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## The Disability Tax Credit: Exploring Attitudes, Perceptions, and Beliefs About Disability

TAMARA LARRE\*

Cet article porte sur le crédit d'impôt pour personnes handicapées (CIPH), l'un des rares programmes fédéraux à offrir un financement direct aux personnes en situation de handicap. Cet article vise à analyser ce que révèle le CIPH sur les attitudes, les perceptions et les croyances à l'égard des handicaps. Il s'agit d'une importante contribution à la littérature, puisque les universitaires œuvrant dans le domaine du handicap ont montré à quel point les forces sociétales comme les attitudes, les perceptions et les croyances à l'égard des handicaps jouent elles-mêmes un rôle sur ceux-ci. En comparant les attitudes, les perceptions et les croyances des législateurs et des juges aux points de vue exprimés dans la littérature sur les handicaps, cet article révèle les stéréotypes blessants qui ne tiennent pas compte des différentes réalités des personnes en situation de handicap. De plus, l'article témoigne du désaccord qui existe entre quatre groupes, soit les universitaires du domaine du handicap, les législateurs, les juges et les contribuables, sur des questions comme la définition de « handicap » et les politiques appropriées pour encadrer la réalité des handicaps. L'auteure considère ce désaccord comme inquiétant, puisqu'il pourrait nuire à l'élaboration progressiste des politiques et à la clarté juridique. L'absence d'un consensus sur l'objectif du CIPH entrave entre autres son évaluation et son interprétation. Le CIPH est-il destiné à servir de soutien au revenu des personnes en situation de handicap (c'est-à-dire à servir de dépense fiscale) ou à prendre en considération les coûts qui nuisent à la capacité de payer (c'est-à-dire à servir de disposition formelle)? D'autres discussions et enquêtes s'imposent quant au CIPH et aux questions générales liées aux handicaps soulevées dans cet article.

This article examines the disability tax credit (DTC), one of the few federal programs providing direct funding to persons with disabilities. The goal of the article is to explore the DTC as a window into attitudes, perceptions, and beliefs about disability. This is an important contribution to the literature as disability scholars have shown how societal forces, such as attitudes, perceptions, and beliefs about disability, contribute to disability itself. Through comparing attitudes, perceptions, and beliefs of legislators and judges with the views expressed in the disability literature, the article reveals harmful stereotypes that fail to take into account the diverse realities of those experiencing disability. Further, the article shows a lack of agreement between four groups: disability scholars, legislators, judges, and taxpayers, on issues relating to the meaning of disability and the appropriate policy response to disability. The author contends this disagreement is troublesome as it may impede progressive policymaking and legal clarity. In

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particular, the evaluation and interpretation of the DTC is hindered by the lack of agreement about whether the DTC is intended to serve as income support for persons with disability (thus, operating as a tax expenditure), or to take into account costs negatively impacting ability to pay (thus, operating as a technical provision.) Further discussion and investigation of the DTC and the broader disability-related questions raised in this article are warranted.

THE CURRENT FEDERAL GOVERNMENT HAS SHOWN AN INTEREST in disability issues, raising their profile within cabinet and charging the Minister of Sport and Persons with Disabilities with creating new accessibility legislation.<sup>1</sup> This bringing of disability issues to the forefront presents a timely opportunity to examine how our society views disability. This article examines the disability tax credit (DTC), one of the few federal programs providing direct funding to persons with disabilities.<sup>2</sup> The goal of the article is not to perform a full policy analysis of the DTC, but rather to explore the DTC as a window into attitudes, perceptions, and beliefs about disability. This is an important contribution to the literature as disability scholars have shown how societal forces, such as attitudes, perceptions, and beliefs about disability, contribute to disability.<sup>3</sup> As others have pointed out, “attitudes disable.”<sup>4</sup> The social construction of disability may be reflected in language used to describe persons with disabilities and assumptions relied upon when making and discussing policies and laws.<sup>5</sup> Comparing these attitudes, perceptions, and beliefs with the views expressed in the disability literature can reveal harmful stereotypes that fail to take into account the diverse realities of those experiencing disability. Further, where there is a lack of agreement between the various subsets of society, the conflict may impede progressive policymaking and legal clarity. Conflicting views can also have a negative impact on the integrity of the tax system if they give rise to perceived unfairness of its provisions or their application.

In this article, I study (1) the disability and tax scholarship, (2) the DTC itself, and (3) recent case law on the DTC in order to gain an understanding of the attitudes, perceptions, and beliefs of scholars, legislators, judges, and individual taxpayers concerning two linked questions. The first question—what is disability?—encompasses questions including who is disabled, who

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<sup>1</sup> Employment and Social Development Canada, News Release, “What Does an Accessible Canada Mean to You?” (22 June 2016), online: <canada.ca/en/employment-social-development/news/2016/06/what-does-an-accessible-canada-mean-to-you-.html> [perma.cc/PY6J-GSEL]; Letter from Rt. Hon. Justin Trudeau to Mr. Kent Hehr, Minister of Sport and Persons with Disabilities (October 4, 2017) online: <pm.gc.ca/eng/minister-sport-and-persons-disabilities-mandate-letter> [perma.cc/7UCQ-L879].

<sup>2</sup> The other major federal direct support programs are the Canada Pension Plan and the Veterans Disability Pension. The term “persons with disabilities” is respectfully used here, while recognizing that there are conflicting views on the preferred term: see Tom Shakespeare, *Disability Rights and Wrongs* (London: Routledge, 2006) at 32.

<sup>3</sup> See discussion of social model in section I.A. Understanding Disability, below.

<sup>4</sup> See e.g. Richard Rieser, “Disability Discrimination, the Final Frontier: Disablement, History and Liberation” in Mike Cole, ed, *Education, Equality and Human Rights: Issues of Gender, ‘Race’, Sexuality, Special Needs and Social Class* (New York: RoutledgeFalmer, 2000) 118 at 119; Bradley A. Areheart, “Disability Trouble” (2010) 29:2 Yale L & Pol’y Rev 347 at 379.

<sup>5</sup> Arlene S Kanter, “The Law: What’s Disability Studies Got to Do with It or An Introduction to Disability Legal Studies” (2011) 42:2 Colum HRLR 403; Tamara Larre, “Pity the Taxpayer: The Tax Exemption for Personal Injury Damages as a Disability Policy” (2007) 33:1 Queen’s LJ 217.

gets to decide who is disabled, and the causes and effects of disability. The second question is: what is the appropriate policy response to disability? Examined in the context of tax policy, this second question can be more specifically framed as: what effect should disability have on taxes payable? If the DTC is viewed as the equivalent of a direct spending program that happens to be implemented through the tax system, it is also appropriate to ask: what financial supports, if any, should be available to persons with disabilities? The views of the four groups are compared throughout, and the analysis reveals that the various groups have differing answers to these questions. I argue that this misalignment of views of the groups is notable and troublesome. My brief conclusion reiterates that the question of how society should view and respond to disability should continue to be debated and discussed. It is hoped that this article can make a contribution to the discourse on disability and tax policy.

## I. PERSPECTIVES ON DISABILITY REFLECTED IN THE SCHOLARSHIP

Here, I review disability and tax scholarship to provide a basic outline of prevailing expert views on the meaning of disability and the appropriate policy responses to disability. Additional literature is introduced later in the article to point out inconsistencies between the views of academics as compared to those of legislators, the judiciary, or taxpayers.

### A. UNDERSTANDING DISABILITY

Disability was once understood as the exclusive result of bodily defects, and the policy response was to grant charity<sup>6</sup> and benevolence to those in such tragic circumstances.<sup>7</sup> Since the introduction of the social model of disability in the late 1970s,<sup>8</sup> insisting that it was important to recognize the role society plays in creating and contributing to disability,<sup>9</sup> many disability scholars have relentlessly discredited and condemned the medical and charitable models of disability. Although the social model has been subject to a number of criticisms, including its failure to account for the lived experiences relating to impairment,<sup>10</sup> it is clear that disability scholars no longer see an exclusive focus on impairment as appropriate. Society's creation of barriers to full inclusion is an important, if not the paramount, contributor to what we know as "disability." Such barriers include negative views of persons with disabilities. For example, Kay

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<sup>6</sup> Justin Anthony Haegele & Samuel Hodge, "Disability Discourse: Overview and Critiques of the Medical and Social Models" (2016) 68:2 *Quest* 193 at 195.

<sup>7</sup> Kanter, *supra* note 5 at 419–21. Although the tragedy model of disability has been discredited, that is not to say that impairment *can't* be tragic. See Dan Goodley, "Dis/entangling Critical Disability Studies" in Anne Waldschmidt, Hanjo Berressem & Moritz Ingwersen, eds, *Culture-Theory-Disability: Encounters Between Disability Studies and Cultural Studies* (Bielefeld, Germany: Transcript-Verlag, 2017) 81 at 85.

<sup>8</sup> Anne Waldschmidt, "Disability Goes Cultural: The Cultural Model of Disability as an Analytical Tool" in Waldschmidt, Berressem & Ingwersen, *supra* note 7, 19 at 20.

