

TAX AND ESTATE PLANNING FOR SPECIAL NEEDS INDIVIDUALS¹

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Introduction

According to Statistics Canada, there are roughly 3.6 million special needs individuals in Canada. Tax and estate planning can have a substantial impact on the financial future of a disabled person, helping to create a secure future and a better quality of life for the individual. Through careful planning, families of disabled persons can ensure that their assets are gifted to their beneficiaries in the manner they desire. Families can also protect against an unexpected clawback of government benefits and supports. The following aims to address these issues, examine the benefits of tax and estate planning for special needs individuals, explore recent tax and support changes offered at both the federal and provincial levels, and recommend strategies to plan effectively for disabled family members. In particular, this paper sets out and describes the significant changes proposed in the 2005 Federal Budget, some of which have been enacted in Bill C-43 and received Royal Assent on June 29, 2005, and explains some of the provincial supports that are available in British Columbia, Alberta, Ontario, and Quebec. Finally, we consider the use of other financial planning tools, such as trusts, to protect the level of supports provided by government. However, families who wish to pursue this option should be advised that there are strict limits in place on the value of assets from which a person with a disability can benefit, and that these limits vary across provinces. In some cases, the ability to benefit from provincial support programs may be adversely affected unless careful planning is carried out.

Tax and estate planning by a parent or other family member can help to ensure a secure future for a beneficiary with special needs in a number of ways. For instance, it can help to minimize income and probate taxes on an estate. Proper planning can also maximize the benefits received by a disabled person without compromising that person's entitlement to those benefits. A carefully crafted plan will consider how income can be generated from gifted assets, as such

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income may have an impact on the tax credits available to a disabled individual. It will also take into account all supports, benefits, and credits available to persons with special needs. Recent changes proposed in the 2005 Federal Budget (the “Budget Proposals”),² impact these considerations. For the most part, the Budget Proposals expand or clarify the scope of eligibility and increase the generosity of tax measures to ensure persons with special needs have the opportunity to achieve an improved quality of life and ensure that they enjoy a higher standard of living.

While the Budget Proposals clearly aim to help Canadians with special needs, a caregiver might also wish to plan privately for the needs of a disabled family member. Doing this in a way that works with the disability supports and tax regimes will help plan for the future needs of a disabled family member. Considerations that a testator might provide for in his or her Will include: care and living arrangements for a disabled beneficiary, financial support, management of a disabled person’s property, if required, and a provision for the possible need for a substitute decision maker. In addition, careful consideration must be given as to who will act as the executor of the deceased’s estate.

Several changes proposed in the Budget Proposals and enacted in Bill C-43 have practical implications for a person with special needs, and in some cases, his or her family. These changes expand eligibility for certain credits and deductions include: more generous tax credits and deductions, and easier deferment of income through incentives such as RRSP and RRIF roll-overs, all of which potentially provide better financial supports for special needs individuals.

The 2005 Federal Budget

The Technical Advisory Committee on Tax Measures for Persons with Disabilities (the “Advisory Committee”) was established as a result of the 2003 Federal Budget to advise the Ministers of Finance and National Revenue on disability-related tax measures. The Advisory Committee was comprised of members of organizations representing persons with disabilities, medical practitioners, and private sector tax experts. The Advisory Committee’s purpose was to make recommendations to the federal government geared towards improving the fairness of the treatment of persons with disabilities under the income tax system. The Advisory Committee’s

² See <http://www.fin.gc.ca/budget05/pdf/bp2005e.pdf>.

final report, *Disability Tax Fairness*,³ contains 24 recommendations concerning the reform of existing disability tax measures. This report was submitted to the Minister of Finance and the Minister of National Revenue in December 2004. Many of the Advisory Committee's recommendations were brought forward in the 2005 Federal Budget proposals.

The Disability Tax Credit and Expanding Eligibility

The 2005 Budget sets out several proposals involving the disability tax credit (the "DTC"), which will have a far-ranging impact on the eligibility of persons with a disability. These proposals are addressed in the August 15th, 2005 draft legislation. Some of these changes are clarifications to the wording of the legislation. For example, the proposed wording of paragraph 118.3(1)(a) refers to a disability as a "severe and prolonged impairment in physical or mental functions". In contrast, the current provision reads "severe and prolonged mental or physical impairment". The purpose of this change is not to expand the eligibility requirement for the DTC, but rather to clarify the existing criteria to ensure more accurate characterization of the threshold necessary to establish eligibility.

