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Fiscal Contract and the Canada Disability Benefit: Lessons from Income Tax Law

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ABSTRACT

This paper adopts a fiscal contract approach to examining the design of the Canada Disability Benefit and advocates using the CCB as a design model. It argues that a fiscal contract underlies the Income Tax Act which collects taxes as well as spends public money on poverty-reduction programs. In a tax state, the government's spending is tied to taxing. The current fiscal contract reflects key Canadian values, such as equity and fairness, ability to pay, work, family and the rule of law. The CCB, which is implemented through the Income Tax Act, is a superior design model to the Guaranteed Income Supplement for designing the new benefit.

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I. THE CANADA DISABILITY BENEFIT AND ITS DESIGN CHALLENGES

Bill C-22, the *Canada Disability Benefit Act* aims "to reduce poverty and to support the financial security of working-age persons with disabilities by establishing the Canada disability benefit and making a consequential amendment to the Income Tax Act." [1] The Canada Disability Benefit (CDB), if established, will be a "once in a generation" measure, providing a social safety net for working-age Canadians with disabilities in a way similar to that for seniors.[2] Employment, Workforce Development and Disability Inclusion Minister Carla Qualtrough reintroduced the bill in the House of Commons in 2022 as follows:[3]

> In 1967, during the 27th Parliament, the Right Hon. Lester B Pearson rose in the House of Commons and stated that no senior should live in poverty, and the guaranteed income supplement was born.
>
> In 2016, our government stated that no child in our country should live in poverty, and the Canada child benefit was born.
>
> Today, I begin with the following declaration: In Canada, no person with a disability should live in poverty.
>
> The values that drove past governments to reduce poverty and create benefits for seniors and children are the same values that have created the bill before us today. I am talking about equality, fairness and inclusion, Canadian values, values that guide us and define us as a country and bring out the very best in us.

But how can these aspirational goals translate into a sustainable social security program? Bill C-22 has very few answers and leaves the key design issues to be settled by the Governor in Council through future regulations. These answers will largely be based on consultations with disability communities and negotiations with the provinces and territories that already provide disability benefits. In other words, the devil will be in the details and the details are yet to come.

At the moment of writing, there are serious legislative and fiscal uncertainties about the CDB. Legislative uncertainty arises from the fact that Bill C-22 is a mere framework legislation. It is unknown when the detailed regulations will be introduced. Even when they're introduced, the regulations could be changed by the cabinet without public consultation. Fiscal uncertainty is obvious. Without knowing the design parameters, it is impossible to estimate the cost of the program. It is also difficult to determine how many Canadians with disabilities will receive the benefit and whether the benefit can actually lift them out of poverty.

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[1] Bill C-22, *An Act to reduce poverty and to support the financial security of persons with disabilities by establishing the Canada disability benefit and making a consequential amendment to the Income Tax Act*, 1st Sess, 44th Parl, 2021-2022 (1st reading 2 June 2022). It is the same as Bill C-35 that was tabled on 22 June 2021 before the last federal election. The idea of a CDB was first announced in the Throne Speech in 2020. For more chronological details, see Michael J Prince, "Expectations, Patchworks, and Goals: Stitching the Canada Disability Benefit into the Social Security System," (2023) OHLJ [same issue, page number TBD], at table 1.

[2] See "Canadians with disabilities waiting for Bill C-22", (22, October 2022), online (radio): *CBC News: The House* **<www.cbc.ca/news/politics/assisted-dying-carla-qualtrough-1.6625412>.**

[3] House of Commons Debates, Vol.151, No. 098, 1st Sess., 44th Parl, 2021-2022 (2nd reading Sept. 20, 2022, per Hon. Carla Qualtrough ("*House of Commons Debates,* 44-1, No 98").

One of the reasons for the legislative and fiscal uncertainties is the choice of design model: The Guaranteed Income Supplement or GIS. The GIS is a popular and successful program, helping reduce poverty for seniors.[4] However, the GIS is a poor model for the CDB. One of the reasons is that the GIS is an add-on to a quasi-universal Old Age Security (OAS) system, a federal program, and the GIS is supported by provinces and territories. In contrast, the CDB will be a federal orphan added to a family of divergent provincial programs. Also, the CDB will be income-tested, while provincial programs (except the new Quebec basic income program)[5] are means-tested. Bridging the two designs can be tricky. Negotiations with provinces and territories will dictate the ambition of the CDB because "if they are not willing to not claw it back, we are not willing to replace the income they already provide."[6]

This paper argues that the CDB should be designed like the Canada Child Benefit (CCB). As a federal program implemented through the Income Tax Act, the CCB paid 3.5 million families a total of $24.8 billion in 2021.[7] Taking the form of a refundable tax credit, this program is administered by the Canada Revenue Agency (CRA). Legislative certainty would be enhanced by amending the Income Tax Act as opposed to introducing standalone regulations. Fiscal certainty would be increased by focusing on the intersection between disability and poverty (e.g., the extraordinary costs and income-earning capacity). While keeping in mind the definition of disability in the *Accessible Canada Act*, as a fiscal matter, the CDB should adopt a fiscal notion of disability by building on, but not being constrained by, the pertinent provisions of the Income Tax Act. The poverty-reduction goal is better achieved through a combination of benefit transfers and tax deduction of expenses. Having both aspects administered through the Income Tax Act provides consistency and coherency. The CCB and the childcare expense deduction regime helps reduce poverty for Canadians with children. A similar regime can be designed for Canadians with disabilities.

There are legitimate concerns about using the Income Tax Act to deliver the CDB. The current disability support measures, such as the disability tax credit and registered disability savings plan have been criticized as difficult to access or leaving low-income persons with disabilities out.[8] The Income Tax Act is the largest and most complex statute in Canada and its appearance is intimidating. It is also a "blunt" instrument in the sense that by focusing on ascertaining income, the Income Tax Act is written in an identity-neutral manner. As such, even though the effect of the provisions may be different for people in different circumstances, especially those in vulnerable groups, such as women, visible minorities, Indigenous peoples, and new immigrants,[9] such identity-based effect is difficult to be addressed by the Income Tax Act itself, and supplementing measures are needed.

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[4] See Daniel Béland & Patrik Marier, "How to Design a Program for the Poor that is Not a Poor Program: Explaining the Political Sustainability of the Guaranteed Income Supplement" (2023) OHLJ [same issue, page number TBD] [Béland & Marier, "How to Design a Program for the Poor"].

[5] See Samuel Ragot, "The New Quebec Basic Income Program: A Potentially Useful Set of Policy Directions for the Canadian Disability Benefit" (2023) OHLJ [same issue, page number TBD]

[6] *House of Commons Debates*, 44-1, No 98, supra note 3, at 1125 (Hon Carla Qualtrough).

[7] See Department of Finance Canada, *Report on Federal Tax Expenditures: Concepts, Estimates and Evaluations 2022*, Catalogue No F1-47E-PDF (Ottawa: Department of Finance Canada, 22 April 2022) at 81 [*Report on Federal Tax Expenditures 2022*].

[8] See Senate Canada, *Breaking Down Barriers: A Critical Analysis of the Disability Tax Credit and the Registered Disability Saving Plan: Report of the Standing Senate Committee on Social Affairs, Science and Technology* (June 2018)(Chair: Hon Art Eggleton); Sally A Kimpson, *Basic Income, Gender & Disability* (Women's Legal Education and Action Fund, 2021).

