

NEWS RELEASE

Canada Revenue Agency makes life harder for Canadians with disabilities by denying them the Disability Tax Credit on questionable grounds

Toronto — May 19, 2016 —The Canada Revenue Agency (CRA) continues to make it increasingly difficult for Canadians with disabilities to access a modest tax credit that means a great deal to people with marginal incomes.

“In this area our tax administration is unfair, inefficient and not accountable to anyone,” says tax accountant Peter Weissman. “We are concerned about CRA’s disregard not only for its own policies and procedures designed to protect the interests of the taxpayer but also numerous Tax Court of Canada rulings that have provided guidance as far as interpreting the legislative intent of the *Income Tax Act*.”

The CRA has abdicated its mandate for fairness by denying the Disability Tax Credit (DTC) to eligible Canadians with disabilities. The tax system is too complicated or expensive for most people to appeal the CRA's decisions..

“It has become virtually impossible for the majority of people living with severe psychiatric illnesses to access the DTC without appealing to the Tax Court of Canada,” says mental health advocate, Lembi Buchanan, who has successfully represented dozens of individuals navigate the appeal process. “CRA civil servants with insufficient medical and legal training are sending rejection notices without providing valid reasons for their decisions. Canadian taxpayers should be able to access the DTC without having to pay expensive legal bills for lawyers to represent them in court or excessive contingency fees to companies to act on their behalf.”

Peter Weissman and Lembi Buchanan, members of the former Disability Advisory Committee to the Minister of National Revenue, created in 2004 but shut down by the government the following year, are appealing to the Minister of Finance Bill Morneau and Minister of National Revenue Diane Lebouthillier to address several systemic problems with the administration of the DTC by reinstating the Disability Advisory Committee.

In addition to a modest return on taxes, the DTC has become the screening tool for a growing number of federal and provincial income support programs including the Registered Disability Savings Plan and the Canada Child Disability Benefit.

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For further information, please contact:

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Encls.

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April 4, 2016

The Honourable Diane Lebouthillier
Minister of National Revenue
House of Commons
Ottawa, ON K1A 0A6

The Honourable Bill Morneau
Minister of Finance
House of Commons
Ottawa, ON K1A 0A6

Dear Ministers:

Re: Request to reinstate the Disability Advisory Committee

Overview

In March 2005, former Minister of National Revenue, John McCallum, appointed a Disability Advisory Committee (DAC) reporting directly to him on all administrative aspects of the tax system to ensure fair treatment of people with disabilities.

The creation of the DAC was one of the many recommendations of the Technical Advisory Committee on Tax Measures for Persons with Disability. The DAC was comprised of volunteers from across Canada (two of whom are the authors of this letter) and members of the Specialty Benefits Directorate of the Canada Revenue Agency (CRA). A photo from our inaugural meeting is attached along with our bios.

The creation of the DAC led to an excellent working relationship between senior CRA staff and the committee members. Although we made significant progress on a number of important issues during our first year, our committee was canceled soon after the Conservative government was sworn in on February 6, 2006.

Not only was the DAC's tenure cut short when the government changed but the significant improvements that were made to the administration of the DTC ten years ago by your Liberal government have been all but lost.

Why Reinstate the DAC?

We believe that there is an urgent need to reinstate the DAC. The DTC is even more important now for many Canadians than it was when the DAC was cancelled because it is now the basis for eligibility for Registered Disability Savings Plan and Qualified Disability Trust benefits.

Although the CRA has taken steps to improve transparency and tax fairness, and implemented the Taxpayer Bill of Rights and the Service Complaints Program, there are serious problems with the current administration of the DTC.

We have observed the following systemic issues regarding applications for the DTC:

- Disregard of policies and procedures as outlined in its *Income Tax Folio on the Disability Tax Credit*, previously espoused in an *Interpretation Bulletin*.
- Determination of eligibility by a clerical staff unable to interpret the medical information in Form T2201 Disability Tax Credit Certificate and in follow-up questionnaires referred to as “clarification letters.”
- Creating questions in the clarification letters that are not legal tests for eligibility.
- Interpreting negative responses in these clarification letters as conclusive evidence to deny the DTC while disregarding relevant medical information already provided by the doctor.
- Defining “markedly restricted all or substantially all of the time” as being “at least 90% of the time” even though a significant body of case law recognizes that a mathematical formula is not an appropriate measure of the effects of an impairment, especially for people suffering from psychiatric illnesses.
- Requiring doctors to speculate whether or not their patients with mental impairments meet the CRA’s narrow interpretation of “all or substantially all of the time” even though there are no specific tests to measure brain activity in a 24-hour time frame.
- Disallowing the tax credit on questionable grounds or fabricated reasons that have no relevance to the applicant.
- Abusing the internal appeal process by withholding documentary evidence, for example, clarification letters that may have formed the basis for disallowing the DTC.

There are numerous Tax Court rulings in which the court has had no choice but to exercise common sense in order to achieve a reasonable and just result. In our opinion, no judge has made a more indelible contribution to the understanding of the legislative intent of the *Income Tax Act* as former Chief Justice of the Tax Court of Canada, Donald G. H. Bowman who consistently applied his pragmatic and reasonable approach to DTC determinations while on the bench.