The explanation of what constitutes an impairment is also clarified in the Budget Proposals. In Subparagraph 118.4(1)(c)(i), a person's impairment will be described as one that markedly restricts his or her "mental functions necessary for everyday life", rather than merely restricting "perceiving, thinking and remembering." The mental functions that this new phrase aims to capture include memory, problem solving, goal-setting and judgement, and adaptive functioning. The result is that the changes to the *Income Tax Act* simply reflect the language already found in prescribed Form T2201, meaning that in practical terms, only clarification of the eligibility criteria, not its expansion, occurs.

However, eligibility for the DTC is expanded in another way paragraph 118.3(1)(a.1) will be amended to state that those "persons who are restricted in two or more activities of daily life ("ADLs") where the cumulative effect of the restrictions are equivalent to a marked restriction in a single ADL all or substantially all of the time" are now eligible for the DTC. ADLs include walking; speaking; perceiving, thinking, or remembering; hearing; feeding and dressing; and

³ The Report may be found at <http://www.disabilitytax.ca/English.pdf>.

eliminating bodily waste⁴. This list is more restrictive than the one originally proposed by the Advisory Committee to the Federal Government. Nevertheless, the criterion for eligibility is expanded. Under the Budget Proposals, those persons who suffer from a number of impairments, where an impairment taken individually might not reach the statutory eligibility threshold, may now be eligible for the DTC.

Similarly, pursuant to draft subsection 118.3(1.1), a person may qualify for the DTC if it is only with time-consuming therapy that the impairment is prevented from markedly restricting the individual's ADLs. For therapy to qualify, it must be essential to sustain a vital function of the individual and is required to be administered at least three times a week for a total duration averaging not less than fourteen hours per week. The proposed changes in the Budget give the term "therapy" a more precise definition and allow time spent on preparation, administration of, and recovery from therapy to be taken into consideration when determining whether the fourteen hour threshold is met.

Eligibility must be determined by a health practitioner such as a medical doctor or an optometrist. Draft subparagraph 118.1(a.2)(v) proposes to add physiotherapists to the list of qualified people who can make such a determination.⁵

The impact of the expanded DTC eligibility criteria touches on other areas and consequently has a great bearing on the overall disability support regimes in Canada. In some ways it is the watershed definition for special needs supports. By way of illustration, the question of whether a person qualifies for the child disability benefit (the "CDB") is answered by whether the child meets the DTC criteria. A trust arrangement with a "preferred beneficiary" may also be affected by the most recent Budget Proposals. The Act permits a "preferred beneficiary" of a trust to be taxed on the accumulated income, even where the income is not payable to the beneficiary. To be a "preferred beneficiary", a person must meet the eligibility criteria for the DTC. With expanded DTC eligibility criteria, the potential exists for more families to take advantage of the "preferred beneficiary" election because a broader DTC definition means more people will be eligible for the credit.

⁴ Canada Revenue Agency, "About the Child Disability Benefit (CDB)", online: <http://www.cra-arc.gc.ca/benefits/faq_cdb-e.html#q1>.

⁵ Physiotherapists are restricted to assessing an impairment with respect to an individual's ability in walking.

Lessening the Financial Burden: Other Supports in the 2005 Federal Budget

In addition to expanded eligibility for the DTC, the list of expenses eligible for the Disability Supports Deduction (the “DSD”) is also expanded in the August 15th, draft legislation.⁶ The DSD is designed to enable a taxpayer with a disability to work or attend school. The expanded list of services that require certification by a medical practitioner includes job coach services (other than job placement or career counselling services), reading services provided to a person who is blind or has a severe learning disability, and Braille note-taking devices for use by a blind individual.

The 2005 Federal Budget continues along the path introduced in previous budgets by allowing the supports and credits to move among individuals within a family, provided the member of the family with special needs is a close and dependent relative.