[9] See gender-based plus analysis in *Report on Federal Tax Expenditures 2022, supra* note 7; David Macdonald, *Are tax Loopholes Sexist?*, (Canadian Centre for Policy Alternatives, March 2019); Isabella Bakker & Lisa Philipps,

Overall, however, the Income Tax Act embodies the trade-offs accepted by Canadians through a democratic process. It reflects a kind of fiscal contract about financing collective spending. Parliament has chosen the Income Tax Act to implement social benefit programs, such as the most recent Canada Dental Benefit. Therefore, between the GIS and CCB, the latter is a more appropriate model for the CDB.

This paper explains why the CDB should be designed as a fiscal program and be modelled on the CCB. While being informed by the broader context of disability law and insights of the disability community,[10] the paper argues that the CDB should focus on the interconnection between disability and income and be sensitive to work incentives as eligible persons are of working-age. Part II presents the fiscal context for the CDB – the fiscal contract approach, Canada as a tax state, the history of give-and-take and fiscal federalism. Part III discusses the main design features of existing social income programs, including the standalone OAS/GIS program and those implemented as part of the Income Tax Act (referred to as "tax-transfers"), including the CCB. Part IV teases out some core values that underlie the Income Tax Act as an instrument of raising revenue as well as spending public money on social programs. These values include equity and fairness, ability to pay, work, family and the rule of law. Based on these values and using the CCB as a model, Part V offers some insights on designing the CDB. Part VI concludes with some general observations.

II. THE FISCAL CONTEXT FOR THE CDB

A. Fiscal Contract

The CDB will be added to the tapestry of existing social security and welfare programs. Its design is necessarily constrained by the existing way of thinking and technical design choices, which, in turn, are dictated by fiscal federalism and the fact that Canada is a tax state. The history of progressive income tax and social support programs points to the existence of a fiscal contract among Canadians.

The notion of fiscal contract is explained as follows:[11]

> The fiscal contract approach posits that citizens, at least to some extent, view governments as selling services in exchange for tax revenue. Governments, like all good suppliers, are likely to respond primarily to the wishes of those who pay for their services. Because taxes are costly and difficult to collect, those who run states presumably want to

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"Gender Distribution of Tax Expenditures", in Vivien Morgan, eds, *Canadian Tax Highlights*, vol 25, No 10 (Canadian Tax Foundation, 2017).

[10] See Briefs published by HUMA (Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities) on its website regarding Bill C-22. See House of Commons, "Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA): Bill C-22" (22 November 2021), online: House of Commons <www.ourcommons.ca/Committees/en/HUMA/StudyActivity?studyActivityId=11860383>. See also Laverne Jacobs, "The Canada Disability Benefit Act and Women with Disabilities: Pursuing Administrative Justice and Reducing Administrative Violence," (2023) OHLJ [same issue, page number TBD]; Ravi Malhotra, "Is the Canada Disability Benefits Program Consistent with the Social Model of Disablement? The Perils and Possibilities of Equality Rights through Income Support," (2023) OHLJ [same issue, page number TBD]; Mark C Weber, "Reflections onf Payroll-Tax-Based Social Insurance for Disability," (2023) OHLJ [same issue, page number TBD].

[11] Richard M Bird & Eric M Zolt, "Taxation and Inequality in Canada and the United States: Two Stories or One?" (2015) 52 Osgoode Hall L J 401 at 403.

> reduce the willingness and ability of citizens to evade or avoid taxes. One approach to reducing tax collection costs is to increase citizens' willingness to pay by ensuring that a majority of taxpayers view government spending as beneficial. Another approach is to strengthen tax administration and increase penalties to make it more costly for citizens who fail to pay their taxes. From this perspective, the central fiscal problem of the state is to balance the use of these two levers to obtain the revenues desired at the least cost. Countries are thus continually seeking a sustainable equilibrium between force and persuasion in raising tax revenue.

The fiscal contract approach predicts that those who are expected to pay most of the taxes are likely to receive most of the benefits (direct or indirect). An example of an indirect benefit would be to provide low-income people with funds "on the condition that they act in ways taxpayers value, such as ensuring that their children go to school."[12] Fiscal contracts change when taxpayers change their preferences for redistribution or beliefs in the relative efficiency and effectiveness of governments to provide goods and services. "Taxpayers' preferences are also coloured by beliefs (whether well-founded or not) about why the poor are poor and the rich are rich, as well as by perceptions of who bears the tax burden and who benefits from government spending."[13] It is important for the government to have the buy-in from voters and taxpayers.[14] The fiscal contract approach is particularly important in tax states where fiscal spending is tied to taxing.

B. Canada as a Tax State

Canada is a tax state.[15] "To spend is to tax."[16] The Canadian social state is taxpayer-funded.[17] As contributing citizens,[18] Canadians are both "givers" and "takers."[19] Since the 1940s when progressive income tax became a "mass" tax,[20] the link between paying income tax and receiving social support has been critical to forging the necessary fiscal contract.

In the 2019-2020 fiscal year, total federal revenues amounted to $334.1 billion, of which 68% were raised through the Income Tax Act.[21] In the same year, total expenses amounted to $373.5 billion, about two-

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[12] *Ibid* at 403-04.

[13] *Ibid* at 404.

[14] For further discussion on fiscal contract and taxation, see Jeffrey F Timmons, "The Fiscal Contract: States, Taxes, and Public Services", (2005) 57 World Politics 530.

[15] Canada is like other high-income OECD member countries. See OECD Data, "Tax Revenue" (2022), online: <data.oecd.org/tax/tax-revenue.htm>.

[16] For further information, see Edward D Kleinbard, *We Are Better than This: How Government Should Spend Our* Money (Oxford University Press, 2015); Molly C Michelmore, *Tax and Spend: The Welfare State, Tax Politics, and the Limits of American* Liberalism (University of Pennsylvania Press, 2012).

[17] See David Tough, *The Terrific Engine: Income Taxation and the Modernization of the Canadian Political Imaginary* (UBC Press, 2018) at 3-5.

[18] See Shirley Tillotson, *Contributing* Citizens (UBC Press, 2008) [Tillotson, *Contributing Citizens*].

[19] See Shirley Tillotson, *Give and Take: The Citizien-Taxpayer and the Rise of Canadian Democracy* (UBC Press, 2017) [Tillotson, *Give and Take*].

[20] See Colin Campbell & Robert Raizenne, *A History of Canadian Income Tax, Volume 1: The Income War Tax Act 1917-1948* (Canadian Tax Foundation, 2022).

[21] See Department of Finance Canada, *Annual Financial Report of the Government of Canada 2019-2020*, Catalogue No F1-25E-PDF (Ottawa: Department of Finance Canada, 1 March 2020) at 15.

thirds of which were transfer payments, including funding income support programs administered by provinces and territories.[22]

C. The History of "Give and Take"

Historically, the creation and growth of social income programs are tied to the expansion of the progressive income tax system.

> In addition to associating the new income taxes with paying for the war and inflation prevention, Ilsley [Minister of Finance] invoked social goods in the form of social security … – an ideal of connectedness in which individuals' self-interested actions were linked by macroeconomic mechanisms to social goods.[23]
>
> The transformation of the income tax during the war accompanied a peaceful revolution in popular thinking about the proper role of the state and became inextricably connected with the somewhat troubled birth of the modern Canadian welfare state.[24]

Since the 1940s, the income tax system has been engaged to raise the necessary revenue to pay for social spending, including the OAS/GIS, as well as to directly provide income support through tax reliefs, such as family allowances (now CCB).