In one of his most important and influential decisions relating to the DTC (*Radage v. The Queen* 96 DTC 1615), Justice Bowman provided the following “sensible practical and compassionate interpretation” of the legislation:

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

This jurisprudence has guided the decisions of at least 64 subsequent Tax Court of Canada rulings but has had no influence in CRA’s administration of the DTC.

Our Experiences

Our concerns are based on our experiences “in the trenches,” as one author is a tax practitioner with over 25 years in practice and the other, the spouse of a person with a mental impairment, who has had first-hand experience with the CRA, Parliament, the Tax Court of Canada and the Federal Court of Appeal.

We have seen and been involved with:

- consultations and/or direct experience with individuals and organizations;
- reviews of completed Form T2201 Disability Tax Credit Certificates;
- reviews of Notices of Determination disallowing the DTC;
- formal reviews and appeals to CRA;
- appeals to the Tax Court of Canada; and
- judicial reviews of these decisions by the Federal Court of Appeal.

It seems as if it is becoming an institutional tactic for the CRA to deny DTC applicants' eligibility for the DTC on questionable grounds. Although all applicants have the right to appeal decisions to the Tax Court of Canada, the system is too complicated or expensive for most of them to challenge the CRA.

One unintended consequence of the myriad of problems with the administration of the DTC is the growth of a highly profitable industry. Currently, there are approximately 24 companies in Canada charging contingency fees to assist taxpayers in navigating the complex DTC application process.

We applaud Parliament's passing Bill C-462 to limit fees these companies (referred to as “promoters”) can charge. However, protecting taxpayers’ interests from excessive fees while not addressing systemic problems with the administration of the DTC seems hypocritical to us.

Conclusion

Now, more than ever, it is of critical importance to create productive dialogue between stakeholders of the special needs community, experienced professionals and the CRA to address problems with the administration of the DTC.

We must ensure that all Canadians with severe disabilities are entitled to a just result when applying for this modest credit intended as a tax fairness measure.

We would welcome an opportunity to discuss our request with you at your earliest convenience.

Thank you for your consideration.

Sincerely,



Peter Weissman, CPA, CA, TEP



Lembi Buchanan, M.S.M.

Encl. DTC Backgrounder
Biographies of the authors
Photograph of the previous DAC (2005) with Minister McCallum

c.c. Right Hon. Prime Minister Trudeau
Hon. John McCallum, Minister of Immigration, Refugees & Citizenship
Hon. Carolyn Bennett, M.D., Minister of Indigenous & Northern Affairs
Hon. Kirsty Duncan, Ph.D., Minister of Science
Hon. Jody Wilson-Raybould, Minister of Justice & Attorney General of Canada
Hon. Carla Qualtrough, Minister of Sport & Persons with Disabilities
Cheryl Gallant, M.P. Renfrew-Nipissing-Pembroke
Murray Rankin, M.P. Victoria

b.c.c. Hon. Donald G. H. Bowman, former Chief Justice, Tax Court of Canada

Backgrounder: Disability Tax Credit

The federal Disability Tax Credit (DTC) is a modest tax measure to assist people with disabilities who are often faced with additional costs not covered by the Medical Expense Tax Credit. Historically, the tax credit was limited to persons who were blind or confined to a bed or wheelchair.

- 1986 Eligibility for the DTC expanded to include all severely disabled Canadians.
- 1991 Parliament amends the *Income Tax Act* when concerns are expressed about the broad interpretation of the legislative intent of the DTC. Eligibility was to be determined by specified “basic activities of daily living” for people with physical and mental impairments. In an effort to further limit the number of individuals qualifying for the DTC, the legal test required an individual to be “markedly restricted all or substantially all of the time... or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living.”
- 2000 Life-Sustaining Therapy added as a new category qualifying for the DTC.
- 2001 Letters sent to 106,000 Canadians with disabilities asking them to requalify for the DTC. Concerns had been raised citing abuses by 80 per cent of patients and their physicians filing invalid claims. Nevertheless, there was a public outcry leading to hearings held by the Subcommittee for the Status of Persons with Disabilities and its report *Getting it Right for Canadians: The Disability Act* which criticized the administration of the DTC by the Canada Customs and Revenue Agency (CCRA).
- 2002 House of Commons censured CCRA for practices that were “grossly inadequate.” A unanimous vote in the House of Commons called for a more humane and compassionate approach.
- 2003 Technical Advisory Committee on Tax Measures for Persons with Disabilities (TAC) created with a mandate to help the federal government improve the fairness of the treatment of persons with disabilities under the income tax system.
- 2004 TAC issues its report, *Disability Tax Fairness*.
- 2005 TAC recommendations led to the following revisions of the *Income Tax Act*.
- Mental functions for everyday life defined as:
 - Memory
 - Problem solving, goal setting and judgment (taken together)
 - Adaptive functioning.
 - Cumulative effect of significant restrictions.
 - Life-sustaining therapy expands eligibility requirements.
- TAC recommendations also included the creation of a Disability Advisory Committee (DAC), composed of consumer and professional representatives reporting directly to the Minister of National Revenue on all administrative aspects of the tax system related to persons with disabilities.
- 2006 DAC disbanded by the newly elected Conservative government.
- 2008 Registered Disability Savings Plan (RDSP) created for individuals with disabilities to help ensure their future financial security. Eligibility for the DTC is a requirement to participate in the program.
- 2013 Concerns expressed in Parliament regarding the rapid growth of companies (“promoters”) assisting individuals access the DTC and charging contingency fees up to 40 per cent of the refund.
- 2014 Bill C-462 Disability Tax Credit Promoters Restrictions Act passed in House of Commons and received Royal Assent but has not been implemented to date.