<sup>9</sup> Kanter, *supra* note 5 at 419–21; Haegele & Hodge, *supra* note 6 at 196–97.

<sup>10</sup> Carol Thomas, *Female Forms: Experiencing and Understanding Disability* (Philadelphia: Open University Press, 1999); Tom Shakespeare & Nicholas Watson, "The Social Model of Disability: An Outdated Ideology?" in Sharon N Barnartt & Barbara M Altman, eds, *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need to Go* (Oxford: Elsevier Science, 2001) 9; Waldschmidt, *supra* note 8 at 19–21; Haegele & Hodge, *supra* note 6 at 197–98.

Schriner has stated that policies based on assumptions that persons with disabilities are unproductive, ill, immoral, and incompetent “reflect common misperceptions, myths, and prejudices about some kinds of individual differences.”<sup>11</sup>

This shift away from exclusive focus on impairment in the literature has gained considerable momentum, including among international organizations such as the United Nations and the World Health Organization, which have acknowledged social contributors to disability.<sup>12</sup> One specific example is the World Health Organization’s International Classification of Function, Disability and Health (ICF Model), developed based on what it refers to as the “biopsychosocial model.”<sup>13</sup> While the medical model looked only to bodily function, this model recognizes that it is important to assess how bodily functions affect activities, and ultimately participation in society, and that external and personal factors influence function, disability, and health.<sup>14</sup>

## B. SOCIAL POLICY RESPONSES TO DISABILITY

Disability policy, at the highest level, is a response to the issue of how society should treat disability. Lyn Jongbloed frames the key question as: what does society owe persons with disabilities? She concludes that we, as a society, have not yet decided.<sup>15</sup> Scholars have weighed in on the appropriate policy response across a variety of disability-related policy issues, and a brief overview of the literature follows.

What policies are dictated by the social model? David A Weisbach argues that the social model does not point to a particular policy result.<sup>16</sup> However, the indisputable shift from the medical and charitable models of disability to the social model has played an important role in discussions about the appropriate policy response.<sup>17</sup> For one thing, the shift meant that removing barriers to full participation in society and achieving autonomy and human dignity<sup>18</sup> became seen as a responsibility of society, through government.<sup>19</sup>

There is a tension in the disability scholarship between the calls for treatment of persons with disabilities as equals, and the need to recognize difference as compared to non-disabled people in order to achieve full participation in society.<sup>20</sup> The rise of universalism has perhaps

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<sup>11</sup> Kay Schriner, “The Political Implications of the Disability Construct in Public Policy” (2000) 11:2 J Disability Policy Studies 103 at 104.

<sup>12</sup> *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/106; World Health Organization, *The International Classification of Functioning, Disability and Health* (Geneva: World Health Organization, 2001), online: <who.int/classifications/icf/en> [perma.cc/5TEE-Q5ZA].

<sup>13</sup> World Health Organization, *supra* note 12.

<sup>14</sup> *Ibid.*

<sup>15</sup> Lyn Jongbloed, “Disability Policy in Canada: An Overview” (2003) 13:4 J Disability Policy Studies 203 at 207.

<sup>16</sup> David A Weisbach, “Toward a New Approach to Disability Law” (2009) 47 U Chicago Legal F at 67, drawing on the work of Adam M Samaha, “What Good is the Social Model of Disability?” (2007) 74:4 U Chicago L Rev.

<sup>17</sup> Waldschmidt, *supra* note 8 at 21.

<sup>18</sup> Jerome Bickenbach, “Universally Design Social Policy: When Disability Disappears?” (2014) 36:16 Disability and Rehabilitation 1320 at 1323.

<sup>19</sup> Laura Wilkinson-Meyers et al, “To Live an Ordinary Life: Resource Needs and Additional Costs for People with a Physical Impairment” (2015) 30:7 Disability and Society 976 at 989.

<sup>20</sup> Theodore P Seto & Sande L Buhai, “Tax and Disability: Ability to Pay and the Taxation of Difference” (2006) 154 U Pa L Rev 1053 at 1071–73.

contributed to this tension. Universalism views human functioning along a continuum and has emerged, alongside the social model, in opposition to the medical model. Instead of using a minority group approach (under which some persons would qualify as disabled) and its limited vision of “normal,” universalism views disability as universal, multidimensional, and variable.<sup>21</sup> While subscribers to universalism have advocated for a policy approach that accommodates all human variation, thus applying universally across all of society,<sup>22</sup> others have called for policies that meet the specific needs of individuals (through, for example, individualized and personalized direct funding for persons with disabilities).<sup>23</sup>

Jerome Bickenbach argues that targeted policies are required because the needs of individuals are varied.<sup>24</sup> However, he also recognizes that determining eligibility for targeted policies is expensive and is usually dependent on the medical opinion of doctors who are not well informed about disability.<sup>25</sup> Others have criticized this use of medical professionals as gatekeepers for putting the person in a sick role<sup>26</sup> and ignoring the social contributors to disability.<sup>27</sup> Another problem noted with targeted policies is that they can incentivize people to “game the system”<sup>28</sup> and trap disabled people in the “disability benefits culture.”<sup>29</sup>

Scholars have reasoned that direct financial payments to people with disabilities are consistent with the premises underlying the social model.<sup>30</sup> Due to society’s contributions to disability, it is incumbent upon government to compensate for this through income redistribution.<sup>31</sup> Michael Palmer points out that persons with disabilities are prone to deprivation for reasons of reduced capacity to earn, additional expenses, and a reduced availability of household labour due to caregiving by family members.<sup>32</sup>

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<sup>21</sup> Ian Joiner, “Obscuring Disability: The Impact of a Universalism/Minority Group Dichotomy on Assessing Equality” in Mary Ann McColl & Lyn Jongbloed, eds, *Disability and Social Policy in Canada* (Concord: Captus Press, 2006) 87 at 92.

<sup>22</sup> Irving Kenneth Zola, “Toward the Necessary Universalizing of a Disability Policy” (1989) 67 *Milbank Q* 401.

<sup>23</sup> Bickenbach, *supra* note 18; Dave Sims & Joanna Whisker, “Personalisation and Disabled People: The Rhetoric and the Reality” (2014) 17:3 *Social Work & Social Sciences Rev* 137; Jennifer Hall-Lande, “County Administrator Perspectives on the Implementation of Self-Directed Supports” (2012) 22:4 *J Disability Policy Studies* 247 at 248.

<sup>24</sup> Bickenbach, *supra* note 18 at 1323.

<sup>25</sup> *Ibid*; Haegele & Hodge, *supra* note 6 at 195–196.

<sup>26</sup> Colin Barnes, “Disability, Disability Studies and the Academy” in John Swain et al, eds, *Disabling Barriers-Enabling Environments*, 2nd ed (London: SAGE Publications, 2004) 28 at 29; Haegele & Hodge, *supra* note 6 at 195–96.

<sup>27</sup> See e.g. Anne Crichton & Lyn Jongbloed, *Disability and Social Policy in Canada* (North York, ON: Captus Press, 1998) at 10; Carol Thomas, *Female Forms: Experiencing and Understanding Disability* (Philadelphia: Open University Press, 1999).

<sup>28</sup> Bickenbach, *supra* note 18 at 1323; Simoni Symeonidou, “New Policies, Old Ideas: The Question of Disability Assessment Systems and Social Policy” (2014) 29:8 *Disability & Society* 1260 at 1268.

<sup>29</sup> Robert E Drake et al, “Mental Health Disability: An International Perspective” (2012) 23:2 *J Disability Policy Studies* 110 at 112–13.

<sup>30</sup> See e.g. Matthew Diller, “Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs” (1998) 76:5 *Tex L Rev* 1003 at 1006–07.

<sup>31</sup> Wilkinson-Meyers et al, *supra* note 19 at 989. Tom Shakespeare argues that redistribution is justified due to a combination of societal barriers and impairment arising from the “random effect of genes or disease.” See Shakespeare, *supra* note 2 at 67.

<sup>32</sup> Michael Palmer, “Disability and Poverty: A Conceptual Review” (2011) 21:4 *J Disability Policy Studies* 210 at 212–13.

## C. TAX POLICY RESPONSES TO DISABILITY

In this section, I move from the disability studies literature to the tax policy literature dealing with disability. A number of tax policy scholars have pointed out that there are two distinct reasons why tax legislation might respond to disability.<sup>33</sup> First, income tax legislation might be used as a means for implementing a broader social policy, in which case disability-related provisions would be considered tax expenditures.<sup>34</sup> Second, income tax legislation might recognize disability for tax policy reasons, in which case the provisions would be considered technical tax provisions implemented to improve the tax system in terms of its primary goals of “raising revenue and redistributing income.”<sup>35</sup>

A handful of tax policy articles considering the DTC, all written between 2000 and 2006, have invariably recognized the need to consider whether the DTC is, or should be, a tax expenditure, a technical tax provision, or perhaps both.<sup>36</sup> In two of the four articles, the writers preferred to view the DTC as a technical tax provision,<sup>37</sup> and in the other instances, the writers saw the DTC as playing a dual role, as both a tax expenditure and technical tax provision.<sup>38</sup> While none of the tax or legal scholars<sup>39</sup> identified the DTC as solely a tax expenditure, at least one article authored by a disability scholar examined the DTC on the assumption that it was a tax expenditure (without analysis).<sup>40</sup> Perhaps this serves as evidence, though limited, that the perspective of the writer plays an important role in how the credit is viewed as, for tax policy academics, the question of whether a provision is a tax expenditure is a frequent starting point for tax policy analysis, whereas for disability scholars, the focus on disability policy leads to a natural assumption that the DTC be viewed as a tax expenditure. Regardless, it is apparent from the literature that the DTC could be classified as either a technical tax provision or a tax expenditure, or perhaps even both concurrently.