Progressive Income Tax

The personal income tax has always been progressive, although progressivity has varied over time. The marginal rate on taxable income exceeding $10,000 (but below $15,000) was 13.7% before WWI and 69% by 1942.[25] Since WWI, the tax became more democratic: while only 2.3% of the population filed income taxes in 1938, 24% did in 1955, and over 75% in 2017.[26] By the early 1970s the federal government had put into place a comprehensive framework of expenditure policies built on the robust economic growth after WWII and the belief that such growth would continue. "The role of the state as the provider of core public goods within a liberal market economy had shifted to one of government as a source of redistribution and social investment."[27]

Since the 1972 tax reform, the marginal rate for the top bracket began to decline when the tax base became more universal (e.g., taxing capital gains): 60% in 1971 (exceeding $400,000); 47% in 1972 (exceeding $60,000); 34% in 1987 (exceeding $63,347), 29% in 1988 (exceeding $55,000) and bounced back to 33% in 2016 (exceeding $200,000).[28]

As a source of revenue, the personal income tax generated less than 10% of total federal revenues between 1917 to 1942, 10% to 30% between 1942 and the mid-1960s, and over 60% in recent years.[29]

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22 *Ibid* at 17-18.
23 Tillotson, *Give and Take* supra note 19 at 198.
24 Campbell & Raizenne, *supra* note 20 at 235.
25 See Livio Di Matteo, *A Federal Fiscal History: Canada, 1867-2017* (Fraser Institute, 2017) at 35.
26 *Ibid* at 48.
27 *Ibid* at 47.
28 See William Watson & Jason Clemens, eds, *Zero to 50 in 100 Years: The History and Development of Canada's Personal Income Tax* (Fraser Institute, 2017).
29 See Livio Di Matteo, "Major Changes to the Federal Personal Income Tax: 1917-2017" in Watson & Clemens, *ibid*, 11 at 11-16.

According to one study, about 87% of the federal income tax is estimated to be paid by those earning $50,000 or more taxable income; individuals earning over $100,000 taxable income account for 8.4% of taxfilers but paid over 50% of total federal income tax; about one-third of all filers paid no federal income tax, many of whom received benefits.[30]

Social Income Programs

The Income Tax Act and the Old Age Security Act provides income support to low-income Canadians. Tax transfers take the form of refundable tax credits, requiring eligible individuals to file tax returns to account for their income and apply for the benefit. The benefits are paid periodically. The OAS/GIS pay benefits to seniors and are regarded as part of the pension system. These social support programs are paid out of general revenues and are thus different from contribution-based social insurance programs, such as Employment Insurance or Canada/Quebec Pension Plans. The OAS/GIS program had an estimated cost of $62.8 billion in 2022, while tax-transfers had an estimated cost of $35.7 billion.

Table A: Overview of Tax-Transfers and OAS/GIS

Program[31]	Number of recipients (2019)	Estimated cost for 2019	Estimated cost for 2022	Administration
OAS/GIS	*6.4 million*[32]	*$53.3 billion*[33]	*$68.2 billion*[34]	*Services Canada*
Canada Child Benefit	3.5 million	$24.3 billion	$25.5 billion	CRA
Canada Workers Benefit	2.1 million	$2.005 billion	$3.63 billion	CRA
GST credit	10.5 million	$4.9 billion	$5.1 billion	CRA
Refundable medical expense supplement	545,000	$165 million	$165 million	CRA
Disability tax credit	*1.25 million*	*$1.2 billion*	*$1.35 billion*	*CRA*

D. Fiscal Federalism

Provinces and territories share the power to tax income with the federal government but are responsible for providing social welfare and support to citizens. To achieve equalization[35] and adequate funding of provincial programs, the federal government makes transfer payments to provinces and territories. As shown above, the federal government also provides direct support to Canadians through the tax system.

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[30] See Mark Mike, *Who Pays Income Tax?* (Canadian Taxpayers Federation, 2017) at 1, 7.

[31] The source for the data is *Report on Federal Tax Expenditures 2022*, supra note 7.

[32] Employment and Social Development Canada, *Canada Pension Plan/Old Age Security Quarterly Report – Monthly Amounts and Related Figures From October to December 2019* (Ottawa: Employment and Social Development Canada, 30 September 2019) at 2. This value is for the number of benefits given out in July 2019.

[33] Department of Finance Canada, *Budget 2019: Investing in the Middle Class*, Catalogue No F1-23/3E-PDF (Ottawa: Department of Finance Canada, 19 March 2019) at 289.

[34] Department of Finance Canada, *2022 Budget: A Plan to Grow Our Economy and Make Life More Affordable*, Catalogue No F1-23/2E-PDF (Ottawa: Department of Finance Canada, 7 April 2022) at 188.

[35] See Daniel Béland et al, *Fiscal Federalism and Equalization Policy in Canada: Political and Economic Dimensions* (University of Toronto Press, 2017).

In the case of creating national social support programs, such as the OAS and CCB, agreements with provinces and territories were critical. "The adoption of a universal federal flat pension in 1951 [OAS] required a constitutional amendment that allowed Ottawa to create a purely federal program in that policy area."[36] The current CCB was built on a national child benefit supplement introduced in 1998 in consultation with provinces and territories. The provinces and territories, at their discretion, agreed to reallocate savings from welfare expenses for children, made possible by the federal credit, to other programs and services for low-income families with children.[37] The success of national social security programs turns on fiscal federalism.

III. DESIGN FEATURES OF FEDERAL SOCIAL INCOME PROGRAMS

A. Overview

The OAS/GIS

The OAS was adopted in 1951 as a universal federal flat pension available to all Canadians aged seventy and older who met basic residency criteria.[38] It replaced an earlier Old Age Pensions Act enacted in 1927. As a universal "demogrant"[39] for seniors, the amount of the benefit was modest - $40 per month in 1951. The modesty of the amount reflects two main considerations: (1) the principal source of income security for seniors should be earnings-based pension programs, such as tax-assisted private pensions (RPPS and RRSPs) and public pensions such as the CPP and QPP; and (2) Canadians should become aware of the costs of providing universal pensions.[40] Universality was eroded in 1989 when a claw-back was introduced: OAS

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[36] Daniel Béland & Patrik Marier, "Universality and the Erosion of Old Age Security" in Daniel Béland, Gregory P Marchildon and Michael J Prince, eds., *Universality and Social Policy in Canada* (University of Toronto Press, 2019) 103 at 104 [Béland & Marier, "Universality"].

[37] See Kevin Milligan, "The Tax Recognition of Children in Canada: Exemptions, Credits, and Cash Transfers" (2016) 64 Can Tax J 601 at 608-09 [Milligan, "The Tax Recognition of Children in Canada"].

[38] See *Old Age Security Act*, RSC 1985, c O-9. For House of Commons Debates, see *House of Commons Debates*, 21-2, vol 1 (20 February 1950) at 60 (Mr St Laurent).

[39] See Tillotson, *Give and Take*, *supra* note 19 at 304. Tillotson states that:

> Taxpayers and citizens had become largely overlapping groups. As citizens in a welfare state, the new taxpayers sought benefits different from the older benefits of railways, postal systems, courts and police forces, which had been designed to support property and production. There was now a kind of citizen wage, as James Snell has called the old age pension of 1952. The middle-class and rich taxpayers of the interwar years had expected that governments would provide services to the productive economy and had worried about the impact of tax on production and saving. The mass taxpayers expected services that would support their ability to consumer to at least a minimum standard, but they also worried about the impacts of taxes on their ability to consume and save. All sorts saw or imagined that others were free riders, getting more than they contributed.

See also James G Snell, *The Citizen's Wage: The State and the Elderly in Canada, 1900-1951* (University of Toronto Press, 1996).

[40] See Béland & Marier, "Universality", *supra* note 36 at 105. Initially, the OAS was financed by an earmarked tax levy. This tax was meant to "serve as a symbol of the cost of the pension and create an immediate awareness of that cost in the minds of all those who paid income tax". The design of this tax was complex and collected revenues according to a "2-2-2" formula: "2 per cent on personal income, 2 per cent on corporate income, and 2 per cent from general budgetary revenue, all to be deposited in a special OAS fund". It became too complex to administer and was eliminated in the 1970s. Since then, the OAS is funded by general revenue.

recipients with income above stipulated thresholds would repay all or part of the OAS benefit. This changed the nature of the OAS from a demogrant towards an income support program.