Lembi Buchanan M.S.M.



Lembi Buchanan has been recently awarded the Meritorious Service Medal by the Governor General of Canada recognizing her dedication and perseverance to ensure fair tax treatment for the most vulnerable members of our society.

Lembi began advocating for the reform of the Disability Tax Credit (DTC) in 2001 when her husband James Buchanan when the Canada Revenue Agency (CRA) did not recognize mental illnesses as being as disabling as physical illnesses. She appealed to the Tax Court of Canada on his behalf and the landmark case was upheld by the Federal Court of Appeal.

Lembi established the “Fighting for Fairness” campaign in 2001 and spearheaded the Coalition for DTC Reform which included a number of national health charities representing people with physical and mental impairments. The Coalition successfully lobbied the federal government and in 2003, Lembi was appointed a member of the Technical Advisory Committee on Tax Measures for Persons with Disabilities. The federal government adopted many of the committee’s recommendations including amendments to the *Income Tax Act* in 2005. Lembi was subsequently appointed to the Disability Advisory Committee created as a consultative forum by the Minister of National Revenue to review tax measures for persons with disabilities and also to provide recommendations to improve the administration of the DTC.

Peter Weissman CPA, CA, TEP



In his 25+ years as a tax specialist, Peter has focused on corporate tax and estate planning, reorganizations and shareholder planning. His practice also includes creative use of trusts, compensation strategies and shareholder estate and succession planning (domestic and cross-border) for clients (including special needs families). Peter's practice also includes structuring mergers and acquisitions and performing tax due diligence for potential purchasers.

Peter has acted as an expert witness in matters relating to professional negligence as well as estate and corporate litigation matters.

Peter is a member of the Chartered Professional Accountants, The Society of Trust and Estate Practitioners (STEP) and The Canadian Tax Foundation (CTF).

He was also the inaugural co-chair of the Disability Advisory Committee to the Minister of National Revenue on Tax Measures for People with Disabilities and is currently National Chair of STEP Canada's education committee and a Governor of the CTF.

Academic achievements, memberships and professional designations:

- Governor, Canadian Tax Foundation (November 2013 - current)
- National Chair STEP Canada Education Committee (2012 - current)
- Member, STEP Canada Education Committee (2007 - 2011)
- Chair STEP Canada Student Liaison Committee (2007 - 2009, 2011)
- Inaugural Co-Chair of The Disability Advisory Committee to the Minister of National Revenue (2005)
- Trust and Estate Practitioner (TEP)
- CICA In-Depth Tax Course - 1990
- Chartered Accountant (now CPA, CA) - 1988
- Bachelor of Business Administration - York University, 1986

Disability Advisory Committee



Ottawa - July 19, 2005 - Minister of National Revenue John McCallum announced yesterday, the creation of the Disability Advisory Committee to deal with the administrative aspects of the Disability Tax Credit and with implementing recommendations made by the Technical Advisory Committee on Tax Measures for Persons with Disabilities.

"I am pleased to announce that the CRA has created the Disability Advisory Committee. This committee will provide a forum to identify the needs and expectations of the disability community," said McCallum. "The Disability Advisory Committee is an important consultative forum through which members can provide helpful advice, comments, and suggestions on tax measures for persons with disabilities."

The committee will report directly to the Minister of National Revenue on all administrative aspects of the tax system related to persons with disabilities. McCallum and the committee held their inaugural meeting in Ottawa yesterday.

The federal government established the Technical Advisory Committee on Tax Measures for Persons with Disabilities in February 2003 to recommend ways of improving the fairness of treatment under the income tax system for persons with disabilities, taking into account available fiscal resources. It specifically recommended that the CRA form a consultative committee composed of consumer and professional representatives.

The 12 committee members, appointed by McCallum, come from different areas of the country and include professionals, such as medical practitioners and tax lawyers, advocates for the disability community, and persons with disabilities: George Archibald, Harry Beatty, Dr. Pierre Beauséjour, Dr. Gary Birch, Lembi Buchanan, Dr. Karen Cohen, Hubert Drouin, Deanna Groetzinger, Dr. Ashok Muzumdar, Eileen Reppenhagen, Dr. Raffath Sayeed, and Peter Weissman.