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DECONSTRUCTING THE DISABILITY TAX CREDIT

APPLYING UNDER “MENTAL FUNCTION”

By Caitlin Wright

The Disability Tax Credit (DTC) is a federal program operated by Revenue Canada, and it has two main benefits for people with disabilities. First, it can be used as a tax credit, either by the disabled person or by a family member who is their caregiver. As a tax credit, the DTC generally only benefits those with a middle to high income, who earn enough to pay income tax in the first place. A person who is approved for the DTC (or their family member) can also ask Canada Revenue

Agency to re-assess the last 10 years of their income taxes, which could trigger a significant income tax refund.

The second benefit of the DTC is that it allows an individual to open a Registered Disability Savings Plan (RDSP). If you are on a low income, the federal government will contribute a grant of \$1000 per year to your RDSP until the year you turn 49. For individuals who are able to make their own financial contributions, there is a system of matching federal bonds that can see your personal contribution doubled or even tripled.

MEETING THE ELIGIBILITY CRITERIA

To be approved for the DTC, an applicant must have either a marked restriction in one activity of daily living, or significant restrictions in two or more activities of daily living, resulting in cumulative impacts. The person must be unable to complete the activity, or the activity must take them an inordinate amount of time to complete. These restrictions (or combination of restrictions) must be present at least 90 percent of the time. For several years, only physical limitations were considered.

(See Disability Tax Credit, page 4)

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844 JOHNSON AND TENANT RIGHTS: THE PHS DECISION

By Leila Geggie-Hurst

In May 2018, the BC Supreme Court confirmed two important things for local tenants. First, residents of 844 Johnson Street are considered tenants in supportive housing and have rights that are protected under the *Residential Tenancy Act (RTA)*. Second, blanket restrictions against all guests in a supportive housing complex go against residential tenancy rights. If you're a resident of

supportive housing, what does this mean for you?

What Happened?

After Super-in-Tent City (SIC—a tent city formerly located on the Victoria law courts property) was dismantled, a social housing building was set up to house SIC residents at 844 Johnson Street. Portland Hotel Society (PHS), a non-profit supportive housing provider and operator of the 844 Johnson building, introduced blanket restrictions that severely limited tenants' ability to have guests. TAPS supported a number of residents in arguing against these rules at a Residential Tenancy Branch hearing.

At the hearing, PHS argued that the Residential Tenancy Act shouldn't apply to the building, but the arbitrator agreed that it should, even though the landlord provides support services and personal health care. The arbitrator also agreed that the blanket guest restrictions were not reasonable restrictions of the tenants' *RTA* rights.

PHS appealed this decision to the BC Supreme

Court, where the tenants were represented by lawyers from the Community Legal Assistance Society. On May 18, 2018, Justice Sharma agreed with the arbitrator's decision. The judge agreed



that “tenants who are being given a social benefit of below market housing in an effort to stabilize their living situation” should have the same legal rights as tenants paying market rates.

This case now sets a precedent—that means that the judge's decision should be applied in future cases.

What Does This Mean For People Living In Supportive Housing?

This decision will have positive and lasting effects on the lives of the thousands of tenants living in supportive housing in Victoria and across the province.

First, the court has confirmed that people living in supportive housing have the same tenancy rights as people living in market housing. As Kevin Love, a staff

(See 844 Johnson, page 6)

PERSONS WITH DISABILITIES

TAPS has advocates who can help you apply for Person With Disabilities status (PWD) through the Ministry of Social Development and Poverty Reduction. TAPS can also help you with an appeal if you have been denied. Call us at 250-361-3521 for more information. If you are at the appeal stage, get in touch with us as soon as possible after receiving your letter of denial, and tell the receptionist you are calling about a disability appeal.

KEEP WORKING IT!

THE OMBUDSPERSON'S REPORT ON MSDPR PRACTICES

By TAPS Staff

On May 15, The BC Office of the Ombudsperson released a special report addressing systemic shortcomings at the Ministry of Social Development and Poverty Reduction (MSDPR). In "Working Within the Rules: Supporting Employment for Income Assistance Recipients" the BC Ombudsperson explores the Ministry's consistent failure to follow its own legislation regarding earnings exemptions, ultimately denying people assistance they were legally entitled to.

The particular case the Ombudsperson looked at involved a woman with Person with Persistent Multiple Barriers to Employment designation (PPMB) who had several injuries that interfered considerably with her ability to work. In some months she was able to work a fair amount, while in other months she was only able to work very little or not at all.