The GIS was introduced in 1967 to be an explicit income-tested program.[41] It is a top-up to the OAS pension and the recipient's income must fall below the maximum annual income threshold based on their marital status. Although it was created as a temporary program aimed at supporting low-income people during the maturation of the C/QPP, the GIS has since become a key component of the social security system. At present, the monthly payment is slightly over $600 if the annual income of the recipient and his/her spouse or common-law partner is less than $27,456.[42]

Canada Child Benefit

Child benefits were the first-born of Canada's tax-transfer system.[43] The present CCB can be traced to the $200 tax exemption introduced in 1918 to reduce the tax payable by taxpayers with children, in recognition of the fact that having children reduced the amount of income available to pay tax.[44] It is also built on the family allowance program introduced in 1944 to help lower-income families.[45] "Tax fairness and social welfare were thus tightly tied together"[46] and the tax system is used to provide social assistance.

The CCB under section 122.6 of the Income Tax Act currently provides a maximum amount of $6,833 per child under the age of 6 and $5,765 per child aged 6 through 17.[47] The benefit is income-tested based on adjusted family net income with the benefit phase-out rate depending on the number of children. For example, for the 2021-2022 benefit year, on the portion of adjusted family net income between $32,028 and $69,395, the benefit is phased out at a rate of 7% for a one-child family, 13.5% for a two-child family, 19% for a three-child family and 23% for a larger family. Where adjusted family net income exceeds

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[41] See *House of Commons Debates*, 27-1, vol 10 (5 December 1966) at 10707 (Hon E A MacEachen).

[42] See Government of Canada, "Guaranteed Income Supplement: How much you could receive" (22 November 2022), online: Government of Canada <www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/guaranteed-income-supplement/benefit-amount.html>.

[43] Ken Battle, "Child Benefit Reform: A Case Study in Tax-Transfer Integration" (1999) 47 Can Tax J 1219 at 1222.

[44] For further, see Jinyan Li & Jacklyn Neborak,"Tax, Race and Child Poverty: Improving the Canada Child Benefit Program" (2018) 28 J L & Soc Pol'y 67; Battle, *supra* note 43; Jonathan R Kesselman, "Credits, Exemptions, and Demogrants in Canadian Tax-Transfer Policy" (1979) 27 Can Tax J 653; Jonathan R Kesselman, "The Child Tax Benefit: Simple, Fair, Responsive?" (1993) 19 Can Pub Pol'y 109; Milligan, "The Tax Recognition of Children in Canada", *supra* note 37; and Felicite Stairs, "The Canada Child tax Benefit: Income Support and the Tax System" (1999) 14 J L & Soc Pol'y 123.

[45] See Tillotson, *Give and Take*, *supra* note 19 at 175. Tillotson states, "[I]n the face of tax resistance and protest, changes in the law were meant to build consent to the new level of personal income taxation, mainly among working-class and modestly paid middle-class Canadians. A similar purpose was served by the Family Allowances Act of 1944."

[46] See Tillotson, *Give and Take*, *supra* note 19 at 201. Tillotson states:

> There are reasons to distinguish among methods of delivering social assistance, but in 1942-45, when these tax and welfare measures were being designed and first delivered, the tax dimension of the story indicates that personal income tax relief, inflation control, and social spending had common origins – the new ideology of social security. … The Liberals' tax program connected social security and stabilization policy, and their response to lower-income Canadians' tax resistance became an occasion to explain those connections.

[47] Overall, the trend in the tax recognition of children is moving away from rewarding parents for their services of raising children or providing them with financial support toward investing in children on economic and social policy grounds. See Li & Neborak, *supra* note 44.

$69,395, remaining benefits are phased out at rates of 3.2% for a one-child family and 9.5% for families with more than three children.

Goods and Services Tax/Harmonized Sales Tax Credit

Section 122.5 of the Income Tax Act provides income support to about 10.5 million individuals in the name of GST/HST credit.[48] It was introduced upon the introduction of the GST, a tax that is regressive by taxing goods and services consumed by low-income individuals. The GST credit helps reduce the regressivity of the GST by offsetting the GST paid by low-income individuals. This benefit is assessed by the CRA based on the information on the tax returns. For the 2021-2022 fiscal year, based on net family income reported for the 2020 taxation year, the amount of annual benefit is as follows: a basic adult credit of $299; a basic child credit of $157 for each child; and an additional credit of $157. The amount of benefit is reduced for individuals and families with annual incomes over $38,892.[49]

Canada Workers Benefit

The Canada Workers Benefit provides income support to low-income workers as employees or self-employed. The rationale was to "reward and strengthen incentive to work" and "help people over the welfare wall … and achieve the dignity and independence that comes with a job".[50] It was promised to help lift "tens of thousands of low-income workers out of poverty".[51]

Individuals aged 19 or older not attending school full-time are eligible. In 2021, the benefit is equal to 27% of each dollar of earned income in excess of $3,000 to a maximum amount of $1,395 for single individuals without dependents and $2,403 for families (couples and single parents). The benefit is phased out at a rate of 15% of each dollar of adjusted net income above thresholds of $22,944 for single individuals without dependents and $26,177 for families.[52]

Refundable medical expense supplement

The refundable medical expense supplement under section 122.51 of the Income Tax Act is a refundable tax credit that provides low-income working Canadians with assistance for medical and disability-related expenses. For 2021, it is available to individuals whose earnings from employment or self-employment meet or exceed a minimum threshold of $3,751. To be eligible, individuals must be 18 years of age or older and have claimed eligible medical expenses under the medical expense tax credit or the disability supports deduction. The amount of the benefit is equal to the lesser of $1,285 (for 2021) and 25% of the

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[48] *Report on Federal Tax Expenditures 2022*, supra note 7 at 190.

[49] As part of the COVID-19 economic response plan, a one-time special supplemental payment was made in 2020 to double the 2019-2020 GST/HST credit amounts.

[50] *House of Commons Debates*, 39-1, No 124 (20 March 2007) at 1145, 1155 (Ms Diane Ablonczy). Ms. Diane Ablonczy (Conservative) was discussing the Working Income Tax Benefit (WITB), the predecessor of Canada Workers Benefit.

[51] Remarks by Prime Minister Justin Trudeau in the House of Commons regarding Budget 2018 and proposing to replace the WITB with the Canada Workers Benefit. *House of Commons Debates*, 42-1, No 268 (27 February 2018) at 1450 (Right Hon Justin Trudeau).

[52] *Report on Federal Tax Expenditures 2022*, supra note 7 at 90-91.

allowable portion of expenses that can be claimed. The amount of benefit is reduced by 5% of net family income above an income threshold of $28,446.[53]

B. Targeting Poverty Reduction

The social income programs provide support to targeted individuals for the main purpose of reducing poverty. There is no universal basic income regime; all programs are income-tested. The amount of benefit is set on a program-by-program basis, without any specific reference to poverty measurement. The income-test applies to net family income, even though tax liability is on an individual basis. These programs rely on the amount of income as assessed for tax purposes (line 1500 on TI Tax and Benefit Return) to determine eligibility and the amount of payment. The CCB and OAS/GIS are age-based (either too young or too old to work and earn income). The amount of benefit for working-age persons is much less.

