

Brief Submitted to the
Sub-Committee on the Status of Persons with
Disabilities

*The Current Disability Tax Credit Certificate, Form T2201, its
Impact on Individuals with Disabilities, and Case Law*

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Introduction

Thank you, Chair, Dr. Bennett and members of the Sub-Committee on the Status of Person with Disabilities for this opportunity to make a presentation on behalf of my husband and so many others who suffer from serious mental illnesses in our country and are being treated unjustly by Canada Customs and Revenue Agency (CCRA). And thank you for recognizing the urgency for a full review of the current Disability Tax Credit Certificate (DTC) T2201 form and responding to my original submission to this Committee in March 2001, titled, *The Current Disability Tax Credit Certificate, Form T2201, its Impact on Individuals with Disabilities, and Case Law*.

I will be following the progress of this submission throughout the parliamentary process until the issues brought forward today are resolved. We are fortunate to live in a democratic society where there are no insurmountable obstacles when we are dealing with the concepts of what is fair and what is right.

Mental illness is one of the least understood and least accepted of all illnesses. The particular disadvantages facing the mentally disabled was recognized by the Supreme Court of Canada in *Regina v. Swain 1991*. Judge C.J. Lamer stated the following: “There is no question but that the mentally ill in our society have suffered from historical disadvantage, have been negatively stereotyped and are generally subject to social prejudice.”

Individuals with mental illnesses remain among the most vulnerable members of our society. Unlike individuals with physical disabilities, they do not have the intellectual capacity or the mental stamina to pursue their causes. For many people, and their families, these illnesses are a source of shame and embarrassment. As a result they are unwilling to stand up for their rights or to protest when an injustice has been done to them.

That is why I am here today.

I have heard too many heart-breaking stories.

The current Disability Tax Credit Certificate (DTC) T2201 Form discriminates against individuals with severe and prolonged mental illnesses

In recent years, it has become virtually impossible for anyone with a serious mental illness to qualify for the DTC without appealing the decision by the CCRA to the Tax Court of Canada.

At the present time, health professionals are faced with the absurdity of dealing with a question with respect to mental functions that reads, “Can your patient think, remember or perceive?”

Dr. Hoffman, Chief of Psychiatry for North York Hospital and Associate Professor of Psychiatry for the University of Toronto explains the frustration that so many doctors experience when completing the T2201 form: “The only category of basic activities of daily living pertaining to the seriously mentally ill would be perceiving thinking and remembering. Since all persistent or recurrent seriously mentally ill patients can ‘think, perceive or remember’ not one of them would be eligible for the DTC.”

The question is designed to exclude individuals with mental illnesses, whether intentionally or unintentionally. However, the Tax Act was not designed to provide tax relief only for individuals with physical disabilities.

Such discrimination is unlawful.

Such discrimination ignores CCRA’s own Fairness Policy

Such discrimination is a poor reflection of our society’s values.

My husband, who suffers from bipolar disorder (also known as manic depressive illness), was first diagnosed in February 1973 after he was discovered on the roof of St. Patrick’s Cathedral in New York City, only partially clothed in frigid weather, waiting for a helicopter to take him directly to God.

My husband has not always been disabled by a medical illness caused by a biochemical disorder in the brain. For almost 20 years, he managed to lead a relatively productive life because of a new “wonder drug” called lithium carbonate, which is nothing more than a common salt.

In December 1990, my husband suffered a major setback and never fully recovered. Back then, he was working as a public relations officer for a major mining company. This time, he actually believed that he was God and that it was within his power alone to cure me of cancer. He had to be committed to the psychiatric ward because he was considered to be a danger not only to himself but also others. Since then, he has been unable to work in any capacity. There is not a moment in the day or night that he is not held hostage by an illness that can have devastating consequences not only for him but also for the rest of his family. The roller coaster ride can begin at any time, set off by a manic high with grandiose delusions and ultimately plummeting into the depths of a debilitating depression.

For years, my husband and others with serious mental illnesses received the tax credit. But subsequent applications for the DTC were rejected. The Tax Act hasn’t changed. The eligibility criteria haven’t changed. It is the same diagnosis and prognosis. Often, it is still the same doctor who is filling out the form. Only the form has changed.

Why are these individuals being denied the DTC?