The Child Disability Benefit, (the “CDB”) is aimed at low income families with a disabled child under the age of eighteen. The Budget proposes to increase the CDB from \$1,681 to \$2,000 annually, and the benefit will continue to be indexed to inflation. Families with a single child who make more than \$35,595 a year will find the benefit phased out with increases in income. The income threshold for 2004 was \$35,000, also indexed to inflation. Families with more than one child are subject to a graduated scale. For example, a family with six children will find their benefits phased out at an income level of \$48,544.

Other supports for low income persons are available, including the refundable medical expense supplement, which have increased to \$750 with the enactment of Bill C-43. Pursuant to section 122.51, a person can claim only 25% of the portion of medical expenses that are otherwise eligible for the medical expense credit. However, the maximum amount, while increased, is still relatively small. The measure is targeted towards those families most in financial need; the supplement is reduced by 5% of the family net income over \$20,296.

Medical expense tax credits are available for persons with special needs and their family caregivers. Amendments to section 118.2 of the *Income Tax Act*, which deals with the medical expense tax credit, are included in the August 15th, 2005 draft legislation. These new changes

⁶ Section 64 of the *Income Tax Act*.

expand the list of expenses eligible for the credit. This amended section will allow such items as oxygen concentrators, deaf-blind intervening services used by person who is both blind and deaf, and marijuana purchased by authorized users and patients from Health Canada.

In addition, certain expenses for renovations and alterations to the home of a person with special needs are eligible for the credit. These are contained in paragraph 118.2(2)(1.2). These expenses must not typically be incurred by persons who have normal physical development or who do not have severe or prolonged mobility impairment; and must not typically be expected to increase the value of a home. This proposal is meant to disallow the costs of items such as hot tubs and hardwood floors, which the courts have, in some instances, allowed as eligible expenses under paragraph 118.2(2)(1.2).

However, it should also be noted that, like the medical expense supplement, the medical expense credit is not a particularly significant sum of money. Once a person reaches the maximum allowable income, the allowable medical expenses are clawed back at a rate of 68%, a rapid reduction for those earning anything more than a modest income.

Subsection 118.2(1) of the *Income Tax Act* allows a family caregiver to claim the credit for eligible medical expenses incurred in caring for the dependant relative. Draft legislation proposes to expand the eligibility for the medical expense tax credit to include persons who pay expenses on behalf of a dependant relative such as an adult child. In 2005, the maximum amount that can be claimed will be doubled, from \$5,000 above the medical expense threshold to \$10,000. Therefore, any amounts over the threshold of \$1,844 (the 2005 threshold) are eligible. A dependant relative is defined as a child at least 18 years old, a grandchild, parent, grandparent, brother, sister, uncle, aunt, niece or nephew who is dependent on the family caregiver for support. The amount expended must be the lesser of 3% of the relative's net income or \$1,844.

RESPs

Section 146.1 of the *Income Tax Act* governs registered education savings plan ("RESPs"). There is an annual limit and a lifetime limit on the amounts that can be contributed to RESPs. For each beneficiary, the annual limit for contributions to all RESPs is \$4,000 and the lifetime limits \$42,000.

Pursuant to paragraph 146.1(2)(h) of the *Income Tax Act*, contributions to an RESP can only be made for a maximum of 21 years following the year in which the plan was created. Paragraph 146.1(2)(i) requires that an RESP must terminate no later than the end of the year following the 25th anniversary of the plan.

Extended Eligibility under the 2005 Federal Budget

The 2005 Federal Budget introduced amendments aimed at accommodating RESPs with disabled beneficiaries. Newly enacted paragraphs 146.1(2)(h) and (i) of the *Income Tax Act* will extend the maximum contribution period and the maximum period during which an RESP may be in existence. If an RESP beneficiary is entitled to the disability tax credit in the 21st year following the year in which the plan was entered into, the maximum period during which contributions may be made to the RESP has been extended to 25 years after the year in which the plan was entered into – increased from the regular 21 year contribution period. The termination date of the RESP has now been extended to the 30th year following the year in which the plan was entered into – increased from the regular 25 year period.