The OAS Act and Income Tax Act do not define poverty per se. The amount of benefit is set nationally, allowing for no variation for the different costs of living across Canada. The legislation is written in gender-neutral language and does not differentiate individuals based on their identity, even though women, Indigenous peoples and people in other vulnerable groups experience more serious poverty issues.[54]

Canadian residence is required to qualify for the benefits. Canadian residence is also the basis for Canada to tax personal income on a global basis (i.e., income earned anywhere in the world in order to ascertain ability to pay tax in Canada).[55] This reflects the notion of give-and-take of members of the Canadian community.

C. Tax relief for Non-discretionary Expenditures

The two common factors contributing to poverty are non-discretionary expenditures required to support oneself for basic activities and the lack of income-earning capacity. The social income programs address the latter factor. Other social programs, such as housing, health care and pharma care for seniors (at the provincial level) help address the expenditures factor.

The Income Tax Act allows deductions for child care expenses (s.63) and disability-related costs (s.64) and provides tax credits with regards to, among others, medical expenses (s.118.2) and home accessibility-related costs (s.118.041 of ITA). In the case of low-income families with children, the CCB and child care deduction work together to reduce child poverty.

D. Gap for Working-age Persons with Disabilities

There is a gap in addressing poverty of working-age Canadians with disabilities. The current disability benefits cover low-income children with disabilities (as part of the CCB) and seniors with disabilities (as part of the OAS/GIS).[56] Working-age Canadians with disabilities can receive benefits under some social

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[53] *Report on Federal Tax Expenditures 2022*, supra note 7 at 280.

[54] See Statistics Canada, *Disaggregated Trends in Poverty from the 2021 Census of Population*, by André Bernard & Xuelin Zhang, Catalogue No 98-200 X, (Ottawa: Statistics Canada, 9 November 2022).

[55] See Income Tax Act, RSC 1985, c 1 (5th Supp) (ITA), ss.2 and 3.

[56] Disability benefits are available to working-age Canadians under Employment Insurance Act, Canada Pension Plan, and Veterans Well-being Act. See *Employment Insurance Act*, SC 1996, c 23 [*Employment Insurance Act*];

insurance programs, such as the Employment Insurance Act (SC 1996, c. 23) and Canada Pension Plan (R.S.C., 1985, c. C-8),[57] but only if they have worked and are covered by these programs. They do not receive the benefits for being in poverty.

The Income Tax Act provides some financial assistance to persons with disabilities through a non-refundable Disability Tax Credit (DTC), disability supports deduction, registered disability savings plan. The origin of the DTC in s.118.3 is the tax deduction of $480 for blind persons introduced in 1944.[58]

Even though the DTC was intended to provide relief for non-itemizable disability-related costs, the credit amount is fixed ($8,662 in 2021).[59] This benefit only reduces a person's tax liability and is therefore only helpful to individuals who would otherwise have taxes to pay. As such, it is not a social income program per se.

The notion of disability (currently mental or physical impairment) largely follows the medical model—the effect of disability is certified by a qualified medical practitioner. The test has been broadened in recent years: for example, Budget 2005 extended eligibility to individuals who face multiple restrictions that together have a substantial impact on their everyday lives and to more individual requiring extensive life-sustaining therapy on an ongoing basis; Budget 2017 expanded the list of medical practitioners who can certify eligibility.[60] Certification by medical practitioners remains a key requirement.

IV. VALUES EMBEDDED IN INCOME TAX LAW

The fiscal contract embedded in the taxing and spending choices reflects some important values. At a deeper level, one can say that equality, fairness and inclusion underlie the design of the spending programs, such as the OAS/GIS and CCB. As a policy design matter, requirements of Canadian residence, non-working age, and the use of an income test imply values of work, family and connection between paying taxes and receiving benefits. On the taxing side, ability to pay, economic efficiency, and the rule of

Canada Pension Plan, RSC 1985, c C-8 [*Canada Pension Plan*]; *Veterans Well-being Act*, SC 2005, c 21 [*Veterans Well-being Act*].

[57] Veterans disability benefits are available under the Veterans Well-being Act. See *Veterans Well-being Act*, SC 2005, c 21.

[58] See *Report on Federal Tax Expenditures 2022, supra* note 7 at 145. This deduction was expanded in 1985 to individuals with severe disabilities and was replaced by a non-refundable tax credit in 1988 (s.118.3). See *ITA* at s 118.3. Other support measures in the Income Tax Act include: (a) Disability Supports Deduction to recognize the costs incurred by taxpayers with disabilities for disability supports required to enable them to earn business or employment income or to attend school; (b) preferential treatment of Registered Disability Savings Plans; (c) Medical Expense Tax Credit; (d) Infirm Dependent Credit; and (e) additional amounts on account of disability in Child Care Expense deduction, Caregiver Credit, Canada Child Benefit, Canada Workers' Benefit, First-time Home Buyers' Tax Credit, and Home Accessibility Tax Credit. For descriptions of tax expenditures, see *Report on Federal Tax Expenditures 2022, supra* note 7 at 49-339. Government support outside the Income Tax Act include Canada disability savings grants and Canada disability savings bonds under the Canada Disability Savings Act.

[59] Families caring for eligible children with severe and prolonged impairments may claim an additional amount ($5,053 in 2021) as a supplement to the Disability Tax Credit. This supplement amount is reduced dollar-for-dollar by the amount of child care or attendant care expenses in excess of $2,959 (for 2021) that is claimed under s.63 for child care expenses, s.64 for disability supports or the medical expense tax credit under s.118.3. See *ITA*, *supra* note 53 at ss 63-64, 118.3.

[60] see *Report on Federal Tax Expenditures 2022*, supra note 7 at 145.

law are key values. These values are deeply entrenched in the Canadian fiscal system and are expected to affect the design of the Canada Disability Benefit.

A. Fairness and Ability to Pay

Fairness is the glue of a democratic society.[61] To achieve substantive fairness or equity, the ability to pay principle guides the design of progressive income tax. The Income Tax Act reflects the ability to pay principles by measuring income as broadly as possible to ascertain the economic capacity to pay tax as well as by applying progressive rates to higher amounts of income.[62] In order to protect the integrity of the progressive income tax, the Income Tax Act contains many rules to prevent individuals from using legal constructs (such as corporations or trusts) or arrangements (such as contracts) to defer or avoid tax.

The ability to pay principle influences the design of tax-transfers and tax assistance measures. For example, the Disability Tax Credit and Disability Support Deduction recognize non-discretionary expenses that reduce a taxpayer's ability to pay. Childcare expense deduction and the CCB recognize non-discretionary expenses of raising children and the parent's ability to pay.

B. Work

Work is the "basis for the economic survival of individuals and society."[63] Workers are the bulk of Canadian citizens and taxpayers. Workers bear the main burden of personal income tax. Disincentives for work is a main policy concern in designing the taxing rules as well as tax-transfer rules and the OAS/GIS system.

Income from work[64] became the most important base for personal income tax in the early 1940s when waged work became widespread in the industrializing Canadian economy and a pay-as-you-go withholding tax was imposed on wage earners.[65] This tax was accepted as fair and legitimate means to finance the public goods and social transfers that workers sought from government. Income tax on workers remains crucial to financing social spending. In 2020, employment income and self-employment income accounted for 69 per cent of aggregate individual income in Canada.[66]

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[61] See Richard M Bird & J Scott Wilkie, "Tax Policy Objectives" in Heather Kerr, Ken McKenzie & Jack Mintz, eds, *Tax Policy in Canada* (Canadian Tax Foundation, 2012), chapter 2 at 2:3. See also John Ralston Saul, *My Fair Country: Telling Truths about Canada* (Viking Canada, 2008) at 303. Saul states, "When Canadians are asked –as citizens, not as representatives of interest groups or as employees –what lies at the heart of their civilization, they are most likely to reply: fairness and inclusion."