Mental impairments are not always perceived to be as severe as physical impairments

How do I know?

Paul Martin said so. With total disregard for the fact that my husband had previously qualified for the tax credit under the strictest interpretation of the Tax Act by Health and Welfare Canada, the Minister of Finance wrote in a letter addressed to me on September 13, 1999: “The DTC provides tax assistance for individuals that are severely impaired in a basic activity of daily living such as walking, feeding and dressing oneself which would indicate a much more severe disability” (Than my husband). Mr. Martin neglected to mention that one of the “basic activities of daily living” spelled out in the Tax Act is “thinking, perceiving, and remembering.”

And why does government want to exclude individuals with mental illnesses?

Because of the expense.

And how do I know?

Once again, Paul Martin said so. In the same letter, he also wrote. “If eligibility for the DTC were broadened to include situations as you have described as well as persons with severe disabilities, the federal cost would be much greater than the current \$275 million.

Providing equal benefits for the most vulnerable members in our society is becoming a financial burden. Unfortunately, the perception is that it is more difficult to assess mental impairments than physical impairments. I refer once again to Paul Martin’s letter where he says, “In addition, the eligibility criteria would become even less clear and even more difficult to administer fairly.”

Nothing could be further from the truth. Certainly, the federal government has not made the effort to ensure that mental impairments are on equal parity with physical impairments. Furthermore, CCRA officials have ignored case law from previous appeals in the Tax Court of Canada that provide significant guidelines in the determination of whether or not an individual’s specific disability falls within the eligibility criteria.

In *Radage v. The Queen 1996*, Tax Court Judge Donald Bowman suggested that the legislators, when drafting the Tax Act referred to the basic activity of daily living, that is thinking, perceiving and remembering, “in a manner that conforms to common human experience.” Judge Bowman explored the meaning of each word in depth and concluded that Taavi Radage, at 24 years of age, was markedly restricted in his ability to think, perceive and remember because of his intellectual limitations.

It is important to note that Taavi was earning approximately \$60 per week in a work placement suited to his intellectual limitations. The fact that Taavi was employed did not automatically disqualify him for the DTC. The judge noted that Taavi did not have any

immediate avenues for increased earning power and that his disabilities make his career prospects dismal indeed. Judge Bowman ruled that Taavi's "capacity to think, perceive and remember, though not non-existent, was sufficiently limited to bring him within the said guidelines."

There is no question that setting appropriate parameters or thresholds for mental impairments is a more complicated process than for physical impairments but only for someone who does not have the medical knowledge to do so. Instead of consulting with health professionals, the federal government has arbitrarily decided that mental functions can be measured in the same manner as physical disabilities. As far as the government is concerned, the functions of thinking, perceiving and remembering can be measured on a scale of 1 to 100.

In Bulletin IT-513R2, "an individual is viewed as being 'markedly restricted' in performing a basic activity when the individual is restricted for at least 90% of the time." In a supplementary questionnaire sent to physicians, asking for further clarification, one of the questions reads as follows, "During the year(s), what percentage of time was your patient unable to think, perceive and remember?" As far as I know, there is no piece of technological equipment that can provide such a measurement, unless the individual is brain dead and then the answer is 100%. Any other answer is pure speculation as far as the doctor is concerned. Unless the doctor is aware of the 90% threshold set by CCRA, chances are that the individual will be disqualified.

In *Buchanan v. The Queen 2000*, Judge Diane Campbell ruled in favour of the Appellant, quoting extensively from the Radage case. She also stated, "Although the Appellant is certainly able to operate adequately in some areas, his impairment permeates his entire existence. The facts support that while engaged in some seemingly rational activity to an outsider, all other though processes are otherwise exploding in an array or erratic, bizarre and potentially harmful activities. However, the Appellant's ability to perceive, think and remember, although non-existent, is of such severity that his entire life is affected to such a degree that is unable to perform the necessary mental tasks required to live and function independently and competently in everyday life... the Appellant's condition and resulting behaviour so far exceeds the normal and reasonable ambit that he comes within the otherwise very narrow confines of these sections of the Act."

CCRA has made an Application in the Federal Court of Appeal on behalf of the Minister of National Revenue for a judicial review of Judge Campbell's ruling.