These time extensions are limited to a “specified plan” created under subsection 146.1. A specified plan is one in which:

1. the beneficiary under the RESP is an individual entitled to a disability tax credit under subsection 118.3(1) for the individual’s taxation year that may be claimed for the 21st year following the year in which the plan was entered into; and
2. at all times after the end of the 25th year after the plan was entered into, the RESP does not allow more than one beneficiary at a time

Considerations for families with “family plan” RESPs

Under existing tax rules, in the case of a disabled beneficiary under a family RESP, the individual’s share of the plan can be transferred into a single-beneficiary RESP plan to ensure access to the extended contribution and termination date limits. The extended limits will apply to 2005 and subsequent taxation years.

Payments out of an RESP and Full-Time Status

In general, a student must have full-time status at a qualifying post-secondary institution to receive a payment out of an RESP. Students who qualify for the disability tax credit or those who

cannot be reasonably expected to be enrolled as a full-time student due to mental or physical impairment will not be held to the full-time requirement to receive a payment out of an RESP.

RRSPs and RRIFs

RRSP/RRIF Rollovers for a Disabled Child

When an RRSP or RRIF annuitant dies, he or she is generally held to have received, immediately before death, an amount equal to the fair market value of all the property held in the RRSP or RRIF. This amount is then required to be included in the deceased's income for the year of death in the deceased's terminal tax return.⁷ This general rule is not absolute, as a preferred RRSP/RRIF transfer is allowed for qualified beneficiaries. A qualified beneficiary includes the deceased annuitant's spouse or common law partner. It also includes a financially dependent child or grandchild if the death occurred:

- in 1999 or later;
- in 1998, and the annuitant had no spouse or common-law partner at the time of death;
- in 1998, the annuitant had a spouse or common-law partner at the time of death, **and** an election was filed to treat the child or grandchild as a qualified beneficiary;
- in 1996 or 1997, the annuitant had a spouse at the time of death, **and** an election was filed to treat the child or grandchild as a qualified beneficiary; or
- from 1993 to 1997, and the annuitant had no spouse at the time of death.⁸

For 2004, an infirm child or grandchild is financially dependent if the child's income for the preceeding year was less than \$14,035. If the child's income is greater than this amount, he or she may still be considered to be financially dependent if the dependency can be demonstrated on the particular facts.⁹

When the financially dependent child is dependent because of a physical or mental infirmity, the RRSP/RRIF of the deceased annuitant can be transferred to the dependant's RRSP,

⁷ <http://www.cra-arc.gc.ca/E/pub/tg/rc4177/rc4177-e.html>; <http://www.cra-arc.gc.ca/E/pub/tg/rc4178/rc4178-e.html>.

⁸ *Ibid.*

⁹ <http://www.cra-arc.gc.ca/E/pub/tg/t4040/t4040-02-e.html>.

RRIF or annuity. One perceived problem with this situation is that the rollover is not permitted to fund a trust for the dependant on a tax-deferred basis. The RRSP/RRIF vests in the dependant. This situation is problematic in that it leaves the dependant to make decisions about the RRSP/RRIF. Further, as will be discussed in detail below, the value of the RRSP would be considered an asset for purpose of eligibility for government benefits. However, a proposed amendment to add section 60.011 to the *Income Tax Act* has been put forth to remedy this situation. This new section will allow the RRSP/RRIF to fund a trust if two conditions are satisfied: (1) the taxpayer must be, immediately before the death of the deceased individual, a mentally infirm spouse or common-law partner of the deceased individual, or a mentally infirm child or grandchild of the deceased individual who was dependent on the deceased individual by reason of that infirmity; and (2) the trust must be, at the particular time, a personal trust under which:

- no person other than the taxpayer may, during the taxpayer's lifetime, receive or otherwise obtain the use of any of the income of the trust (determined, as required under subsection 108(3) of the Act, without reference to the provisions of the Act) or the capital of the trust;
- the trustees are empowered to pay amounts from the trust to the taxpayer; and
- the trustees are required to consider the needs of the taxpayer (including the comfort, care and maintenance of the taxpayer) in determining whether to pay, or not to pay, an amount to the taxpayer.