The tax expenditure literature clearly indicates that policies placed in the tax system for purposes other than measuring income should be evaluated according to their non-tax policy goals.<sup>41</sup> That is, just because a policy is in the tax system does not make it immune from analysis

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<sup>33</sup> Raquel Chisholm, “The Disability Tax Credit and Amputees: It’s Time for a Reality Check” (2003) 2:1 JL & Equality 156; Michael Smart & Mark Stabile, “Tax Support for the Disabled in Canada: Economic Principles and Options for Reform” (2006) 54:2 Can Tax J 407; David Duff, “Disability and the Income Tax” (2000) 45:4 McGill LJ 797; Seto & Buhai, *supra* note 20.

<sup>34</sup> For a discussion of tax expenditures, see Peter W Hogg, Joanne E Magee & Jinyan Li, *Principles of Canadian Income Tax Law*, 9th ed (Toronto: Carswell, 2017) at 64–72.

<sup>35</sup> Tim Edgar, Arthur Cockfield & Martha O’Brien, eds, *Materials on Canadian Income Tax*, 15th ed (Toronto: Carswell, 2015) at 73.

<sup>36</sup> Duff, *supra* note 33; Smart & Stabile, *supra* note 33; Chisholm, *supra* note 33; Lisa Philipps, “Disability, Poverty and the Income Tax: The Case for Refundable Credits” (2001) 16 JL & Soc Pol’y 77.

<sup>37</sup> Smart & Stabile, *supra* note 33 at 408; Duff, *supra* note 33 at 840. Note that in an American article, Seto and Buhai view disability-related provisions as technical tax provisions. See *supra* note 20.

<sup>38</sup> Chisholm, *supra* note 33 at 188; Philipps, *supra* note 36 at 93.

<sup>39</sup> Here, “tax scholars” refers to academics studying tax, including those in the fields of economics, business, and law, while “legal scholars” refers to academics in the legal field, who may or may not focus their scholarship on taxation law.

<sup>40</sup> Michael J. Prince, “Tax Policy as Social Policy: Canadian Tax Assistance for People with Disabilities” (2001) 27:4 Can Public Pol’y 487.

<sup>41</sup> Hogg, Magee & Li, *supra* note 34 at 65.

as a spending program.<sup>42</sup> Therefore, the disability literature on social policy responses to disability, described in the previous section, should be taken into account if the DTC is evaluated as a tax expenditure. Additionally, tax scholars have pointed out that the decision to place a policy within the income tax system comes with some potential benefits (such as built-in income calculation and the potential for administrative efficiencies)<sup>43</sup> as well as potential drawbacks due to the structure of the income tax system (such as a lack of flexibility relating to application criteria, amount, and timing).<sup>44</sup> Hence, it is important to question whether financial support for persons with disabilities should be located within the income tax system.

Technical tax provisions are evaluated differently than tax expenditures, usually by applying three primary criteria: equity, neutrality, and simplicity.<sup>45</sup> In the case of disability provisions, equity is particularly relevant. Horizontal equity requires that taxpayers in the same position pay the same amount of tax, and vertical equity demands that taxpayers in different positions pay appropriately different amounts of tax.<sup>46</sup> Ability to pay is often used to compare the relative positions of taxpayers,<sup>47</sup> and scholars have argued that it is appropriate to adjust income for extraordinary disability-related costs because of the resulting decreased ability to pay.<sup>48</sup>

## II. PERSPECTIVES ON DISABILITY REFLECTED IN THE LEGISLATION

After describing the DTC in this section, I explain how it reflects certain views of disability and the appropriate policy response to disability. In doing so, I point out discrepancies between views reflected in the DTC and those reflected in the scholarship.

### A. THE DTC AND RELATED CREDITS

Section 118.3 of the *Income Tax Act*<sup>49</sup> (*ITA*) permits individual taxpayers to claim the DTC where certain requirements are met. First, under the function impairment requirement, the individual must have “one or more severe and prolonged impairments in physical or mental functions.”<sup>50</sup> Second, under the marked restriction requirement, the ability to perform at least one basic activity of daily living must be “markedly restricted,” or would be if not for certain

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<sup>42</sup> *Ibid* at 64–65.

<sup>43</sup> Tamara Larre, “The Children’s Fitness Tax Credit: Right Message, Wrong Policy Instrument” in Lisa Philipps, Neil Brooks & Jinyan Li, eds, *Tax Expenditures: State of the Art* (Toronto: Canadian Tax Foundation, 2011) 12:1 at 12:6–7.

<sup>44</sup> *Ibid* at 12:10–11.

<sup>45</sup> Hogg, Magee & Li, *supra* note 34 at 47.

<sup>46</sup> *Ibid* at 49.

<sup>47</sup> *Ibid*.

<sup>48</sup> Seto & Buhai, *supra* note 20 at 1100–03, 1143.

<sup>49</sup> RSC 1985, c 1 (5th Supp), s 118.3 [*ITA*].

<sup>50</sup> *Ibid*, s 118.3(1)(a). Prolonged is defined as lasting, or expected to last, for a continuous 12-month period (*ibid*, s 118.4(1)(a)).

essential and regular therapy.<sup>51</sup> The activity is markedly restricted where all or substantially all of the time, even with 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.”<sup>52</sup> Such basic activities of daily living are defined in the legislation to include, for example, “mental functions necessary for everyday life,” feeding and dressing oneself, “speaking so as to be understood” and hearing to understand, eliminating, and walking.<sup>53</sup> The definition specifically excludes working, housekeeping, and social and recreational activities.<sup>54</sup>

In order to claim the credit against taxes owing, the taxpayer and an appropriate medical practitioner must fill in a T2201 form to certify that the function impairment and marked restriction requirements are met,<sup>55</sup> and the taxpayer must file the form.<sup>56</sup> While the credit is not refundable,<sup>57</sup> where the individual has insufficient income to use it, the DTC may be claimed by a relative on whom the individual is dependent.<sup>58</sup> The amount of the credit, like many other credits, is indexed for inflation.<sup>59</sup> In 2017 the maximum value of the credit was \$1,216.<sup>60</sup>

To understand the role of the DTC, it is important to note that a series of other credits are also available in relation to disability of the taxpayer or a dependent. The medical expense tax credit recognizes certain costs, including a number of expenses beyond medical services and drugs,<sup>61</sup> above a certain “floor” amount.<sup>62</sup> The caregiver credit, introduced in 2017 as a consolidation of three credits, is available in varying amounts to caregivers to certain eligible dependent relatives.<sup>63</sup>

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<sup>51</sup> *Ibid* s 118.3(1)(a.1). Alternatively, the marked restriction requirement can be met where the cumulative effects of multiple restrictions are considered the equivalent of “having a marked restriction in the ability to perform a basic activity of daily living” (*ibid*).

<sup>52</sup> *Ibid* s 118.4(1)(b).

<sup>53</sup> *Ibid* s 118.4(1)(c).

<sup>54</sup> *Ibid* s 118.4(1)(d).

<sup>55</sup> *Ibid* s 118.3(1)(a.2)–(a.3).

<sup>56</sup> *Ibid* s 118.3(1)(b).

<sup>57</sup> Credits are applied against taxes owing. Where taxpayers are unable to use up the whole amount of a credit because they do not have enough taxes owing, a refundable credit will result in the government issuing payment to the taxpayer for any unused credit amount.

<sup>58</sup> *Supra* note 49, s 118.3(2).

<sup>59</sup> *Ibid* s 117.1.

<sup>60</sup> The maximum credit amount is \$8,113. See Government of Canada, “Disability Tax Credit” *Government of Canada*, online: < [canada.ca/en/revenue-agency/services/tax/individuals/segments/tax-credits-deductions-persons-disabilities/disability-tax-credit.html](http://canada.ca/en/revenue-agency/services/tax/individuals/segments/tax-credits-deductions-persons-disabilities/disability-tax-credit.html) > [perma.cc/3FPQ-RCDH]. To determine the value, this amount is multiplied by the lowest marginal rate (*ITA*, *supra* note 49, ss 118.3(1), 248(1)), which is equal to 15% (*supra* note 49, s 117(2)(a)).