The federal government has made two assumptions that are not true:

1. individuals with a severe and prolonged mental impairment cannot think, perceive or remember, and
2. individuals with a severe and prolonged mental impairment cannot manage or initiate personal care without constant supervision.

Although medications have improved the overall quality of life, they do not cure the illness. Nor do they necessarily eliminate all of the disabling impacts of the illness.

Canadian Charter of Rights and Freedoms

Besides ignoring case law, CCRA officials have also ignored the provisions of the Canadian Charter of Rights and Freedoms.

“Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The Supreme Court of Canada has recognized the distinct disadvantage and negative stereotyping faced by persons with mental disabilities and has held that discrimination against individuals with mental disabilities is unlawful.

We expect our government to be fiscally responsible. But it is unconscionable when cost-saving measures are carried out by targeting our most vulnerable members of society. In fact, the Charter does not allow lesser benefits to individuals with mental impairments than to individuals with physical impairments.

When Supreme Court Justice J. Sopinka delivered the judgment in *Battlefords and District Co-operative Limited v. Gibbs* 1996, he stated the following: “One of the reasons such legislation (referring to human rights legislation) has been so described is that it is often the final refuge of the disadvantaged and disenfranchised... the last protection of the most vulnerable member of society.”

In this court case, the employer, Battlefords and District Co-operative Limited, provided disability insurance coverage to all of its employees if they were no longer able to perform their duties on the job. Under the terms of the policy, an employee would be covered until the age of 65 as long as the individual continued to be disabled.

However, if the disability was the result of a mental disorder, the individual would only be covered for a two years unless he or she was institutionalized because of the disability. As a result of the restrictive clause in the policy, Betty-Lu Gibbs was denied the benefit after two years because of a mental disability. The Court ruled that she was discriminated against by her employer.

In this Court case, discrimination was described as a “distinction, whether intentional or not, but based on ground relating to personal characteristic of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”

Therefore, it is unlawful for CCRA to impose unrealistic restrictions for the assessment of individuals with mental disorders that are virtually impossible to surmount when similar restrictions are not imposed on individuals with physical disabilities.

Consequences of the recent changes to the Disability Tax Credit Certificate T2201

Prior to 1994, the Disability Tax Credit Certificate asked physicians to provide the diagnosis of the disability in Part III and in Part IV, a “description of how the effects of the disabling condition outlined in Part II (above) and any other associated conditions cause the individual to be markedly restricted in his or her ability to perform basic activities of daily living.”

In the current form, physicians are not asked for the diagnosis until the very end of the form on page four. Instead, the “yes” and “no” questions are presented on page three and the example for the mental functions is very specific and clearly contradicts the objectives of the Tax Act.

“Can your patient perceive, think and remember? For example, answer **no** only if he or she cannot manage or initiate personal care without supervision.”

There is nothing in the Tax Act that defines the limitations of an individual with a mental illness.

The consequences of the changes to the new form, whether intentional or not, is that an individual such as my husband, and so many others who qualified in previous years for the tax credit, no longer qualify.

As far as Judge Campbell was concerned, in her ruling for *James Buchanan v. The Queen 2000*, Buchanan’s psychiatrist misinterpreted the Tax Act when completing the DTC Certificate for his patient. He disqualified his patient by putting the check mark into the “yes” box. But that is hardly surprising because the question pertaining to mental functions is incomplete, inaccurate and ambiguous.

Judge Campbell recognized that the doctor was confused when she stated: “From the facts and the evidence, it is clear, in answering the questions on the form, he (Dr. Robert Cooke, Centre for Addiction and Mental Health in Toronto) clearly held the incorrect view that most individuals with mental impairments did not qualify for the credit and that it was intended instead for those (as he wrote in his correspondence to the Appellant) who had difficulty ‘feeding themselves, dressing, using the toilet or carrying on a simple conversation.’ He clearly did not understand that the six items defining a basic activity of daily living, as contained in subsection 118.4 (1) (c), are not to be read together, but each activity is treated separately.”

Once again, we are faced with the irony that the Tax Act has not changed, the eligibility criteria have not changed, my husband’s disability has not changed. Even the doctor is the same. However, his assessment is based on the misleading information provided on the T2201 form by CCRA.

Not surprisingly, a number of judges have also criticized the current DTC Certificate.

