basis to specific savings vehicles (*e.g.*, annuities or registered savings plans) the payments from which would be fully taxable as received.[372]

c. Social Policy

Although tax policy considerations may favour a "deduction/inclusion" system in which contributions to disability insurance plans are either deductible or not taxable if employer-paid and income replacement benefits are fully taxable, several arguments have been advanced in favour of an alternate "taxation/exemption" approach under which contributions would be non-deductible (or taxable if employer-paid) and benefits would be fully exempt.

First, it is argued, while the exemption of all sources of disability income (*e.g.*, employment insurance, CPP/QPP benefits, and employer-paid disability insurance) would increase net after-tax income for many disabled individuals,[373] the comprehensive taxation of disability incomes "would likely reduce that standard of living of many persons with disabilities who are already not well-off."[374] Second, it is suggested

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[369] For a discussion of this "bunching problem", see Schulze, *supra* note 341 at 152.

[370] See 1999 Federal Budget, *supra* note 65 where it proposes to introduce such a system to compute the tax payable by individuals receiving "qualifying retroactive lump-sum payments". The draft legislation for this proposed amendment has yet to be released.

[371] For proposals along these lines, see Frolik, *supra* note 366 at 11-12; M.L. Morris, "Taxing Economic Loss Recovered in Personal Injury Actions" (1986) 38 U. Fla. L. Rev. 735 at 742-43, 759-69; M.W. Cochran, "Should Personal Injury Damage Awards Be Taxed?" (1987) 38 Case W. L. Rev. 43 at 49.

[372] For a proposal along these lines, see the *Royal Commission on Taxation*, *supra* note 24 at 274-75, 438-39. See also the recommendation for an RDSP at text accompanying notes 292-95, above.

[373] Schulze, *supra* note 341 at 161.

[374] Shillington, *supra* note 86 at 21. See also Schulze, *ibid.* at 151, concluding that "taxing benefits which are currently exempt will merely reduce the limited income available to the disabled unless such a measure is combined with an increase in the income tax threshold for low-income earners generally, since it is currently set far below the poverty line."

that since the number of individuals contributing to disability insurance plans greatly exceeds the number of individuals receiving benefits under these plans, a comprehensive taxation/exemption approach would reinforce the insurance function of these plans by spreading the tax burden widely on the many individuals making contributions as opposed to the few who receive benefits.[375] Third, since those contributing to disability insurance plans tend to have higher incomes than disabled individuals receiving benefits under these plans, a taxation/exemption approach is also favoured on the grounds that it is both more progressive and likely to produce more revenue than a deduction/inclusion approach.[376]

In evaluating the social policy implications of a particular tax reform, conclusions premised on the immediate impact of the measure may be qualified by considering potential behavioural responses by affected taxpayers and accompanying policy measures that might be expected to be adopted by different levels of government. With respect to the taxation of disability income, for example, it is plausible that a shift toward a more comprehensive deduction/inclusion system would lead to increased contributions under private insurance plans and increased pre-tax benefit levels under private and public plans to offset the impact of the tax, while a shift toward a taxation/exemption approach would lead to reduced contributions under employer-sponsored plans and reduced benefit levels under private and public plans the income from which is currently subject to tax.

Accordingly, a conclusion that a deduction/inclusion system would reduce the standard of living of disabled persons while a taxation/exemption approach would increase their standard of living is neither certain nor necessary. Nor is it obvious that a deduction/inclusion system would undermine the function of disability insurance to spread the costs of disabilities widely. Indeed, to the extent that a deduction for individual contributions and non-taxation of employer-paid contributions encourages individuals and employees to obtain long-term disability insurance, whereas a taxation/exemption system might discourage the acquisition of disability insurance in the first place, it is the former approach rather than the latter that is likely to be more conducive to the insurance goal of spreading the costs of disability and is thereby more likely to improve the standard of living of disabled persons. As for the argument that a taxation/exemption approach is more progressive and likely to produce more revenue than a deduction/inclusion system, these goals are achieved more directly through the structure and level of tax rates.

In addition to the incentive effect of a deduction/inclusion system in encouraging the acquisition of long-term disability insurance, two further considerations suggest that this approach is preferable to the taxation/exemption approach not only from the perspective of tax policy narrowly defined but also in terms of social policy more

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[375] Shillington, *ibid.* at 21.