Occasionally, she worked enough to become ineligible to receive any PPMB money. A person on income assistance who has earnings one month must

report these earnings the next month, and these earnings will affect their cheque for the month after that. For example, earnings in December are reported in January and affect the February income assistance cheque. If a person's earnings in December, say, are high enough that they are ineligible to receive income assistance, their cheque for February will be zero. This was the situation of the woman in question.

The Ministry's policy was that if a person was not in receipt of income from MSDPR in the previous month, they were not eligible for the earnings exemption the following month. It was this policy that negatively affected the woman in this case. Her December earnings (in 2014) were such that she received no income from MSDPR in February (2015), and as a result she was not eligible for the earnings exemption in March, and her earnings were deducted dollar-for-dollar from her income assistance cheque that month. She ended up, in fact, being financially worse off as a result of the work she did in

(See Ombudsperson Report, page 6)

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FEDERAL DISABILITY ADVOCACY PROJECT

TAPS' Federal Disability Advocacy Project can provide information on CPP-Disability, the Disability Tax Credit and the Registered Disability Savings Plan. If you would like to speak with an advocate about any of these benefits, or would like help applying, contact TAPS at 250-361-3521.

(Cont'd from Disability Tax Credit, page 1)

Advocates and individuals with mental health disorders and their family members lobbied the federal government for years, arguing successfully through appeals to the Tax Court of Canada that the DTC was unfairly discriminatory towards applicants with mental health disorders. It wasn't until 2005 that mental function was fully incorporated into the DTC application.

The DTC is one of the more complex disability-related applications, requiring a significant amount of detail, provided and verified by a

medical professional. As a federal disability advocate, I help individuals with disabilities apply for the DTC. Let's break down what each sub-category of Mental Function means in reality.

Adaptive Functioning

This sub-category relates to how well a person interacts with others and their environment, including their ability to process written, visual, or auditory information. People with various mental health disorders, including mood (anxiety, depression), psychiatric (schizophrenia), and developmental (ADHD, autism) disorders, can have great difficulty initiating, comprehending, and engaging in various forms of communication. Adaptive Functioning also considers how a person regulates their own self-care, including managing their hygiene, dressing appropriately, responding to medical emergencies (for example, going to the hospital after sustaining an injury), managing their medications, and regulating their diet (eating disorders would fall under this heading). Again, for many individuals with mental health disorders, their ability to do these types



of tasks on a daily basis can be severely impacted, particularly by such symptoms as erratic moods and low motivation. This sub-category also considers a person's ability to complete basic social transactions like making medical appointments, going grocery shopping, leaving the house for basic errands, and going to the bank.

Memory

This sub-category is concerned with how well a person is able to learn and recall basic information, including names, birthdates, addresses and phone numbers, directions, recipes, and general information. This activity can be particularly impacted by many mental health disorders, as well as traumatic brain injuries. If a person needs to rely on another person, a written account, or technology (for example, a computer or phone) at least 90 percent of the time, their memory would likely be considered markedly restricted.

Problem-solving, goal-setting, and judgement

For this last sub-category a person must have restrictions in all three

(See Disability Tax Credit, page 5)

(Cont'd from Disability Tax Credit, page 4)

areas—problem-solving and goal-setting and judgement. Many mental health disorders cause mood swings, cognitive distortions, intrusive and disordered thoughts, poor insight and impulse control, and low motivation; some people with mental illness may exhibit volatile or erratic emotions and behaviours, paranoid thinking, self-imposed isolation from friends and family, an inability to ask for help, inappropriate responses to unexpected demands (for example, excessive anger/hostility, emotional

outbursts), and thoughts of self-harm. Any of these can interfere with a person's ability to use their judgement to complete basic tasks, make simple decisions, and problem-solve in unexpected situations.

Approval for the DTC is not based on a specific medical diagnosis, but instead on the level of restrictions (marked or significant) in a person's life. If a person's symptoms are relatively well managed by the use of assistive devices, therapies, or medications, resulting in little to no restrictions, they will not be

found eligible for the DTC, even if they have a serious mental health disorder.

Applicants whose restrictions may be periodic or episodic, meaning that on paper they might not reach the threshold of being restricted 90 percent of the time, face particular difficulty qualifying for the DTC. However, legal challenges through the Tax Court of Canada have successfully argued that the 90 percent threshold is an unfair, and mathematically impossible, benchmark to measure. Keep in mind, though, that applications are decided

(See Disability Tax Credit, page 6)

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(Cont'd from Disability Tax Credit, page 5)

individually and the decisions from these court cases are not binding on future DTC adjudications.