<sup>61</sup> These include costs of group home care, attendant care, or in-school care (*ITA*, *supra* note 49, s 118.2(2)(b)–(e)); atypical renovation and home building costs; van expenses; tutoring; and prescribed devices or equipment (*supra* note 49, s 118.2(2)).

<sup>62</sup> The credit permits expenses to be claimed in excess of the lesser of 3% of the taxpayer’s net income, and the fixed amount for that particular year (\$2,237 in 2016) (*ITA*, *supra* note 49, s 118.2(1), Government of Canada, “T1-2016-Federal Tax”, online: < [canada.ca/content/dam/cra-arc/migration/cra-arc/E/pbg/tf/5000-s1/5000-s1-fill-16e.pdf](http://canada.ca/content/dam/cra-arc/migration/cra-arc/E/pbg/tf/5000-s1/5000-s1-fill-16e.pdf) > 2 [perma.cc/3GRM-F9FG].

<sup>63</sup> *ITA*, *supra* note 49, s 118(1)(b)(iv), s 118(1)(b.1), and 118(1)(d).. supporting minor children with disabilities (*supra* note 49, s 118(1)(b.1)); and a dependent adult credit for taxpayers supporting dependent adults (*supra* note 49, s 118(1)(d)).

## B. LEGISLATIVE PERSPECTIVES ON THE MEANING OF DISABILITY

What can we glean about the way that drafters viewed disability from looking at the DTC itself? One could posit that legislators had a binary understanding of disability; that is, that the population can be divided into disabled (entitled to the credit) and non-disabled (not entitled to the credit). This is entirely inconsistent with the human variation or universalism model of disability in the literature.<sup>64</sup> The DTC has also been criticized for perpetuating the medical model, which focuses on the impairment and deviations from a norm.<sup>65</sup>

By focusing on the level of impairment and its effect on basic functions as opposed to the effects on participation in society, the DTC appears to either: (1) be based on pity or charity (that is, anyone with a certain impairment deserves to be compensated for their disability) or (2) to correlate the level of impairment with the financial costs of disability. The former, based on pity or charity, is inappropriate, and the latter is certainly a very rough estimate. Equating impairment with disability-related costs is also inconsistent with the social model because it largely leaves societal factors out of the equation. Put in another way, the DTC's focus on impairment and basic functioning ignores important aspects of disability by failing to look to the *effect* of functional limitations on the individual's participation in society, considering relevant contextual factors. Joseph J Chen references the ICF Model<sup>66</sup> and points out that traditional functional assessments miss out on the participation element, which is not just affected by bodily functional limitations, but also by external and personal elements of disability.<sup>67</sup> This point is directly applicable to the DTC. For example, if one compares two people with the same impairments and functional restrictions, including an inability to drive a car, but one lives in an area with widely available, inexpensive, and accessible public transit and the other does not, the latter will experience greater disability and disability-related costs because of the different environment. These differences do not affect eligibility for, or amount of, the DTC.

## C. LEGISLATIVE PERSPECTIVES ON THE POLICY RESPONSE TO DISABILITY

By enacting the DTC, legislators must have thought it appropriate for persons with disabilities to be given beneficial tax treatment (1) in the form of a non-variable credit amount, (2) if they (or a close family member) otherwise have taxes payable, and (3) so long as a medical professional finds specific criteria are met. Below, each of these three aspects of the DTC is examined, after first discussing the legislative purpose behind the DTC.

As previously discussed in section I.C., the DTC is most often classified by policy scholars as a technical tax provision, as opposed to a tax expenditure.<sup>68</sup> The Technical Advisory Committee on Tax Measures for Persons with Disabilities explained that tax measures for persons with disabilities are “not meant to subsidize or offset ... [disability-related] costs, but

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<sup>64</sup> See Joiner, *supra* note 21 and accompanying text.

<sup>65</sup> Chisholm, *supra* note 33; Philipps, *supra* note 36 at 103–04. For more on the medical model, see Michael Oliver & Colin Barnes, *The New Politics of Disablement*, 2nd ed (Basingstoke, UK: Palgrave MacMillan, 2012) at 85ff.

<sup>66</sup> See World Health Organization, *supra* note 12 and accompanying text.

<sup>67</sup> Joseph J Chen, “Functional Capacity Evaluation and Disability” (2007) 27 *Iowa Orthopaedic J* 121 at 124–25.

<sup>68</sup> See section I.C. Tax Policy Responses to Disability, above, for more on this topic.

rather to achieve equity and greater fairness in the allocation of the tax burden.”<sup>69</sup> The reference to equity and fairness in allocating the tax burden indicates that the DTC was implemented to measure income, and therefore should be characterized as a technical tax provision. On the other hand, there are reasons to question the Technical Advisory Committee’s statement, as there are a couple of features, namely its nature as a credit rather than a deduction and its inclusion in the tax expenditure report, that indicate that the legislators intended the DTC to operate as a social policy measure, and thus a tax expenditure. However, the inclusion in the tax expenditure report<sup>70</sup> cannot be used as conclusive proof that the DTC was intended to serve a non-tax policy purpose as there are differing views on how to define tax expenditures, and Canada’s tax expenditure report takes a broad approach to identifying tax expenditures.<sup>71</sup> Thus, there is uncertainty surrounding the intended legislative purpose of the DTC.

## 1. THE TAXPAYER OR A RELATED CAREGIVER MUST OTHERWISE HAVE TAXES PAYABLE

As a non-refundable, transferable credit, the DTC can only be used against taxes payable by the taxpayer or a close family member upon whom she or he is dependent. Assuming the DTC is a technical tax provision based on reduced ability to pay, the tax policy literature suggests that the credit should instead be in the form of a deduction from income (and therefore, like a non-refundable credit, would only be of use where taxes were payable).<sup>72</sup> However, where expenses are difficult to itemize, some have pointed out that a standard amount may be more appropriate.<sup>73</sup>

If the DTC is a tax expenditure, then the literature would tend to support a policy based on disability-related costs and/or reduced capacity to earn income.<sup>74</sup> In no way do these connect to income of the disabled person or a caregiver. In fact, those with the greatest costs and lowest capacity to earn are unlikely to have sufficient income to use a credit, and will be in greatest need if they do not have a caregiver with sufficient income to use the credit. Therefore, the calls to make the credit refundable<sup>75</sup> are well-founded if it is viewed as a tax expenditure.

Maintaining its form as a credit, as opposed to a deduction, makes sense if it is viewed as a tax expenditure because a deduction would be worth more to those who need it the least (the

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<sup>69</sup> Technical Advisory Committee on Tax Measures for Persons with Disabilities, *Disability Tax Fairness: Report of the Technical Advisory Committee on Tax Measures for Persons with Disabilities* (Ottawa: Government of Canada Publications, 2004) at 19, online: <publications.gc.ca/collections/Collection/F34-1-2004E.pdf> [perma.cc/T6CJ-M2CM].

<sup>70</sup> Department of Finance Canada, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations, 2016* (Ottawa: Department of Finance, 2016) at 35, online: <fin.gc.ca/taxexp-depfisc/2016/taxexp-depfisc16-eng.pdf> [perma.cc/QZE9-CBFW].

<sup>71</sup> Hogg, Magee & Li, *supra* note 34 at 64.

<sup>72</sup> Smart & Stabile, *supra* note 33 at 421.

<sup>73</sup> Duff, *supra* note 33 at 836.

<sup>74</sup> See Palmer, *supra* note 32 and accompanying text.

<sup>75</sup> Sherri Torjman, *Disability Supports: Missing on the Policy Radar* (Toronto: Caledon Institute of Social Policy, 2015) at 6 [Torjman, *Disability Supports*]; Philipps, *supra* note 36; The Council of Canadians with Disabilities, “Proposal for A Refundable Disability Tax Credit”, online: <ccdonline.ca/en/socialpolicy/income/tax-credit-proposal> [perma.cc/VVT2-MPAZ]; House of Commons, Standing Committee on Human Resources Development and the Status of Persons with Disabilities, *Tax Fairness for Persons with Disabilities* (December 2002) at 22 [House of Commons, *Tax Fairness*].