[376] See *e.g. ibid.*, observing that a deduction/inclusion system "undermines the vertical equity of the income tax system and also reduces government revenue compared to taxing the contributions which are made on average by higher income individuals." See also Schulze, *supra* note 341 at 146, 156.

broadly understood. First, to the extent that current exemptions for workers' compensation, automobile insurance, and tort compensation allow for lower payments in these forms than would otherwise be necessary, non-taxation of these forms of disability income can be viewed as an implicit subsidy to employers, drivers, and tortfeasors who are required to finance these payments through insurance premiums or damage awards. Moreover, where these payments are designed to create incentives for injury avoidance, any subsidy is certain to blunt the effect of these incentives, endangering a higher rate of injuries.

Second, as a social policy measure designed to enhance the after-tax income of disabled individuals, an exemption may be criticized as an inequitable form of tax subsidy that favours those receiving larger amounts of disability income more than those receiving lesser amounts, those with other sources of income in addition to disability income more than those without income from such other sources, and those with fewer medical and disability-related expenses to offset against such income more than those with substantial medical and disability-related expenses.[377] For these reasons, social policy would be better served by taxing all sources of disability income and using the additional revenues from this taxation to finance increased disability benefits, particularly to low-income persons with disabilities.

B. Comprehensive Income Support for Low-Income Persons with Disabilities

To the extent that the current mix of private and public disability insurance plans provides inadequate levels of support and leaves significant gaps in available coverage, social policy considerations are likely to favour measures to increase both the level of disability benefits and the scope of disability coverage. For these purposes, policymakers might reasonably consider a form of guaranteed annual income ("GAI") to provide a basic level of income support to low-income persons with disabilities.[378] If payments under such a GAI were tax exempt and reduced at higher levels of income, the program would take the form of a negative income tax ("NIT") whereby benefits would be fully available to qualifying individuals with incomes falling below a specified threshold above which payments would be reduced according to a specific rate.

The design of a specific NIT proposal is beyond the scope of this paper, involving decisions regarding eligibility, benefit levels, the appropriate tax back rate, the threshold income level at which benefits are reduced, and the computation of income (individual or aggregate spousal income) for the purposes of this threshold and reductions in available benefits. While spousal income might reasonably be aggregated for the

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[377] See *e.g.* Schulze, *supra* note 341 at 159, acknowledging that "a comprehensive exemption is regressive as between disabled people" and that "the exemption would have a special value for those with high benefits and other sources of income."

[378] See *e.g.* Shillington, *supra* note 86 at 32-33.

purpose of computing benefits,[379] and eligibility might reasonably be limited to working-aged persons with disabilities whose ability to support themselves is impaired,[380] choices concerning benefit levels, tax back rates, and income thresholds turn on broad social policy decisions regarding appropriate budgetary allocations.

If a GAI for disabled individuals were considered desirable and affordable, a convenient way to implement this policy might be through a refundable tax credit the amount of which is reduced above a stipulated income threshold. Indeed, a "national disability tax benefit" along these lines would be similar to the CCTB introduced in 1993. Although such a measure could provide an important supplement to the current mix of private and public disability insurance plans, it should not be viewed as a substitute for separate provisions designed to recognize the costs of disabilities in computing the income tax payable by disabled persons and supporting individuals. On the contrary, as explained in Part I of this paper, while it is possible to pursue both tax and social policy goals through the *ITA*, each set of policy goals is best pursued by distinguishing both the objectives themselves and the measures through which they are implemented.

V. Summary and Recommendations

This paper has examined existing and potential income tax provisions regarding families with disabled persons, looking at provisions designed to recognize the costs of disabilities for disabled persons and supporting individuals, measures designed to facilitate participation by disabled persons in the paid labour force, and tax rules applicable to various sources of disability income and the contributions from which this income is often derived. For the purpose of this analysis, Part I distinguished between tax policy objectives narrowly defined, emphasizing the equitable distribution of tax burdens among differently situated taxpayers, and broader social policy goals concerning the allocation of goods and services and the distribution of economic resources among members of a political community. While the analysis has touched upon broader social policy issues at various points, the main focus has been on tax policy issues narrowly defined, particularly the definition of taxable income necessary to achieve horizontal equity. With this emphasis in mind, this final part of the paper

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[379] Since the purpose of the program is to provide support for disabled individuals in financial need, it seems reasonable to assess this need by reference to the combined income of disabled individuals and others from whom they are legally entitled to support. In contrast, is seems unreasonable to reduce a disabled individual's entitlement to benefits where support is provided by someone who is not legally obliged to do so. To the extent that same-sex couples are subject to legal support obligations comparable to those of legally defined spouses, this analysis suggests that the income of such couples should also be aggregated for the purpose of computing disability benefits under a GAI.

[380] Since the purpose of the program is to provide income support to disabled individuals who, but for their disability, would be able to support themselves, eligibility criteria might reasonably differ from those for a non-refundable credit or deduction designed to recognize the additional costs of disability.

reviews the main conclusions and recommendations of the analysis, following the structure of Parts II, III, and IV.