While challenging, it is possible to apply successfully for the DTC under the category of Mental Function, provided you have a supportive medical practitioner and an understanding of how your restrictions meet the eligibility criteria. The legal advocates in TAPS' Federal Disability Advocacy Project (FDAP) are available to meet with you and help you draft a detailed and comprehensive report describing how your disability affects you. If you think you might be eligible for the DTC and would like help applying, contact Caitlin or Daniel at TAPS at 250-361-3521. ■

TAPS TAX CLINIC

**Thursdays
9 to 11
and
1 to 4**

**First come, first
served**

(Cont'd from 844 Johnson, Page 2)

lawyer at Community Legal Assistance Society who represented the clients in the court proceedings said, "This case confirms that subsidized and supported housing providers have to follow the rules just like everyone else. Tenants do not give up all their rights just because they need support or help paying the rent".

More specifically, this case confirms that blanket guest policies cannot restrict access to the building for all tenants' guests—these blanket policies are illegal. The court has confirmed that supportive housing tenants have the right to visit with friends and family in their own home.

However, this decision doesn't mean that social housing providers can't introduce rules. Housing providers still have the right to establish reasonable guest policies that protect the safety, security and quiet enjoyment of tenants. Landlords, whether market or non-profit, continue to be allowed to adopt and enforce reasonable guest restrictions, but they must be on an individual case-by-case basis.

This approach ensures tenants are treated fairly as individuals, and rejects a one-size-fits-all approach that punishes all tenants

regardless of whether or not they have done anything wrong.

What's Next?

The court decision means that people living in supportive housing should have an easier time getting their rights recognized, especially in terms of guest policies. If you live in a supportive housing building and your individual tenant rights are being violated, you can reach out to TAPS for support. ■

(Cont'd from Ombudsperson Report, page 3)

December than if she had worked less or not at all.

The woman appealed the Ministry's decision to the Reconsideration Branch of MSDPR. She was successful and the Ministry re-instated the earnings exemption for March. However, several months later, the situation presented itself again. She received no PPMB money one month as a result of her work income, only to find that her earnings were deducted dollar-for-dollar in the following month. The Ministry again said she was not eligible for the earnings exemption, and she was forced to appeal again, about an issue that was identical to the one the Reconsideration

(See Ombudsperson Report, page 7)

(Cont'd from Ombudsperson Report, page 6)

Branch had resolved in her favor several months before.

So there were two main issues the Office of the Ombudsperson looked at: one relating to the earnings exemption in the month following a month where the person received no income assistance money from



MSDPR; the other regarding the Ministry requiring that a person appeal again over an issue that has previously been resolved in the person's favour.

The report puts forward a number of recommendations to the Ministry, with the aim of resolving, at least in part, issues identified in the Ombudsperson's investigation. Significantly, the Ombudsperson called for the Ministry to identify and reimburse all people who, from October 1, 2012, onward, were wrongfully denied the earnings exemption because they did not received income

assistance in the previous month, and to create a process for dealing with systemic/repetitive legal errors that the Reconsideration Branch identifies.

The report's findings also reflect some of the procedural barriers we have faced in our work at TAPS, for example, the Ministry requiring clients to pursue an appeal in the denial of their earnings exemption, despite knowing that the policy being followed was inconsistent with the legislation, and therefore unlawful. The Ombudsperson described this as "the Ministry act[ing] unjustly and oppressively".

These recommendations, all of which were accepted by the Ministry, represent an important first step, and while change comes slowly to bureaucracy, this report demonstrates that the Office of the Ombudsperson is listening. We hope that the Ombudsperson will continue to look proactively into systemic injustices at the Ministry, in addition to their work addressing individual complaints and issues.

You can read the full report online at www.bcombudsperson.ca, or drop into the TAPS office to read a paper copy. ■

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- Updates on TAPS programs
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See the monthly donor form on page 8 of this newsletter.

ABOUT TAPS

TAPS was established and registered as a society in 1989. We provide legal information and representation on issues relating to income assistance, provincial and federal disability benefits, residential tenancy, and employment standards to people in the Greater Victoria area. We also provide public legal education in these areas and on broader poverty issues.

You can reach us between 9:30 am and 4:30 pm, Monday to Friday, by phone at 250-361-3521 or in person at #302 - 895 Fort Street. The office is closed daily for lunch between noon and 1:00 pm and is closed to walk-in clients on Monday and Friday mornings.

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