These amendments permit the transfer of the RRSP/RRIF to a trust for the benefit of a disabled beneficiary, thereby allowing for the protection of the person's government benefits, if desired.

Home Buyer's Plan

Annuitants who have disabled dependants may take advantage of the Home Buyer's Plan set out in draft section 146.01. This plan allows persons with disabilities or their relatives to withdraw up to \$20,000 from their RRSP on a tax-free basis to buy a home that is more accessible or better suited for the care of a disabled individual. This is permitted even where the purchaser is not a first-time home buyer. The amounts withdrawn under this plan must be repaid into the individual's RRSP over a 15 year period.

Planning for Provincial Support

Another major component of the safety net provided to people with special needs is the provincial entitlement programs available for individuals with special needs. Among these are the Ontario Disability Support Program (the “ODSP”), the Ontario Home and Vehicle Modification Program, Alberta's Assured Income for the Severely Handicapped (AISH) Program and B.C.'s Employment Assistance for Person's with Disabilities. Quebec also provides supports to the disabled. In most cases it will be necessary and desirable to maintain an individual's benefits available from various governments.

The Ontario Home and Vehicle Modification Program

The Ontario government will contribute a maximum of \$15,000 for a home or vehicle improvement. A single individual can receive up to \$30,000 if improvements to both home and vehicle are needed. If a person earns more than \$35,000 they may be required to contribute towards some of these costs.¹⁰ Some of the permitted modifications include: vehicle hand controls, foot controls, lifts, and safety devices; specialized seating for a child; ramps, platform lifts, stairway lifts and lifting/transferring devices including necessary structural changes, and elevating devices; and the creation of a child's play area.

The Ontario Disability Supports Program

The ODSP provides eligible disabled individuals with a monthly benefit of up to \$959 for single individuals or \$1,460 monthly for a couple where one spouse is disabled and the other is non-disabled. As well, the program provides dental, drug and other health and disability related benefits. Not only must the individual be considered disabled, his or her income and asset levels must be below a certain threshold. In Ontario, the person's assets must not exceed \$5,000

¹⁰ Ontario Ministry of Community and Social Services, News Release: “Improvements to Ontario's Home and Vehicle Modification Program”, June 23, 2004.
<<http://cfcsc.gov.on.ca/CFCS/en/newsRoom/backgrounders/040623.htm>>.

(excluding, among other things, a principal residence and automobile) and his or her income must be less than \$5,000 over a twelve-month period.¹¹

Trusts and ODSP Benefits

Where a disabled person suffers from a mental impairment, it may not be appropriate for parents or other relatives to gift or leave a bequest outright to the individual. Using a trust on either an *inter vivos* or testamentary basis provides both a way of maintaining control of the assets, where the beneficiary is incapable of managing property, and protects the government benefits that the person may be entitled to receive.

In Ontario, the ODSP rules exclude from a person's assets property that is held in a "Disability Expenses Trust".¹² The benefit of this type of trust is that a person receiving ODSP benefits is allowed to receive up to \$100,000 from an inheritance or proceeds of life insurance without having their benefits terminated. An ODSP recipient is permitted to receive up to \$5,000 in a twelve-month period out of the trust, without a reduction in their ODSP benefits. Further, payments out of the trust for "disability-related expenses" are permitted, although it may be prudent to seek prior approval for the expense. Payments exceeding \$5,000 that do not qualify as a disability-related expense will reduce the benefit on a dollar for dollar basis. The Trustee of such a trust must be careful where the value of the trust fund is close to \$100,000. If the income earned is added to capital and the capital exceeds \$100,000, the trust will no longer qualify. It is important for the trustee to be familiar with the ODSP rules regarding these trusts to ensure that the individual's benefits are not adversely affected.¹³

The other, and more familiar, trust option is the "Henson Trust." This discretionary trust can be established as either an *inter-vivos* or a testamentary trust, although it is usually testamentary, as it is typically established in a parent or a caregiver's Will. In this type of trust, the settlor or testator gives the trustee full control as to when and how much income is to be paid to the

¹¹ See http://www.cfcs.gov.on.ca/CFCS/en/programs/IES/OntarioDisabilitySupportProgram/Publications/ODSP_handbook.htm.