A. Recognizing the Costs of Disability for Disabled Individuals and their Families

1. Description

Current income tax provisions recognize the costs of disabilities in computing the tax payable by disabled persons and supporting individuals through the medical expenses tax credit (METC), the disability tax credit (DTC), the infirm dependants and caregiver tax credits, and special provisions governing private savings in the form of trusts and tax-deferred savings plans. Other provisions recognize the costs of supporting and caring for dependent children through the wholly dependent person credit, the child care expense deduction (CCED), and the Canada Child Tax Benefit (CCTB). While the CCED operates as a deduction in computing net income, most of these provisions (other than the refundable CCTB) take the form of non-refundable credits against basic federal income tax otherwise payable.

2. Purpose

To the extent that the purpose of these provisions is to achieve horizontal equity among differently situated taxpayers, the analysis in Part I suggests that they should take the form of deductions in computing net or taxable income, rather than non-refundable or refundable credits. To the extent that their purpose is to insure against otherwise privately borne costs or to provide transfer payments to low- and modest-income individuals and families, however, they should take the form of refundable credits, rather than deductions or non-refundable credits. For these reasons, this paper has questioned both the 1988 conversion of what were formerly personal, disability, and medical expense deductions into non-refundable credits, and the elimination of general tax recognition for the costs of supporting dependent children with the introduction of the CCTB in 1993. While the CCTB represents an important social policy instrument to address child poverty, it does not substitute for a separate deduction for the costs of supporting dependent children as a matter of tax equity. On the contrary, as argued throughout this paper, while it is both possible and desirable to pursue both tax and social policy goals through the federal *Income Tax Act*, these goals and the measures through which they are implemented should be clearly distinguished. At a general level, therefore, this paper recommends that the *ITA* should be amended to convert what are now non-refundable personal, disability, and medical expense tax credits into deductions in computing taxable income. Other recommendations concern the introduction of a separate provision to recognize disability-related expenses, amendments to provisions dealing with private savings, and amendments to the CCED and the CCTB designed to recognize the additional costs of caring for and supporting disabled children.

3. Recommendations

a. Personal Tax Credits

Beginning with what are now the personal tax credits, this paper recommends the following: (1) an increase in the basic personal amount from $7,231 for the year 2000 to $10,000; (2) repeal of the current spousal, wholly dependent person, infirm dependants, and caregiver amounts; (3) the introduction of separate amounts of $4,000 for the first dependent child, $3,000 for the second dependent child, and $2,400 for the third and subsequent dependent children; (4) the introduction of a separate amount of up to $10,000 for disabled adults and elderly persons dependent on the individual for support, subject to a reduction based on the dependant's income; (5) the addition to these amounts of the disability amount currently found in sections 118.3 and 118.4 of the *ITA*; (6) full indexation of these amounts for inflation; and (7) the conversion of these amounts from non-refundable credits to deductions in computing taxable income.

b. Disability Amount

With respect to the disability amount in recommendation (5) above, this paper further recommends (8) that eligibility for the disability amount should be independent of any separate claim for attendant and/or nursing home care; (9) that the statutory definition of a "basic activity of daily living in relation to an individual" in paragraphs 118.4(1)(c) and (d) be amended by repealing the exclusion of "any other activity, including working, housekeeping or a social or recreational activity" in paragraph 118.4(1)(d), by adding "working", "housekeeping", "social and recreational activities", "breathing", and "seeing" to the list of basic activities of daily living in paragraph 118.4(1)(c), by amending subparagraphs 118.4(1)(c)(iii) and (iv) to refer to communication in everyday settings rather than "a quiet setting" with "another person familiar with the [disabled] individual", and by replacing the exhaustive word "means" in the definition with the open-ended word "includes"; (10) that the definition of a "marked restriction" in a basic activity of daily living in paragraph 118.4(1)(b) be amended to provide that "an individual's ability to perform an activity of daily living is markedly restricted where, even with therapy and the use of appropriate devices and medication, the individual is blind or significantly restricted in his or her ability to perform an activity of daily living a substantial amount of time"; and (11) that consideration be given to varying the disability amount based on the severity of the individual's disability, the extent to which the individual's ability to perform a basic activity of daily living is restricted, or the number of basic activities of daily living that the individual is markedly restricted in the ability to perform.