“upside-down effect”).<sup>76</sup> However, even if it were a refundable credit, using the income tax system to provide income support could be challenged because it would not reach people who do not file tax returns.<sup>77</sup>

## 2. ALL QUALIFIED TAXPAYERS RECEIVE THE SAME SET AMOUNT

The DTC grants the same credit to all who qualify. Whether the credit is a technical tax provision or a tax expenditure, the credit amount should ideally vary according to costs not otherwise already accounted for in the tax system (in the case of a technical tax provision) or disability-related costs and/or reduced earning capacity (in the case of a tax expenditure). Using a set amount sacrifices accuracy and fairness for administrative simplicity. As mentioned above, there is some justification for this as disability costs are not always easy to itemize.<sup>78</sup>

## 3. DISABILITY MUST BE CERTIFIED BY MEDICAL PROFESSIONALS

Under the DTC, the determination of who is disabled (or perhaps, disabled *enough*) is primarily left to medical professionals. Melinda Jones and Lee Ann Bassar Marks have criticized the medical certification requirements imposed by various disability policies on the grounds that they reflect the medical model, and can be “intrusive, time consuming, and expensive.”<sup>79</sup> Because of a lack of coordination of disability supports, the applicant may have to repeatedly obtain medical certification to meet the requirements of various programs.<sup>80</sup>

In her article on the DTC, Raquel Chisholm describes the process of establishing disability and gives an example of a case where “[i]t was only by portraying himself in [an] incredibly undignified manner that [a] man was able to satisfy the criteria for the DTC.”<sup>81</sup> In order to qualify for the DTC, a taxpayer must focus on his or her physical, mental, or psychological shortcomings to convince a doctor, and perhaps also a government agency or even a judge, that she or he is impaired to a degree that warrants special tax treatment. Chisholm points out that a credit places the person in the sick role, needing to “tug the heartstrings of the tax adjudicators by portraying herself as fitting neatly into the stereotype of the dependent invalid.”<sup>82</sup> In the context of looking at disability programs more generally, Joseph Dumit explains:

[A]pplicants for disability are between a rock and a hard place. If they do dress the part, then they are ‘acting’ ill. But if they do not then they will not be considered ill.

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<sup>76</sup> Hogg, Magee & Li, *supra* note 34 at 379.

<sup>77</sup> In most cases, individuals are not required to file tax returns where no taxes are owing (*ITA, supra* note 49, s 150(1.1)). This includes many low-income individuals and those whose income is not taxable because it is exempt under the *Indian Act*, RSC 1985, c I-5, s 87.

<sup>78</sup> Duff, *supra* note 33 at 836.

<sup>79</sup> Melinda Jones & Lee Ann Bassar Marks, “Law and the Social Construction of Disability,” in Melinda Jones & Lee Ann Bassar Marks, eds, *Disability, Divers-Ability and Legal Change* (The Hague: Martinus Nijhoff, 1999) 1 at 17. It is notable that in the context of Canada’s state-provided health care, the expenses would be largely borne by the state.

<sup>80</sup> Sherri Torjman, *Five-Point Plan for Reforming Disability Supports* (Ottawa: The Caledon Institute of Social Policy, 2007) at 2 [Torjman, *Five-Point Plan*].

<sup>81</sup> Chisholm, *supra* note 33 at 178.

<sup>82</sup> *Ibid* at 158–59.

Therefore their only choice is to pretend to be who they actually are, in the institution's view. They must work at "achieving appropriate appearance" ... and "look and act sick" ... .<sup>83</sup>

It is not a stretch to suggest that having to play the sick role could have a negative effect on self-esteem, self-image, and identity, and may even impede wellness.<sup>84</sup>

### III. JUDICIAL PERSPECTIVES ON DISABILITY REFLECTED IN THE RECENT CASE LAW

Here, I study recent DTC cases with a view to determining the attitudes, perceptions, and beliefs of judges in relation to disability and the appropriate policy response. A study of the recent DTC cases reveals that some judges still appear to hold outdated views of disability that perpetuate the medical and charitable models of disability. This is particularly concerning because the courts have chosen to take an active role in determining who is entitled to the DTC. Here, the cases reviewed are limited to those from 2006 to 2017 to ensure they represent relatively current views of the judiciary.<sup>85</sup> Where these views clash with those of the other groups already reviewed (scholars and legislators), I explore these discrepancies.

It is important to recognize that the usefulness of cases to determine judicial perspectives on disability is limited. As the cases are an interpretation of existing law, it is not easy to separate the normative claims (*i.e.*, what the law *should* be) from the legal claims (*i.e.*, what the law *is*). The primary role of judges is obviously to apply the law, and thus focus on the *legislators'* intentions.<sup>86</sup> However, the language used, and even the decisions made,<sup>87</sup> can reveal the attitudes, perceptions, and beliefs held by judges. The focus in this discussion is not on situations where judges simply apply the law in a rather straightforward manner; rather, the discussion centres on judges' language choices and situations where judges made more difficult interpretive decisions that appear to reflect a certain understanding of disability. Similarly, my aim here is not to evaluate the correctness of the judicial decisions, but, rather, it is to expose views of disability that may have impacted judges' reasoning.

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<sup>83</sup> Joseph Dumit, "Illnesses You Have to Fight to Get: Facts as Forces in Uncertain, Emergent Illnesses" (2006) 62:3 *Social Science & Medicine* 577 at 586 [citations omitted].

<sup>84</sup> Marcus JH Huibers & Simon Wessely, "The Act of Diagnosis: Pros and Cons of Labelling Chronic Fatigue Syndrome" (2006) 36:7 *Psychological Medicine* 895 at 898.

<sup>85</sup> I searched electronic databases for cases from the Tax Court of Canada and Federal Court of Appeal involving the application of the DTC. The cases were then reviewed with the view to finding any commentary by judges that could be construed as reflecting views of disability. The cases discussed in this article were those I considered noteworthy in this regard.

<sup>86</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ontario: LexisNexis Canada, 2008) at 2; Brian J. Arnold, "Statutory Interpretation: Some Thoughts on Plain Meaning" in *Report of Proceedings of Fiftieth Tax Conference*, 1998 Tax Conference (Toronto: Canadian Tax Foundation, 1999) 6:1.

<sup>87</sup> While this article does not go so far as some critical legal theorists (see *e.g.*, Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 *Yale LJ* 1), the discussion in this section of the article assumes that judicial attitudes, perceptions, and beliefs affect legal decision-making. For a discussion of critical legal theory, see Randal N Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery, 2001) at 65–71 and John Hasnas, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument" (1995) 45:1 *Duke LJ* 84.

## A. DISABILITY IS A TRAGEDY

The language used in some of the recent DTC cases suggests that some judges view disability as a tragedy. For example, the word “suffers” is repeatedly used in the case of *McMillan v Canada (McMillan)*,<sup>88</sup> which is contrary to the disability literature, most of which critiques the relegation of persons with disabilities to the sick role. Similarly, judges’ offers of “sympathy” to the disabled taxpayer in *Gourlay v R (Gourlay)*<sup>89</sup> and to the parents of a disabled child in *Marceau v R (Marceau)*<sup>90</sup> reflect a charitable model of disability. As a final example, the judge’s description of the situation in *Lewis v R (Lewis)*,<sup>91</sup> involving a child with vision impairment, as “tragic, and as heartbreaking,”<sup>92</sup> once again perpetuates the tragic and charitable models of disability.

## B. PEOPLE WITH DISABILITIES ARE “SICK” AND INCAPABLE

Although in at least one case (*Bleiler v R*)<sup>93</sup> the judge acknowledged stereotypes affecting persons with disabilities,<sup>94</sup> in other cases judges have made statements that are inconsistent with the disability literature’s focus on equality for persons with disability, variability of disability, and social causes of disability. For example, in *Fontaine v R (Fontaine)*<sup>95</sup> the Court insinuated that only “abnormal” people would qualify for the credit,<sup>96</sup> a view that is inconsistent with the literature that sees disability as human variation and people with disabilities as capable and equals. The stereotypical view of people with disabilities as necessarily incapable was also perpetuated in other cases. For example, in *Pham v Canada (Pham)*,<sup>97</sup> the taxpayer’s ability to represent himself in court was used to support a decision that the DTC requirements were not met,<sup>98</sup> as was the ability of the taxpayer to testify in court, work, and go to school in *Walkowiak v R (Walkowiak)*.<sup>99</sup> Further, in *Fontaine* the Court bolstered the denial of the DTC with the fact that the taxpayer filed a notice of appeal himself.<sup>100</sup> What is particularly troubling is that in these cases the Court often did little, if anything, to tie assessments of the claimants’ capabilities to represent themselves in the legal process to the specific impairments or restrictions claimed. The cases, along with the DTC’s application process, may encourage future DTC claimants to underplay their abilities and assume the sick role,<sup>101</sup> and may create further barriers to persons

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<sup>88</sup> 2010 TCC 189 at paras 10, 14, 16–17 [*McMillan*].

<sup>89</sup> 2006 TCC 493 at para 25 [*Gourlay*].

<sup>90</sup> 2007 FCA 352 at para 14.

<sup>91</sup> 2007 TCC 416 [*Lewis*].

<sup>92</sup> *Ibid* at para 20.

<sup>93</sup> 2014 TCC 296 [*Bleiler*].

<sup>94</sup> *Ibid* at para 10.

<sup>95</sup> 2009 TCC 162 [*Fontaine*].

<sup>96</sup> *Ibid* at para 20.

<sup>97</sup> 2010 TCC 588 [*Pham*].

<sup>98</sup> *Ibid* at para 11.

<sup>99</sup> 2012 TCC 453 at paras 26–27 [*Walkowiak*].

<sup>100</sup> *Fontaine*, *supra* note 95 at para 21.