Judge Bowman stated in his ruling in *Morrison v. The Queen*: “It is clear that Parliament should reconsider the wording that led the Federal Court of Appeal to the decision it reached... Having heard dozens of these cases, I have found that such certificates are often unreliable, contradictory or confusing... Section 118.3 is an important section and it means a great deal to many small taxpayers... The result of the decision of the Federal Court of Appeal is that severely disabled people have no recourse when a doctor or his secretary ticks the wrong box, whether negligently or deliberately, or refused to sign a certificate.”

Judge Bowman was referring to the Federal Court of Appeal case *MacIsaac v. The Queen 2000*, where, Judge Sexton had stated the following: “It is not obvious that putting the questions as they are in this form results in a thorough consideration by the doctor of the questions confronting him. Putting checks in a box is perhaps not the best way of eliciting just results.”

A just result is all I am asking for.

I am not suggesting that the federal government has no compassion. As a result of intensive lobbying efforts by the Cystic Fibrosis Foundation, the DTC was expanded in the year 2000 for individuals requiring life-sustaining therapy to assist with breathing. People undergoing kidney dialysis at least three times a week also qualify for the tax credit. In fact, the T2201 form has been completely revamped to accommodate two large groups of individuals who did not meet the eligibility criteria of the Tax Act.

I can only assume, as I said in the beginning of my presentation, that our society is still faced with myths and misconceptions about mental illness.

Therefore, I believe that our leaders must accept the burden of responsibility to ensure that these individuals are not discriminated against, whether intentionally or unintentionally.

We can no longer condone a government department that has abandoned its responsibility to the most vulnerable members of our society. The fact that the assessment process of the mental disorder may be perceived to be more difficult than a physical disability is no excuse.

Surely, as a society, we can do better.

I do not doubt for a moment that the Department of Finance is nervous about new reports about the increase in depression as one of the country's greatest health care concerns in the future.

But that does not mean that everyone who is diagnosed with depression is going to qualify for the DTC some day. They must still meet the criteria that the illness is **severe and prolonged** and **markedly restricts** their ability to think, remember or perceive “in a

manner that conforms to common human experience.” (Judge Bowman in *Radage v. The Queen*.)

The vast majority of people who are treated for depression are no more likely to qualify for the tax credit than anyone who breaks his or her leg. We don't expect everyone with a broken leg to end up in wheelchair the rest of his or her life.

In both cases, only a very small percentage of these individuals will meet the eligibility criteria of the Tax Act.

It is precisely because of these individuals that we have an obligation to ensure they are not being denied a benefit if they meet the eligibility criteria of the Tax Act as it has been interpreted by our courts and not the bureaucrats at CCRA.

Conclusion

The Disability Tax Credit is a modest tax credit that provides tax relief to many individuals on fixed incomes. Nevertheless, it is a necessary benefit to offset some of the financial burden of the mental illness.

We must ensure that mental disabilities are on parity with physical disabilities. Otherwise the DTC T2201 form is unconstitutional.

The revised format of the Disability Tax Credit Certificate T2201 Form must allow doctors an opportunity to provide a fair medical assessment of their patients' disabilities. Also, CCRA officials are obligated to accept the decision made by the doctor until the Federal Court of Appeal case of *MacIsaac v. The Queen* is overturned. If a doctor certifies that his or her patient meets the eligibility criteria, the doctor's decision is final. It cannot be disputed by CCRA.

In conclusion, I want to quote from Judge Bowman's ruling regarding Claude Lamothe, who was entitled to the DTC on the basis of his mental impairment caused by bipolar disorder. He cites from one of his own cases, *Noseworthy v. The Queen 1995*.

“The statute is very restrictive. The tests have been narrowed even more drastically with the recent amendments (1991). Yet, I think it is important that this Court, who for the first time, either sees the taxpayer or has some appreciation of the human aspects of disabled people, that we approach it to the extent that we can with a measure of compassion and understanding. I say this without meaning in any way to be critical of the Department of National Revenue... these are always tough judgment calls but in this one, I feel that, in the interest of giving effect to what I believe to be the object and spirit of this section and of giving effect to what I believe to be the humane and compassionate approach that we should take in these cases, it is in the interest of justice that the appeals be allowed.”