[62] See Jinyan Li, Joanne Magee & Scott Wilkie, *Principles of Canadian Income Tax Law*, 10th ed (Thomson Reuters, 2022) at 49-76.

[63] Harvey J Krahn, Graham S Lowe & Karen D Hughes, *Work, Industry & Canadian* Society 5th ed (Thomson & Nelson, 2007) at xxi.

[64] This includes income from employment, office, self-employment, businesses carried on by the individual as a sole proprietor or a partner of a partnership, as well as scholarships, bursaries or research grants. For more information on "working income" for purposes of the Canada Workers Benefit provision, see *ITA*, *supra* note 53 at s122.7.

[65] See Campbell & Raizenne, *supra* note 20.

[66] See Statistics Canada, Table 11-10-0239-01 *Income of individuals by age group, sex and income source, Canada, provinces and selected census metropolitan areas* (**DOI:** https://doi.org/10.25318/1110023901-eng) (In 2020, the aggregate total income of individuals is $1,556,822 millions, the aggregate employment income is $1,018,965 millions and self-employment income is $55,316 millions).

The OAS targets seniors or retirees.[67] Working-age individuals do not qualify for this program on the assumption that they can support themselves by working. Even though the OAS is not contribution-based like the C/QPP, seniors were viewed as deserving the "public pension."[68] The creation of the OAS was broadly supported: many working-class earners accepted paying taxes through payroll deductions, seeing themselves as contributors to the family allowance and old age pension programs.[69] The universality of the original OAS was influenced, in part, by the concern of discouraging work before reaching retirement age. One member of Parliament was against any means-test by quoting letters from his constituents saying that "a man who works all his life and puts money aside in his savings would not be eligible for a pension under the means test while someone who lived an idle life would be eligible."[70]

The concern with work is greater with respect to the CCB and Canada Workers Benefit as the recipients are working-age individuals. Working-age Canadians in low-income groups face a welfare trap associated with high marginal effective tax rates on entering the labour market (or working more hours or earning more than a nominal amount). Meanwhile, there is a public perception that the tax-transfers lead to work disincentives and unfairness among those who work and those who don't.[71] Income-tested thresholds are used in both programs. In spite of that, the CCB was found to cause "a significant decrease in hours worked by secondary earners in middle-income families"[72] and disincentivize work for married mothers.[73]

C. Family

Family is recognized as a unit by the Income Tax Act for some purposes, even though each individual is taxed as a unit. To measure an individual's ability to pay and apply progressive tax rates, the Income Tax Act contains various anti-avoidance rules to prevent the high-income earner from shifting income to lower-income family members.[74]

The Income Tax Act recognizes that family members support each other in finance and care. Examples include the Canada caregiver credit, caregiver credit, eligible dependant credit, spouse or common-law partner credit, transferrable medical expense tax credit, tuition tax credit, education tax credit, pension

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[67] The minimum age for qualifying for the OAS/GIS (which is originally 70 years old and now 65 years old) coincides with the general age of retirement. For discussion on work disincentives, *see* George F Break, "Income Taxes and Incentives to Work: An Empirical Study" (195) 47 American Economic Rev 529; Thomas MaCurdy, "Work Disincentive Effects of Taxes: A Reexamination of Some Evidence" 82 American Economic Rev 243.

[68] *See House of Commons Debates*, 21-2, vol 4 (29 June 1950) at 4441 (Mr Drew).

[69] *See* Tillotson, *Give and Take*, *supra* note 19 at 249.

[70] Note, however, the clawback introduced in 1989 was defended on ground of progressivity – saving money from the rich to pay benefit to the poor. Only a small portion of seniors are excluded from receiving the benefit due to their high income. See Béland & Marier, "Universality", *supra* note 36 at 107.

[71] *See* Kourtney Koebel & Dionne Pohler, "Expanding the Canada Workers Benefit to Design a Guaranteed Basic Income" (2019) 45 Can Pub Pol'y 283 at 287.

[72] Alison Dudu et al, "Is the Canada Child Benefit an effective policy? Impacts on earnings and incomes" (28 October 2021), online: Finance of the Nation <financesofthenation.ca/2021/10/28/is-the-canada-child-benefit-an-effective-policy-impacts-on-earnings-and-incomes>. For further discussion about work disincentives and child benefit, see Wanda A Wiegers, "The National Child Benefit: Social Inequality under the New 'Social Union'", (2001) 33 Ottawa L Rev 25.

[73] *See* T Schirle, "The Effect of Universal Child Benefits on Labour Supply" (2015) 48 Can J Economics 437; Kourtney Koebel & T Schirle, "The Differential Impact of Universal Child Benefits on the Labour Supply of Married and Single Mothers" (2016) 42 Can Pub Pol'y 49.

[74] *See e.g. ITA*, *supra* note 53 at ss 56(2), 74.1-74.5, 75, 120.4. S 56(2) corresponds to the indirect payment rules, ss 74.1-74.5 and s 75 are the attribution rules, and s 120.4 is the tax on shifted income rule.

income credit and disability tax credit; pension income splitting; tax deductions for contribution to spousal RRSPs; and the definition of principal residence by reference to inhabitation by dependent children and spouse or common-law partner.[75] Family income is used to test financial neediness. For example, the CCB is reduced when adjusted family net income reaches $32,028 (2021) and phased out when adjusted family net income exceeds $69,395 (2021).

There is no universal definition of family unit in the Income Tax Act. For purposes of measuring ability to pay and anti-income shifting rules, the family include spouse or common-law partners, and children under the age of 18 (or 24 in the case of TOSI – tax on split income rule under s.120.4). For purposes of tax relief measures, such as the disability tax credit and caregiver credit, parents and grandparents may be included. For purposes of the CCB and Canada Workers Benefit, only an "eligible spouse" is included. An "eligible spouse" is a "cohabiting spouse or common-law partner" which is defined in s. 122.6 to mean "the person who at that time is the individual's spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time".

Even though "determining exactly when fiscal couplehood begins and ends can delve into the most personal of judgments about who sleeps where and when with whom,"[76] the statutory definition emphasizes the legality of the relationship and economic inter-dependence. For example, In *Lawin v. R*.,[77] spouses were found to be cohabiting even when one was hospitalized indefinitely because economic unity lies at the heart of the definition.[78]

D. Certainty and Predictability of the Law

The Income Tax Act (as well as the OAS Act) contains detailed provisions to set forth the who, what, how much and how issues to enable citizens and government agencies to determine the amount of benefit or tax liability in a reasonably predictable and certain manner. It is notorious for its massiveness and technical complexity. The Constitution Act, 1867 says in section 53 that a bill imposing any tax or spending public monies "shall originate in the House of Commons." Since public spending is funded by taxpayers, taxpayers have a say about spending or taxing legislation through the democratic process. Only specific and mostly administrative matters are thus left to be introduced by the Governor in Council (Cabinet) in the form of regulations. It is difficult to imagine that Canadians would accept the income tax if the essential elements of the system were to be determined secretly by the Governor in Council or the Minister of Finance.

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75 For a summary of each, see *Report on Federal Tax Expenditures 2022*, *supra* note 7.

76 Kevin Milligan, "All in the Family: Assessing Need in the Fiscal Unit" (Paper delivered at the Canadian Tax Foundation conference "Public Finance in the Real World": A Symposium in Honour of Richard Bird, Toronto, 2022) [unpublished] [Milligan, "All in the Family"].

77 2006 TCC 198.