c. Medical and Disability-Related Expenses

Turning to medical and disability-related expenses currently recognized in section 118.2, this paper recommends (12) that recognition of these itemized expenses also take the form of a deduction in computing taxable income rather than a non-refundable credit against basic federal income tax otherwise payable; (13) that recognition of medical and disability-related expenses be distinguished through the introduction of a separate disability expense deduction; (14) that the list of eligible disability-related expenses for a separate deduction be based on disability-related expenses currently recognized in subsection 118.2(2), be expanded to include disability-related transportation expenses, recreational programs and equipment designed to enhance the skills of disabled persons, and other costs identified by the Council of Canadians with Disabilities, and be supplemented by a general criterion of eligibility for all reasonable amounts to the extent that they are paid for the purpose of ameliorating the effects of a severe and prolonged mental or physical impairment and/or enabling the individual to perform one or more basic activities of daily living; (15) that eligible attendant care expenses be defined to include reasonable amounts paid as remuneration to a disabled individual's spouse; (16) that eligible nursing home care be defined to exclude room and board; (17) that the list of eligible medical expenses for the medical expense deduction be amended by repealing those items made eligible for a separate disability expense deduction, and supplemented by a general statement of principle according to which eligible medical expenses would include all reasonable amounts to the extent that they are paid for the purpose of acquiring goods or services certified as medically necessary by a qualified medical practitioner; (18) that supporting individuals be allowed to claim the medical and disability expense deductions regardless of their familial relationship with the patient or disabled person; and (19) that the current threshold for eligible medical expenses be re-examined in the case of medical expenses recognized through an amended medical expense deduction and eliminated in the case of disability-related expenses recognized through a new disability expense deduction.

d. Private Savings

With respect to tax provisions relating to private savings, this paper has made several recommendations: (20) that the preferred beneficiary election should be available for any disabled beneficiary regardless of his or her relationship with the settlor of the trust; (21) that "rollovers" on transfers of tax-deferred savings should be similarly available regardless of the relationship between the deceased and the recipient, provided that the recipient was financially dependent on the deceased and either under the age of 18 or dependent by reason of mental or physical infirmity; (22) that these tax-deferred savings should be directly transferable to a tax-exempt trust governed by a registered savings plan in the name of the disabled beneficiary rather than subject to the complex rules set out in the current statute; (23) that consideration be given to the introduction of a separate registered disability savings plan designed to encourage private savings to support individuals with a mental or physical disability; and (24) that the existence of these savings plans should not affect the beneficiary's entitlement to social assistance.

e. Child and Disabled Adult Care Deductions

As for the child care expense deduction, this paper has made the following four recommendations: (25) that the maximum amounts that may be claimed under the CCED for infirm children not eligible for the disability tax credit should be increased; (26) that maximum child care expenses should be fully indexed for inflation; (27) that the aggregate limit based on two-thirds of the claimant's earned income should be replaced with a rule prohibiting taxpayers from deducting otherwise allowable child care expenses in an amount exceeding their earned income for the year; and (28) that the provision should be amended to permit the deduction to be claimed by either spouse for amounts up to the stipulated maximum that are paid either to third parties or the other spouse. A further related recommendation (29) involves the introduction of a separate deduction for the costs of caring for a disabled adult to enable a supporting individual to engage in income-earning pursuits.

f. Canada Child Tax Benefit

Although this paper has not examined the CCTB in any detail, it makes two recommendations: (30) that the numerical formula in subsection 122.61(1) be rationalized to reduce its complexity; and (31) that this formula be further amended by the introduction of a supplement for children with mental or physical infirmities.

B. Facilitating Labour Market Integration

1. Description

With respect to tax measures designed to facilitate integration of disabled persons in the paid labour market, the *ITA* contains several provisions directed at disabled persons themselves and other provisions directed at employers. The former include the exemption for employer-provided transportation and attendant care benefits in subsection 6(16), the attendant care expense deduction (ACED) in section 64, and the refundable medical expense supplement (RMES) in section 122.51. The latter consist of provisions allowing businesses to deduct amounts spent for prescribed disability-related modifications to buildings and prescribed disability-related equipment in the year in which they are paid, rather than being required to capitalize these costs and claiming deductions in subsequent years.

2. Purpose

While the exemption for employer-provided transportation and attendant care benefits and the deduction for attendant care expenses reflect a tax policy concern to exclude from a disabled person's net income all necessary costs to earn this income, the RMES and accelerated deductions for business expenses on disability-related equipment and building modifications reflect social policy concerns to reduce the impact of lost subsidies for disability-related supports under provincial social assistance plans (in the case of the RMES) and to actively encourage investments in disability-related equipment and building modifications in order to make the workplace more accessible to disabled persons. These distinct purposes should be taken into account in evaluating these provisions and considering alternatives for their reform.