¹² <http://www.cfcs.gov.on.ca/CFCS/en/programs/IES/OntarioDisabilitySupportProgram/Publications/odspidir.htm>.

¹³ See "Definition and Treatment of Assets", ODSP Branch, January 2003, On-line: http://www.cfcs.gov.on.ca/cfcs/en/programs/ies/Ontario_disability_support_program/publications/odspidir.htm and DSP Income Support Directive 4.7, "Funds Held In Trust".

disabled beneficiary. This feature prevents a Henson Trust from being deemed an asset of the beneficiary. Consequently, the disabled beneficiary is able to retain his or her ODSP and other benefits. That said, in determining the appropriateness of a Henson Trust for a disabled beneficiary, it is important to weigh the value of the government benefit (the monthly payments and the various medical benefits that are attached to it) against the amount of income and capital which a disabled beneficiary might receive from the trust. Where that amount significantly exceeds the government benefits that are available, it may be more beneficial to the disabled person to forgo government benefits and rely on funds from the trust. The concept of a Henson Trust is discussed in further detail below.

Provincial Disability Benefits in Ontario, B.C., Alberta and Quebec and the Suitability of Discretionary and Non-Discretionary Trusts

Ontario

With respect to inheritances and government benefits, trusts are generally viewed as the best vehicles for estate planning. An applicant for ODSP benefits may be able to retain assets which are deemed exempt from the calculation of their income support and asset values. As stated above, such an applicant is entitled to retain as an exempt asset inheritances and the proceeds of a life insurance policy which are placed in trust for the benefit of that person up to a limit of \$100,000.

The ODSP policy directives discuss several types of trusts and how they are viewed for the purposes of eligibility. Essentially a trust derived from an inheritance is an asset, but, as stated above, as long as the trust holds less than \$100,000 in assets, the funds are exempt. In contrast, a discretionary (Henson) trust is not considered an asset regardless of its value. If an applicant for ODSP has access to RRSP funds, then he or she will be expected to do deplete those funds first, regardless of the applicable penalty for such depletion. The value of the RRSP funds will be treated as an asset and the applicant may be deemed ineligible if the assets are above the \$5,000 ceiling.

The concept of a Henson Trust arose in *Ontario (Ministry of Community and Social Services, Income Maintenance Branch) and Henson*¹⁴. In that decision, a father established a testamentary

¹⁴ [1987] O.J. No. 1121, [1989] O.J. No. 2093.

trust for his mentally handicapped daughter. The father specifically stipulated in his Will that the beneficiary could not compel the trustee to pay her any income from the trust. Moreover, the father provided that the trustees had absolute discretion as to the disposition of the trust capital. This was accepted at trial as creating a type of trust which did not restrict the disabled daughter's disability benefits in any way. The Ontario Court of Appeal affirmed this decision, holding that because the trustees had absolute discretion over the trust property, the beneficiary did not have a beneficial interest in the trust assets. Therefore, the beneficiary's interest could not be characterized as a liquid asset, which would otherwise reduce or eliminate her entitlement to benefits. The key to the creation of this type of trust is the language used in the Will. The Will specifically provided that the income from the estate would not vest in the daughter and the only interest she had was in the actual payments made to her.

Since the decision in *Henson*, there have been other cases dealing with the issue of trusts and disability benefits which have helped to further define the concept of a Henson trust. One such case is *Ontario (Ministry of Community and Social Services, Income Maintenance Branch, Director) and Powell*¹⁵. In this decision, the Director of the Ministry of Community and Social Services suspended benefits to the disabled beneficiary of a trust. In the Will, the trustees were directed to pay income to the beneficiary "for his support, maintenance and medical attention". The court looked at the precise language used in the Will, and held that the beneficiary had an interest in the trust assets. The beneficiary's benefits were suspended if the value of trust payments exceeded \$3,000. This decision can be distinguished from the *Henson* decision because the trust in this case was not exactly a Henson style trust; that is, the arrangement did not create an absolute discretionary trust where no interest vested in the disabled beneficiary. In fact, the trustees were instructed to pay the income for the support, maintenance and medical attention of the beneficiary. As we shall see in the next decision, such language takes the trust outside the realm of a Henson trust.