78 See *Sookochoff v The Queen*, 2020 TCC 131. In respect of a married couple living separate and apart since their respective children did not get along, the Court found that the taxpayers' decision to maintain separate households was made to preserve their relationship, not because their relationship had broken down. Accordingly, the Court held that the taxpayers met the definition of "cohabiting spouse or common-law partner," and that their income had to be pooled for purposes of computing the CCB.

As taxpayers and/or recipients of benefits, Canadians need to have a reasonable level of certainty and predictability about the amount of tax or benefit in order arrange their affairs. In the case of the Income Tax Act that charges tax and delivers benefit payments, providing sufficient guidance on the determination of such amount for everyone in every foreseeable situation is a daunting task. Hence the technical complexity is warranted to achieve certainty and predictability.

In addition, taxpayers have the right to avoid tax by exploiting legislative ambiguities. The following statement in the *Duke of Westminster* (1936) case is regarded by the Supreme Court of Canada to be a "bed rock" of Canadian tax law:[79]

> Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

This right has been extended to taking advantage of tax subsidies and other benefits available under the Income Tax Act.[80] To ensure fairness for all Canadians, the Income Tax Act has been drafted in specific and air-tight language, which is protected by specific and general anti-avoidance rules.[81]

Finally, the rule of law requires an independent judiciary to interpret and apply the law. To achieve fairness and neutrality among taxpayers, the more observable and demonstrable evidence the better. Canadian courts have made it clear that in tax cases, taxpayers' motivations or morality considerations are not relevant; what matters is what Parliament says through legislation. As such, even though many provisions of the Income Tax Act reflect moral values, judges limit their interpretation of the provisions to the extent of the words used by Parliament, albeit interpreted textually, contextually and purposively.

E. Administrability

The administrative dimension often dictates policy design choices. "Tax administration *is* tax policy"; "How to do it" is as, if not more, important as "what to do."[82] All underlying values, aspirations, and policy objectives must be reduced to legislative text that can be administered fairly and cost-effectively.

Tax administration relies on the application of general law (e.g., family law or property law), certification by third parties (e.g., medical practitioners regarding disability and employers regarding employee expenses) and a system of reporting, verification, and control. The Income Tax Act seeks to connect everything to an objective accounting number and uses that number to determine the transfer of money to or from the government. Not everything can be connected to an amount of money and many social and economic ills cannot be cured by money. But as a primary fiscal instrument, the Income Tax Act (as well as the OAS Act) is limited in its functions.

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[79] *Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 (*Alta Energy*); *IRC v Duke of Westminster*, [1936] 19 TC 490.

[80] See, *e.g. Canada Trustco Mortgage Co v Canada*, 2005 SCC 54; *Alta Energy*, *ibid*.

[81] See Li, Magee & Wilkie, *supra* note 62 at 570-94.

[82] Richard Bird, "Administrative Constraints on Tax Policy" in Cedric Sandford, ed, *Further Key Issues in Tax Reform* (Fiscal Publications, 1998) 183 at 184.

V. LESSONS FOR DESIGNING THE CDB

A. The CDB as a Fiscal Program

The CDB pays cash benefit to eligible working-age persons. It is part of Canada's fiscal spending program. This is the case in spite of the fact that the Preamble of Bill C-22 refers to "economic and social exclusion", "Accessible Canada Act", "the right to the equal protection and equal benefit of the law without discrimination" under the Canadian Charter of Rights and Freedoms and "Canada's progressive realization of Canada's international obligations under the United Nations Convention on the Rights of Persons with Disabilities." Through reducing poverty and increasing financial security of eligible persons, the CDB is expected to enable persons with disabilities to live in dignity and have the full and equal participation in society. It is an important component of Canada's Poverty Reduction strategy[83] and barrier-free strategy. But, the fact remains that the CDB's function is to determine the amount of benefit payable to each eligible person with disabilities. While illuminating, these justifications for and expected effect of the CDB must be operationalized through law that has more in common with fiscal law than human rights law.

For reasons explained below, the CCB is a better design model for the CDB than the GIS. A CCB-like CDB is a better fit in the existing fiscal system. While the quasi-universal OAS/GIS programs are funded out of general tax revenues, recent developments have pivoted away from universality and targeted poverty reduction in a manner that minimizes work disincentives. Because the CDB targets working-age persons, it is more similar to the CCB paid to working-age parents.

In terms of implementation, because the CDB is income-tested, using the Income Tax Act to deliver the benefit makes more sense than using a stand-alone mechanism (like the GIS) because pertinent and verifiable information about a person's income is already available to the CRA. For working-age persons, the income situation is likely more dynamic than retirees, and changes from year to year. As such, the CRA is in the best position to assess the amount of income at any time.

B. Fiscal Notion of Disability

Bill C-22 states in section 4: "A person is eligible for a Canada disability benefit if they meet the eligibility criteria set out in the regulations." Until the regulations are introduced, it is thus unclear who is eligible for the benefit. Unlike age, disability can have different meanings for different purposes.[84] Without sacrificing the goal of inclusiveness, a lesson from the Income Tax Act is to make the criteria as objectively or legally enforceable as possible. It may be easier to build on the tax law's notion of "mental or physical impairment" than "fiscalizing" the notion of disability in *Accessible Canada Act*.

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[83] Canada, Employment and Social Development Canada, *Opportunity for All – Canada's First Poverty Reduction Strategy*, Catalogue No SSD-212-08-18E (Employment and Social Development, 2018).

[84] See *e.g. Canada Transportation Act*, SC 1996, c 10, ss 1, 2, 169.5*; Accessible Canada Act*, SC 2019, c 10, s 2; *Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2nd supp), s 2; *Canada Emergency Student Benefit Act*, SC 2020, c 7, s 1; *Canada Student Loans Act*, RSC 1985, c S-23, s 2; *Canada Student Financial Assistance Act*, SC 1994, c 28, s 2; *Pension Act*, RSC 1985, c P-6, s 3; *Veterans Well-being Act*, *supra* note 56, s 2; *Pooled Registered Pension Plans Act*, SC 2012, c 16, s 35; *Canadian Human Rights Act*, RSC 1985, c H-6, s 25; *Canada Pension Plan*, *supra* note 56, s 42(2); *Motor Vehicle Safety Act*, SC 1993, c 16, s 2; *Employment Equity Act*, SC 1995, c 44, s 3.

The notion of "mental or physical impairment" under s.118.3 of the Income Tax Act refers to one or more severe and prolonged impairments in physical or mental functions that markedly restrict the ability to perform a basic activity of daily living, or that significantly restrict the ability to perform more than one basic activity of daily living where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living. Specific criteria include whether: an impairment is prolonged; an individual's ability to perform a basic activity of daily living is markedly restricted; or the cumulative effect of significant restrictions on the ability to perform more than one basic activity of daily living is equivalent to a marked restriction in the ability to perform a basic activity of daily living, and those activities constitute basic activities of daily living for these purposes. Even though the test is often described as following a medical model, it is not based on a medical diagnosis but the effects, as certified by a health care profession, of the impairment on one's ability to perform basic activities.[85]

The Income Tax Act's notion of disability differs from section 2 of Accessible Canada Act, which defines disability to mean "any impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment — or a functional limitation — whether permanent, temporary or episodic in nature, or evident or not, that, in interaction with a barrier, hinders a person's full and equal participation in society."[86] For purpose of reducing barriers for Canadians with disabilities, this definition makes sense.

As a matter of fiscal law, however, it is important to connect disability to poverty as objectively and quantifiably as possible. Since the tax deduction for disability-related costs (e.g., therapy, devices and equipment) provide assistance in regard to the extra-ordinary costs, the CDB should focus on the lack of income-earning capacity in defining disability.[87] As such, persons with disabilities who earn income above a defined threshold will not qualify for the CDB, but can claim the tax deduction for the extraordinary costs. This would be similar to the current mechanism for assisting low-income families with children.