<sup>101</sup> Barnes, *supra* note 26 at 28. See also the text accompanying note 26 and section II.C.3. Disability Must be Certified by Medical Professionals, above.

with disabilities participating in the legal system, a problem already recognized in the disability literature.<sup>102</sup>

### C. COURTS PLAY AN IMPORTANT ROLE IN DETERMINING ELIGIBILITY

As set out above, there are three main DTC eligibility requirements set out in the *ITA*: (1) function impairment, (2) marked restriction, and (3) medical certification of the first and second requirements. Given that the legislation requires certification by medical professionals, the courts could decide to rely on the medical certification to conclusively establish the first and second requirements. However, it is apparent from the judicial decisions that this is not the case. This is not entirely surprising as the function impairment and marked restriction requirements are separate from the medical certification requirement. On the other hand, one might expect judges to limit themselves to matters they are traditionally tasked with and thus perhaps well-positioned to assess, such as determining credibility and interpreting unclear statements on medical forms. However, it is clear from some cases set out below that judges have been willing to substitute their own judgment on medical issues for that of medical professionals.

In *Pekofsky v R (Pekofsky)*<sup>103</sup> and *McDermid v R*,<sup>104</sup> judges appeared to consider testimony by various parties (the children for whom the credit was being claimed, the parents, and the medical practitioners) to assist in determining the accuracy or meaning of the doctors' assessments on the required forms. This does not seem inappropriate as judges are experts of these types of factual interpretations. In *Pekofsky*, after stating that the medical practitioner's opinions (in this case, two positive certificates) were not conclusive, the Court went on to satisfy itself that the eligibility requirements were met<sup>105</sup> by relying on testimony of the child and her mother concerning the effect of the disability on their daily lives. The judge concluded that "although not a psychologist myself, I was able to sense the accuracy of the conclusions reached by the psychologists."<sup>106</sup>

The more troubling cases are where the judges appear to give weight to their own observations of the taxpayer's impairment, something that one would expect medical professionals to be in a much better position to assess. For example, in *Pham* the Court's own observations about the taxpayer's hearing abilities, as demonstrated in court, were used to corroborate a medical opinion.<sup>107</sup> In *Gibson v R (Gibson)*,<sup>108</sup> the Court commented that the severity of the disability was evident during the hearing.<sup>109</sup> In *Fontaine*, the Court compared ambiguous and conflicting medical certificates and concluded that the DTC requirements were not met.<sup>110</sup> In doing so, the Court appeared to perform its own assessment of the taxpayer's

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<sup>102</sup> Jones & Bassar Marks, *supra* note 79 at 12–13.

<sup>103</sup> 2014 TCC 183 [*Pekofsky*].

<sup>104</sup> 2014 TCC 264.

<sup>105</sup> *Pekofsky*, *supra* note 103 at para 18.

<sup>106</sup> *Ibid* at para 20.

<sup>107</sup> *Pham*, *supra* note 97 at para 11.

<sup>108</sup> 2014 TCC 236 [*Gibson*].

<sup>109</sup> *Ibid* at para 28.

<sup>110</sup> *Fontaine*, *supra* note 95.

cognitive state, in concluding that there was nothing “abnormal” in his testimony.<sup>111</sup> In *Pham*, the doctor’s certificate, along with testimony from the doctor, led the judge to conclude that the requirements were not met, adding her own observations about the taxpayer’s disability to corroborate the doctor’s evidence: “... the appellant had sufficient hearing capability to represent himself at the hearing of his appeal. My observations during the hearing support Dr. Finkelstein’s assessment.”<sup>112</sup>

The importance of the role of courts in determining eligibility is also highlighted in cases where the courts were willing to consider granting the DTC despite a negative medical certificate. In *Pelletier v R (Pelletier)*,<sup>113</sup> Justice Tardif relied on *Buchanan v R (Buchanan)*<sup>114</sup> for the proposition that although the Court’s role was not to substitute its own medical judgment, it was able to determine if an unambiguously negative medical certificate should be interpreted as a positive certificate.<sup>115</sup> This is actually a rather surprising statement given that medical certification that the impairment requirements are met (*i.e.*, a positive certificate) is a specific requirement in the legislation. In the end, the Court in *Pelletier*, faced with a negative medical certificate, remained unconvinced by the evidence, including testimony by the taxpayer, that the taxpayer was entitled to the DTC. Courts have not always been so willing to consider looking past the certificate requirement. In the subsequent case of *Islam v R (Islam)*,<sup>116</sup> the Court quoted the Federal Court of Appeal in *Buchanan*, which had stated that “a positive medical certificate is a requirement of subsection 118.3(1). The Court does not have a policy-making role. If the requirements of the Act are seen to be impracticable, it is Parliament that must address the necessary changes.”<sup>117</sup> While the interpretation of *Buchanan* in *Pelletier* is thus questionable, it shows that in at least one case the judge believed he could interpret an unambiguously negative certificate as positive and thus had a great deal of latitude in determining eligibility.

While judges have at times acknowledged the limitations imposed on them by the legislation, they have also seemed willing in many cases to themselves evaluate impairments based on their own observations of the taxpayer in the courtroom. In some ways, judges taking an active role in determining whether the taxpayer qualifies for the credit may be consistent with the disability literature critical of the power given to doctors in determining disability.<sup>118</sup> On the other hand, the criticisms surrounding granting doctors too much power were, at least to a certain extent, rooted in their inability to fully assess the situation,<sup>119</sup> and this same concern surely would also apply to judges assessing impairments based on their own observations of the individual’s impairment. The scrutiny of the capabilities of the taxpayer in court, encouraging people with disabilities to act sick and incapable and avoid participation in the legal process, is incongruent with the disability literature. Thus, while it may be necessary for courts to interpret the meaning and assess the credibility of medical evidence provided by professionals, judges

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<sup>111</sup> *Ibid* at para 20. However, it is notable that the Court later points out that the taxpayer could not remember his accountant’s name, though the Court believed this was a credibility issue, not a memory recollection issue (*ibid* at para 26).

<sup>112</sup> *Pham*, *supra* note 97 at para 11.

<sup>113</sup> 2008 TCC 425 [*Pelletier*].

<sup>114</sup> 2002 FCA 231 [*Buchanan*].

<sup>115</sup> *Pelletier*, *supra* note 113 at para 42.

<sup>116</sup> 2013 TCC 175 [*Islam*].

<sup>117</sup> *Ibid* at para 27, quoting *Buchanan*, *supra* note 114 at para 26.

<sup>118</sup> See discussion in section I.B. Social Policy Responses to Disability, above.

<sup>119</sup> Bickenbach, *supra* note 18 at 1323.

need to be aware of the limitations of their own expertise, particularly in assessing functional impairment.

## D. COMPASSION PLAYS A ROLE IN DECIDING WHO IS ENTITLED TO THE DTC

In *Radage v R (Radage)*,<sup>120</sup> a case that predates the decade review period in this article, Justice Bowman stated:

If the object of Parliament, which is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved *the provisions must be given a humane and compassionate construction*.<sup>121</sup>

In *Radage*, Bowman J tied humane and compassionate construction to a liberal, as opposed to a narrow or technical, interpretation of the provision.<sup>122</sup>

A number of more recent cases have acknowledged the humane and compassionate approach set out in *Radage*. In some cases, it appears to be used to lend additional support to the taxpayer's claim. For example, in *Pekofsky*, this approach seems to have been used to support the Court's decision to patch together two medical certificates to declare that the medical certificate requirement was met.<sup>123</sup> Similarly, Bowman J's humane and compassionate approach was quoted in *Benoit v R (Benoit)*,<sup>124</sup> in which the Court concluded that the credit was available in the face of contradictory medical evidence. On the other hand, while courts acknowledged this approach in *Lewis*,<sup>125</sup> *Walkowiak*,<sup>126</sup> and *Gourlay*,<sup>127</sup> they all decided against allowing the DTC.

Does this humane and compassionate approach conflict with the disability literature? One could argue that all human beings, including judges, should act with compassion and humanity towards other human beings. Disability scholars who advocate for needs-based financial support would likely support a compassionate and humane approach that promotes a more flexible application of the requirements, such as allowing late filing of certification, as was done in *Greenaway v R*,<sup>128</sup> and considering medical evidence to supplement the original form, as was done in *Gibson*.<sup>129</sup>

On the other hand, it is peculiar that the phrase "humane and compassionate" seems to be tied to the interpretation of the DTC in particular, whereas in the interpretation of other income tax provisions the move away from literal or textual interpretation was justified without resort to

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<sup>120</sup> [1996] 3 CTC 2510 (TCC) [*Radage*].

<sup>121</sup> *Ibid* at para 45 [emphasis added].

<sup>122</sup> *Ibid*.

<sup>123</sup> *Pekofsky*, *supra* note 103 at para 17.

<sup>124</sup> 2014 TCC 95 at para 27 [*Benoit*].

<sup>125</sup> *Lewis*, *supra* note 91 at para 22.

<sup>126</sup> *Walkowiak*, *supra* note 99 at para 21.

<sup>127</sup> *Gourlay*, *supra* note 89 at paras 20–21.

<sup>128</sup> 2010 TCC 42.