3. Recommendations

a. *Costs of Earning Income*

With respect to costs of earning income, the exemption for employer-provided transportation and attendant care benefits is properly seen as a complement to a corresponding deduction for transportation and attendant care expenses which must be incurred by a disabled person in order to work, but which are not reimbursed by an employer. For this reason, this paper recommends (32) the introduction of a separate deduction for commuting expenses that must be incurred by a disabled taxpayer in order to engage in income-earning activities (employment, business, or education). While this deduction should be structured along the lines of the current attendant care expense deduction, this paper has also recommended (33) that this provision should be amended to make eligibility turn on the lesser standard of mental or physical infirmity rather than the more onerous standard of severe and prolonged mental or physical impairment used for the current disability tax credit; (34) that the deduction should be available for reasonable amounts paid for attendant care provided by a disabled person's spouse; and (35) that attendant care expenses should be deductible up to the full amount of the claimant's earned income rather than the two-thirds limit contained in paragraph 64(b). Where applicable, a similar structure should apply for a separate deduction for commuting expenses. Likewise, (36) the exemption for employer-provided transportation and attendant care benefits should be available for employees with a mental or physical infirmity, even if they do not satisfy the more onerous standard of severe and prolonged mental or physical impairment used for the current disability tax credit.

b. *Refundable Medical Expense Supplement*

As for the RMES, this paper does not question the social policy objective to offset the loss of subsidies for disability-related supports under provincial social assistance where disabled individuals earn additional income from participation in the paid labour force, but makes two recommendations to amend the provision in a way that might better achieve this objective: (37) to calculate the refundable credit on a separate measure of disability-related expenses without any annual threshold (such as would be provided by a separate disability expenses deduction or credit); and (38) to rename the refundable credit the "refundable disability expenses supplement" (RDES).

c. *Tax Incentives Directed at Employers*

With respect to tax incentives directed at employers, this paper has questioned the current use of accelerated deductions, and recommended instead (39) that any such incentives (whether for investments in physical assets designed to make the workplace more accessible to disabled persons or for hiring disabled persons themselves) should be delivered in the form of refundable tax credits delivered throughout the year rather than deductions the value of which depends on the taxpayer's marginal tax rate and the amount of which is received only at the end of the year; and (40) that the cost of these incentives be regularly reviewed in annual tax expenditure accounts. Moreover, to the extent that tax or non-tax incentives are used to encourage employers to hire disabled persons, this paper recommends (41) that these incentives should be designed to discourage a "revolving door effect" (for example by ensuring that the value of the incentive accrues over a period of more than a year rather than immediately upon the hiring of the disabled person).

C. Income Support for Disabled Individuals

1. Description

Income support for disabled individuals is available from a variety of sources, including workers' compensation programs, the Canada and Quebec Pension Plans, Employment Insurance, employer-provided sick leave or long-term disability insurance, private disability insurance, tort compensation, and provincial social assistance plans. The tax treatment of income from and contributions to these various plans is almost as varied as these sources themselves.

2. Purpose and Recommendations

While most commentators agree that contributions to and payments from different disability income plans should be subject to a consistent set of rules, some suggest that this consistency is best achieved by exempting all sources of disability income from tax and including employer-paid disability insurance premiums as taxable benefits. For reasons of tax and social policy, this paper has argued (42) that disability income should be generally taxable regardless of the source, while (43) contributions to public and private disability insurance plans should be deductible or non-taxable as a benefit if paid directly by the taxpayer's employer. To the extent that disability payments are designed to offset non-deductible medical or disability-related expenses, however, this paper has recommended (44) that payments for these purposes be exempt. Likewise, insofar as disability payments reflect compensation for pain and suffering, this paper has suggested (45) that these payments should also be exempt. Yet another recommendation (46) would exempt social assistance payments from tax on the basis that they are part of a "negative income tax" designed to provide income support to persons in financial need. Where disabled individuals receive lump-sum payments, this paper has also recommended (47) the introduction of various measures (*e.g.*, rollover rules for contributions to deferred savings plans) to lessen the burden of progressive rates on amounts that are received in a single taxation year.

Finally, to the extent that the current mix of public and private disability insurance plans provides inadequate levels of support and leaves significant gaps in available coverage, this paper has recommended (48) that consideration be given to the introduction of a refundable tax credit modeled on the CCTB and designed to provide a basic guaranteed annual income to all Canadians with disabilities. In addition to the other measures recommended in this paper, the introduction of a National Disability Tax Benefit along these lines would be the crowning achievement in a series of tax and social policy reforms designed to ensure that disabled persons can assume their proper place as full participants in the economic and social life of this country.