The fiscal notion of disability for CDB purposes can also be informed by the CPP disability benefit that covers a mental or physical disability that regularly stops a person from doing any type of substantially gainful work or that is long-term and of indefinite duration.[88]

C. Amount of Benefit

The design goal of the CDB is likely similar to that of the CCB – providing income support to reduce poverty. The amount of CCB is fixed in s.122.6 of the Income Tax Act without explicit references to benefits available under other programs, such as GST credit, refundable medical expense supplement. It is not contingent on each eligible person's cost of living or the measure of poverty, such as the market basket

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[85] See *Radage v R*, [1996] 3 CTC 2310 at para 46. In *Radage v R*, the Tax Court of Canada stated that "the court must, while recognizing the narrowness of the tests enumerated in sections 118.3 and 118.4, construe to the provisions liberally, humanely and compassionately and not narrowly and technically."

[86] This is similar to article 1 of the United Nations Convention on the Rights of Persons with Disabilities. See United Nations Department of Economic and Social Affairs, "Convention on the Rights of Persons with Disabilities: Article 1 – Purpose", online: United Nations <www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html>. It says that persons with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

[87] The Quebec Basic Income Program is tied to a person's "severely limited capacity for employment." See Ragot, *supra* note 5 at 4.

[88] See *Canada Pension Plan*, *supra* note 56, s 42(2).

measure (MBM),[89] for general purposes. It would be very difficult to have legislative certainty and predictability if the amount is contingent upon factors that are outside the fiscal system. Legislatively incorporating the MBM would mean the amount of benefit varies from location to location across the country and differs based on the family size.

In the case of the CDB, there are other social assistance programs (e.g., housing, health care, transit, job-training, CPP disability, etc.) to working-age persons with disabilities. Their overall impact on the income level of persons with disabilities is difficult to assess and more difficult to be incorporated into the legislative provision on the amount of the CDB.[90] Therefore, even though reducing poverty is the key objective of the CDB, lifting each person with disabilities out of poverty should not be a realistic design goal.

A common feature of social income support programs is to take into account of the net family income in assessing the need of the targeted individuals. For designing the CDB purposes, it would make sense to follow the CCB model by recognizing the unit of cohabitating spouse or common law partner and adopting thresholds for phasing-out based on the number of dependent children.[91] However, dependency may be tested differently for persons with disabilities. It requires some careful study to determine if, and if so, how much, a person's 18th birthday will affect the amount of the benefit. Transition from the child disability benefit or to the senior disability benefit should also be carefully considered and legislated.

D. Benefit Delivered through the Tax System

Bill C-22 contemplates a standalone regime for implementing the CDB. The title of the bill mentions "making a consequential amendment to the Income Tax Act." Section 2 defines "Minister" to mean the Minister of Employment and Social Development." Section 11 says that the Governor in Council may make regulations respecting 21 key aspects of the CDB. This is unsurprising because the GIS was used as a model.

However, if the GIS is not the appropriate model and the CCB is, then it makes sense to deliver the CDB as part of the income tax system. The Minister of National Revenue can deputize the CRA to administer the program. From an institutional competency perspective, compared to Services Canada, the CRA is the best equipped government agency to identify eligible individuals, verify eligibility, determine the amount of benefit, and make payments in a timely and secure manner.[92] Adding the CDB to the existing social

[89] See Statistics Canada, *National Household Survey Dictionary, 2011*, Catalogue No 99-000-XWE, (Ottawa: Statistics Canada, 1 April 2016) at Market Basket Measure (MBM). According to Statistics Canada, "the Market Basket Measure (MBM) is a measure of low income based on the cost of a specified basket of goods and services representing a modest, basic standard of living." A key feature of the MBM is that "it is more sensitive than other low-income measures to geographical variations in the cost of many typical items of expenditure" and "the MBM threshold recognizes differences in the cost of the basket between similar sized communities in different provinces and between different geographical regions within provinces."

[90] See Employment and Social Development Canada, *Towards a Poverty Reduction Strategy – A Backgrounder on Poverty in Canada*, Catalogue No Em20-53/1-2016E-PDF (Employment and Social Development Canada, October 2016).

[91] There are issues about defining family. For example, since the "family unit" for tax-transfer programs excludes children, each child becomes an independent unit after reaching the age of 18, regardless of their economic relationship with the parents. As such, the measurement of neediness of family unit tends to exaggerate the level of poverty when the adult child has no income but lives with the parents. Milligan, "All in the Family", *supra* note 76.

[92] Jennifer Robson & Saul Schwartz, "Policy Forum: The Canada Revenue Agency as a Benefits Administrator" (2021) 69 Can Tax J 87; Marina Flaim, Gillan Petit & Lindsay M Tedds, "Canada Revenue Agency and Tax

income support programs will require additional resources, but not a new infrastructure. More importantly, because the CDB targets working-age individuals and the income situation of these individuals may change from year to year, the status of an individual as a taxpayer or CDB recipient may change accordingly. Any income test will also require the determination of the individual or family net income, which is the amount determined for tax purposes. The CRA is in the best position to ascertain such amount.

As the experience with the Canada Emergency Relief Benefit (CERB) during the earlier period of the COVID-19 pandemic shows,[93] without CRA's ability to double check eligibility with the information in its database, it may be difficult for Services Canada to accurately pay the benefit. It might be better to improve the quality of services by the CRA as opposed to improving the technical administrative capacity of Employment and Social Development Canada (ESDC).

E. Interim Measure

Designing a fiscally sustainable and fair CDB based on the CCB model is better than converting the current Disability Tax Credit into a refundable credit. However, before the CDB becomes law, as an interim measure, the conversion can provide immediate benefit to low-income persons with disabilities who cannot use the credit. According to an estimate by the Parliamentary Budget Officer, the number of recipients in 2022 would increase from 917,000 to 1.45 million.[94]

VI. CONCLUSIONS

The importance of providing financial assistance to persons with disabilities cannot be over-emphasized. Bill C-22 represents a critical step in the right direction. To turn the promise into reality, it is important to reach a fiscal contract about the program. The history of progressive income tax and social support programs offers important lessons about the kinds of fiscal contract Canadian citizen-taxpayers have supported. The Canadian values underlying the existing fiscal contract and how these values are expressed in legislation should inform the design of the CDB. Overall, the CCB is a better model for designing the CDB.

Administration: Re-envisioning Tax and Benefit Administration in the Age of Digitalization" (15 August 2021), online (pdf): <papers.lindsaytedds.ca/Tedds%20KSG%20Report%20FINAL%20August%2015%202021.pdf>.

[93] Auditor General of Canada, *2021 Reports of the Auditor General of Canada to the Parliament of Canada: Report 6 – Canada Emergency Response Benefit* (Ottawa: Reports of the Auditor General of Canada, 2021).

[94] Canada, Office of the Parliamentary Budget Officer, *Making the Disability Tax Credit Refundable (Motion M-6, 44th Parliament)*, by Albert Kho & Nasreddine Ammar (Ottawa: Office of the Parliamentary Budget Officer, 3 February 2022). Converting the disability tax credit to a refundable tax credit can be technically complex. For further discussion, see Wayne Simpson, "The Rise of Refundable Tax Credits: Implications for the Canada Disability Benefit" (Paper delivered at the Workshop on Women with Disabilities: Income Security and Tax Policy, Toronto, 11 November 2022) [unpublished]; Hannah Aldridge & Michael Mendelson, "Extending the disability tax credit to low-income Canadians" (January 2019), online (pdf): <maytree.com/wp-content/uploads/Extending-the-Disability-Tax-Credit-to-Low-Income-Canadians.pdf>.