<sup>129</sup> *Gibson*, *supra* note 108 at paras 19–20.

sentiment or emotion,<sup>130</sup> thus suggesting that the subjects of the DTC call for special treatment. This idea is bolstered by the decisions in *Lewis* and *Benoit*, in which the respective courts commented that the person under consideration was “deserving”<sup>131</sup> of the approach in the circumstances. This suggests adherence to the now-denounced charitable model of disability, under which disabled people were objects of pity and deserving of help.<sup>132</sup> Perhaps this approach would be justifiable if courts made it clear that it applied to all instances involving applying tax law to *all* individuals, as humans deserving of compassion and humanity, as opposed to only persons with disabilities.

## E. PROVING ENTITLEMENT TO THE DTC IS NOT AN AFFRONT TO THE CLAIMANT’S DIGNITY

In *McMillan* the taxpayer argued that he should be permitted to use the DTC despite not having filed a T2201 form. The taxpayer had been awarded a disability pension under the Canada Pension Plan and, based on this award, he argued he should not need to produce evidence of his disability in order to qualify for the DTC. According to the taxpayer, requiring him to re-submit proof of his disability was contrary to the *Charter of Rights and Freedoms*<sup>133</sup> (*Charter*) because it amounted to double or triple jeopardy, and also violated his right to life, liberty and security of the person.<sup>134</sup>

In an oral judgment, Justice Pizzitelli dismissed the taxpayer’s appeal. The taxpayer’s argument that section 7 of the *Charter* was violated was based on a proposition that the requirement to submit evidence of the disability was a violation of his dignity, and therefore, his life, liberty and security of the person. The Court pointed out that while dignity might underlie life, liberty and security of the person, it is not a stand-alone section 7 right. Further, Pizzitelli J stated:

I fail to understand how the requirement for a medical certificate as a condition of gaining access to a tax benefit can be an affront to the dignity of the Appellant ... Whatever anxiety, stress or stigma suffered by the Appellant in having to prove his disability within the meaning of a provision that purports to grant a tax benefit from the Government does not, in my view, constitute in any way a violation of section 7.<sup>135</sup>

The easy dismissal of the *Charter* argument in *McMillan* may be troubling to disability scholars and advocates who use a human or civil rights approach to advocate for change.<sup>136</sup>

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<sup>130</sup> *Canada Trustco Mortgage v Canada*, 2005 SCC 54 [*Canada Trustco*]; *Matthew v Canada*, 2005 SCC 55.

<sup>131</sup> *Lewis*, *supra* note 91 at para 32; *Benoit*, *supra* note 124 at para 38.

<sup>132</sup> See Haegele & Hodge, *supra* note 6 and accompanying text.

<sup>133</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

<sup>134</sup> *McMillan*, *supra* note 88 at para 5.

<sup>135</sup> *Ibid* at para 14.

<sup>136</sup> For an account of advocates using human or civil rights approaches, see Michael T. Prince, “Canadian Disability Policy: Still a Hit-and-Miss Affair” (2004) 29:1 *Can J Sociology* 59 at 62; Richard K Scotch, “Models of Disability and the Americans with Disabilities Act” (2000) 21:1 *BJELL* 213 at 214.

Further, even if *Charter* rights are not breached, this does not mean that the qualification process has no effect on dignity, broadly speaking. Dignity can have many meanings,<sup>137</sup> and one meaning centres on a person's identity, integrity, and feelings of self-worth and self-respect.<sup>138</sup> Disability scholars have identified dignity as an important disability policy goal.<sup>139</sup> It is not difficult to see why it may be an affront to one's dignity to be required to submit oneself to medical evaluation and request a form that will certify that one is impaired in some capacity, especially if it must be done repeatedly to qualify for separate programs. While a full solution to this is not obvious, it is not clear that the courts (and perhaps more importantly, legislators) are aware of this issue.

## F. THE PURPOSE OF THE DTC IS TO PROVIDE FINANCIAL ASSISTANCE

It is generally well accepted that, under the “modern principle,” statutes, including the *ITA*, are to be interpreted in light of their context and purpose, in addition to legislative intent.<sup>140</sup> Thus, the courts have appropriately considered the purpose of the DTC in interpreting the provision.

On several occasions, the courts have stated that the purpose of the DTC is to provide financial assistance to people with disabilities.<sup>141</sup> The courts in both *Gourlay* and *Pekofsky* quoted *Johnson v R*,<sup>142</sup> which in turn quoted from *Radage*, in which the Court stated:

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 ... [T]he object of Parliament ... is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live ... .<sup>143</sup>

Along similar lines, comments from the bench in *McMillan* show that there is a common perception that the credit has a subsidy purpose: “the rationale for the DTC ... was to financially assist a person who suffers from severe and prolonged mental or physical impairment in bearing the additional costs of living and working generated by the impairment itself.”<sup>144</sup> Thus, the courts appear to view the DTC as a subsidy (*i.e.*, a tax expenditure).

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<sup>137</sup> For a discussion of the meaning of dignity, see Errol P Mendes, “Taking Equality Into the 21st Century: Establishing the Concept of Equal Human Dignity” (2000) 12:1 NJCL 3; Rex D Glensy, “The Right to Dignity” (2011) 43:1 Colum HRLR 65.

<sup>138</sup> Lennart Nordenfelt, “The Varieties of Dignity” (2004) 12:2 Health Care Analysis 69 at 75–76.

<sup>139</sup> Karrie A Shogren, Ruth Luckasson & Robert L Shalock, “Using Context as an Integrative Framework to Align Policy Goals, Supports and Outcomes in Intellectual Disability” (2015) 53:5 Intellectual & Developmental Disabilities 367 at 368–369.

<sup>140</sup> Elmer A Driedger, *The Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; Stéphane Beaulac, *Handbook on Statutory Interpretation* (Markham, Ontario: LexisNexis Canada, 2008) at 26; Arnold, *supra* note 86 at 6:15; *Canada Trustco*, *supra* note 130 at paras 10–13.

<sup>141</sup> *Bleiler*, *supra* note 93 at para 13; *Gourlay*, *supra* note 89 at para 20, quoting *Johnston v R*, [1998] 2 CTC 262 (FCA) [*Johnston*].

<sup>142</sup> *Johnston*, *supra* note 141.

<sup>143</sup> *Pekofsky*, *supra* note 103 at para 12; *Gourlay*, *supra* note 89 at para 20; *Radage*, *supra* note 120 at para 45.

<sup>144</sup> *McMillan*, *supra* note 88 at para 16.

The courts' view of the purpose of the DTC is significant as it may impact the interpretation of the provision.<sup>145</sup> A potential issue arises, however, when one compares the courts' view of the DTC as financial assistance (and thus a tax expenditure) with the views of tax scholars and other experts, who, as previously noted, view the credit as a technical tax provision intended to measure ability to pay and thus achieve tax fairness.<sup>146</sup> Although purpose is only one of the three touchstones of statutory interpretation (the other two being text and context), a lack of agreement with respect to the DTC's purpose could nonetheless give rise to uncertainty in its application where more difficult interpretive issues arise.

#### IV. TAXPAYER PERSPECTIVES ON DISABILITY REFLECTED IN THE RECENT CASE LAW

The case law can also be examined to uncover the taxpayer perspective. The taxpayer in these cases is either a person with a disability or a caregiver. There are obvious limitations with respect to using court decisions to determine taxpayer perceptions, attitudes, and beliefs about disability as all of these things are filtered through judges (the authors of the reasons). These taxpayers are a small sample of all disabled people and their caregivers, and, as in any court case, the arguments made by the taxpayers will be motivated by self-interest. Further, the group cannot be presumed homogenous. Still, the cases do provide some insight into the beliefs of at least some taxpayers.

Why are the views of taxpayers relevant? Their ideas about disability and the policy response to disability, if not aligned with current law, could identify a need for policy reform. This is particularly the case if the DTC is viewed as disability support, as many claimants of the DTC are themselves members of the disability community, and therefore should be consulted.<sup>147</sup> Further, examining taxpayer views may identify a lack of understanding of the provision's purpose or availability, in which case there may be a need for public education or simplification of the provision. However, this can only occur after the government clarifies the DTC's purpose.

In their appeals, the taxpayers most often argue that the existing rules should be interpreted to entitle them to the credit. Examples include individuals with single eye blindness in *Lewis*, sleep apnea in *Beauchamp v R*<sup>148</sup> and *Girard v R*,<sup>149</sup> food allergies in *Marceau*, dyslexia in *Gourlay*, mental health in *Cook v R*,<sup>150</sup> seizures in *Pakarinen v R*,<sup>151</sup> headaches in *Fontaine*, and diabetes in *Hutchings v R*.<sup>152</sup>

In other cases, it appears that the taxpayers are really arguing that the legislation should be different than what was enacted. As an example, in the case of *Ostlund v R*, the caregiver of a child with Asperger's syndrome maintained that he should be entitled to the DTC despite the child not meeting the marked restriction requirement.<sup>153</sup> The parents appeared to argue that they

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<sup>145</sup> For a description of this "modern principle" see note 140 and accompanying text.

<sup>146</sup> See section II.C. Legislative Perspectives on the Policy Response to Disability, above.

<sup>147</sup> Philipps, *supra* note 36 at 105.

<sup>148</sup> 2008 TCC 189.

<sup>149</sup> 2006 FCA 65.

<sup>150</sup> 2008 TCC 458.

<sup>151</sup> 2010 TCC 456.

<sup>152</sup> 2009 TCC 375.

<sup>153</sup> *Ostlund v R*, 2011 TCC 197.

should be entitled to the DTC because it was their investments in the child (including opportunity costs) that enhanced their child's potential.<sup>154</sup> This seems to be at odds with legislative intent, as the DTC was drafted in a way that seems to exclude entitlement in such cases.

Taxpayers have also argued, in effect, that the category of family members who can qualify to use the credit should be expanded,<sup>155</sup> demonstrating the narrowness of the existing rules and a disagreement between the taxpayers and legislators in terms of the appropriate scope of the DTC. If the DTC is a tax expenditure that is intended to recognize the additional costs of disability, it might seem to make sense to loosen the rules and allow the support person the credit in order to indirectly support the disabled person.<sup>156</sup> If the DTC is intended to be a technical tax provision, DTC transfers to family members appears to be inconsistent with the ability to pay principle<sup>157</sup> because our system uses an *individual* tax unit. On the other hand, it could be argued that the support person's ability to pay has been reduced because of the responsibility to support a dependent with a disability. Whether or not the concept of ability to pay would take into account, for example, lost wages due to caregiving responsibilities is not clear.

Several taxpayers argued that the certification requirements were too onerous or otherwise problematic. The taxpayer in *Islam*, for example, pointed out that it is costly and unreasonable to get a medical certificate each year.<sup>158</sup> In *McMillan* the taxpayer argued that subjecting himself to medical examination (again) was an affront to his dignity.<sup>159</sup> There are also other examples of cases where taxpayers argued or suggested that qualification should be connected to other programs.<sup>160</sup> This is supported by academic commentary that disability supports should be better integrated with one another.<sup>161</sup> Thus, the views of some scholars and taxpayers conflict with those of legislators with respect to the qualification process, though I acknowledge that political and practical concerns may mask legislators' views of ideal policy (as I explain in more detail in the next section).

## V. FURTHER EXPLORING THE DIFFERING PERCEPTIONS, ATTITUDES, AND BELIEFS ABOUT DISABILITY

The foregoing examination of the DTC exposed and compared perceptions, attitudes, and beliefs about disability and the appropriate policy response to disability. Here, I discuss further conflicting perceptions, attitudes, and beliefs. Although this article is not focused on prescribing policy changes, I take this opportunity to offer some possible suggestions in order to prompt further investigation and discussion.

One problem is that lawmakers have not made the goal of the DTC clear. It is difficult to have a policy discussion without a consensus on whether the DTC is a tax expenditure or a

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<sup>154</sup> *Ibid* at para 4.

<sup>155</sup> *O'Neill v R*, 2008 TCC 548; *Scott v R*, 2009 TCC 36; *Lushtinetz v R*, 2015 TCC 320.

<sup>156</sup> Though it should be noted that there are other credits available to caregivers. See note 63, above.

<sup>157</sup> See section I.C. Tax Policy Responses to Disability, above.

<sup>158</sup> *Islam*, *supra* note 116 at para 29.

<sup>159</sup> *McMillan*, *supra* note 88 at para 5.

<sup>160</sup> *Brassard v R*, 2014 TCC 82 at para 6; *Nancarrow v R*, 2013 TCC 258 at para 3.

<sup>161</sup> See *e.g.* Torjman, *Five-Point Plan*, *supra* note 80 at 2–3.

technical tax provision. The current government has initiated a review of tax expenditures,<sup>162</sup> and although its primary objective is to cut tax expenditures, clarifying the purpose of the DTC should nonetheless be a part of this discussion. Is the purpose of the DTC to account for the impact of costs of disability on ability to pay (thus, a technical tax provision)? Or, is the purpose to provide financial support for persons with disabilities (thus, a tax expenditure)? Although tax and disability writers have made assumptions about the purpose of the credit, either of these interpretations could be made consistent with the normative arguments in the two bodies of literature, provided the resulting gaps are dealt with in other distinct provisions or programs. For example, if the government confirms the DTC is a tax expenditure, the impact of costs of disability on ability to pay could be addressed through another provision in the *ITA*. Alternatively, if the government labels the DTC as a technical tax provision, financial assistance for persons with disabilities can be addressed through another program inside or outside of the tax system. Once the purpose is identified, it can be widely communicated<sup>163</sup> and reform opportunities (such as, for example, transferability and refundability) may be identified to better align the DTC with its purpose. This should improve perceived fairness of the DTC, thus boosting the credibility of, and perhaps even compliance with, the tax system.

The disability studies field offers important insights into both how disability should be viewed as well as the appropriate policy response. After examining the DTC court cases over the past decade, it is also clear that judges' attitudes, perceptions, and beliefs concerning disability are often not in line with those expressed in contemporary disability literature. In a number of cases, comments made by judges in decisions reflected stereotypical views of persons with disabilities, thus impeding advancement of the project of promoting full participation in society. This problem could perhaps be addressed through judicial education.

Also, it is clear that legislators' views of disability do not align with the disability scholarship. For example, the DTC's focus on impairment and basic functioning ignores important aspects of disability by failing to look to the *effect* of functional limitations on the individual's participation in society, considering relevant contextual factors. This may at least partially be attributable to legislators' lack of awareness of the social model or how to integrate it into policy definitions of disability. If the DTC is a tax expenditure, legislators should, for example, investigate the possibility of expanding the credit's criteria such that it would be available to those who incur significant non-deductible disability-related costs of participating in society, including items such as transportation or housekeeping.

The preceding analysis demonstrates that many taxpayers also do not agree with the legislators and judges with respect to what the DTC qualification criteria and process should be. While it is likely that there will be disputes over eligibility wherever the line is drawn, legislators and courts should strive to continue to balance fairness, administrative concerns, and certainty. For example, the Court's role could be clarified, and taxpayer compliance costs could be reduced through coordination with other programs<sup>164</sup> where appropriate.

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<sup>162</sup> Canada, Minister of Finance, *Growing the Middle Class*, (Ottawa: Department of Finance Canada, 2016) at 211, online: <[budget.gc.ca/2016/docs/plan/budget2016-en.pdf](http://budget.gc.ca/2016/docs/plan/budget2016-en.pdf)> [perma.cc/6CKU-QV8K].

<sup>163</sup> Because of the confusion over the purpose of the credit, the 2002 Standing Committee Report recommended an educational strategy to including the purpose of the credit. See House of Commons, *Tax Fairness*, *supra* note 75 at 30.

<sup>164</sup> Philipps, *supra* note 36 at 96–98. A comprehensive list of other disability-related programs can be found in Atul Jaiswal, Lynn Roberts & Mary Ann McColl, *A Review of Disability Policy in Canada*, 3rd ed (2017), online:

There are some practical and political constraints on structuring the DTC. Financial considerations likely drive restrictive qualification criteria and monetary limits.<sup>165</sup> Also, the tax system tends to be a less flexible policy tool, and thus less able to respond to individual circumstances than other policy tools, such as, for example, financial assistance programs outside of the tax system.<sup>166</sup> The decision to use a tax expenditure rather than a direct policy may be attributed to federalism and the fact that the federal government has not assumed the role of funding disability to a major extent.<sup>167</sup> Even the decision to use a credit rather than a deduction has a federalism aspect to it, as it leaves the provinces free to determine how much, if any, to grant as their own disability tax relief. Finally, as with all policies of this nature, the government needs to be concerned with the economic and equity effects of mimickers.<sup>168</sup> The need to verify the presence of a disability, for example, is a practical reality. These musings are not meant to exonerate the government from poor policy choices, but to point out that there are always practical and political constraints on policymaking. This means that the choices made may reflect considerations other than the legislators' views on disability.

There seems to be current political will to re-examine both disability policy and tax expenditure policy. This is a prime opportunity to address the DTC, which lies at the intersection of these two policy areas. However, this article demonstrates that there are differing opinions with respect to the meaning of disability and the appropriate policy response to disability. This prompts us to step back and have a discussion about the larger question: what do we, as a society, owe people with disabilities?<sup>169</sup> The time might be right for the federal government to lead the way by engaging publicly with this question and to start making and promoting meaningful changes to disability tax policy.

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Canadian Disability Policy Alliance <[disabilitypolicyalliance.ca/wp-content/uploads/2016/02/polscan-fed-280217.pdf](https://disabilitypolicyalliance.ca/wp-content/uploads/2016/02/polscan-fed-280217.pdf)> [perma.cc/8JH8-4TY8].

<sup>165</sup> Torjman, *Disability Supports*, *supra* note 75 at 11.

<sup>166</sup> Philipps, *supra* note 36 at 95.

<sup>167</sup> Torjman, *Five-Point Plan*, *supra* note 80 at 1.

<sup>168</sup> Weisbach, *supra* note 16 at 82.

<sup>169</sup> Jongbloed, *supra* note 15 at 207.