In *Ozad and Ontario (Ministry of Community and Social Services, Income Maintenance, Director of Income Maintenance)*¹⁶, the deceased set up a trust in his Will for his disabled son. The Will stipulated that the trust funds were to be held under the control and management of the

¹⁵ [1989] O.J. No. 2310 (Div. Ct.).

¹⁶ [1998] O.J. No. 6498.

Trustees, subject to the Trustees’ absolute discretion. Despite this clear language, the court held that even a trustee with absolute discretion is obliged to consider the beneficiary’s circumstances and maintenance. The *Henson* decision was distinguished because, in that decision, the Will specifically provided that the income from the estate would not vest in the daughter. It was held in this case that the trust was an asset of the beneficiary.

It is important to note that if trustees are merely directed to pay income for a beneficiary’s support, maintenance and medical attention, then the trust will not be deemed a Henson trust. The court (as well as ODSP officials) will look to the precise language used to set up the trust. Mere specification in a Will or trust document that the trustees have absolute discretion does not create a Henson trust. To create a Henson trust, specific wording is required to demonstrate that the trust being created removes funds, in full or in part, from the reach of the beneficiary.

British Columbia

In the past, provincial benefits for disabled persons in British Columbia were referred to as “GAIN” benefits, as they were provided under the *Guaranteed Available Income for Need Act*¹⁷. That act has since been repealed. The current statute governing disability assistance in B.C. is the *Employment and Assistance for Persons with Disabilities Act*¹⁸. Disability Assistance is part of the Ministry of Human Resources B.C. Employment and Assistance Program.¹⁹ The rules state that a person receiving Disability Assistance can be the beneficiary of a trust, which does not compromise that beneficiary’s assistance, if the beneficiary follows the rules of the trust.²⁰

Section 13 of the current act provides that the Minister may reduce disability assistance or declare a person ineligible for disability assistance where they have “failed to accept or pursue income, assets or other means of support”. Under the *Employment and Assistance for Persons With Disabilities Regulation*²¹, an asset is defined as including a beneficial interest in real or personal property held in trust. It should be noted that some assets, such as cash and bank

¹⁷ R.S.B.C. 1979, c. 158.

¹⁸ S.B.C. c. 41.

¹⁹ BC Employment and Assistance, “Disability Assistance and Trusts”, online: BC Ministry of Human Resources <<http://www.mhr.gov.bc.ca/publicat/pdf/DisabilitiesTrusts.pdf>>.

²⁰ *Ibid.*

²¹ B.C. Reg. 265/2002.

accounts, are exempt for the purposes of determining a disabled person's entitlement to disability assistance. For example, a single person can have assets worth up to \$3,000 before any deduction is factored into disability assistance.

According to the Ministry of Human Resources, there are generally two trust options: discretionary trusts and non-discretionary trusts. In a discretionary trust (known in other provinces as a Henson Trust) the beneficiary has no control over the capital held in trust and no control over how it is spent. Instead, the trustee makes all decisions on behalf of the beneficiary. As in Ontario, a discretionary trust is not considered an asset under the B.C. Employment and Assistance Program and, therefore, a beneficiary of this type of trust does not lose any entitlement to disability benefits. In contrast, with a non-discretionary trust the beneficiary has control over the trust property and how that property is to be spent. As such, this type of trust is considered to be an asset for Disability Assistance purposes. This type of trust will not necessarily affect the Disability Assistance received by a beneficiary. A non-discretionary trust for a disabled beneficiary is an exempt asset, but this exemption is limited. As per subsection 12(2) of the Regulations, up to \$100,000 in a non-discretionary trust will be treated as exempt, and will not affect the disabled beneficiary's entitlement to Disability Assistance. An exemption for any greater amount must be approved by the Minister of Human Resources. In addition to this limitation, the method by which the trust income is spent can also affect disability benefits. Section 12(1) of the Regulations stipulates that the trust income is to be spent on "disability-related costs", such as medical aids, care-giver services, education or training, and the like. If disbursements from a non-discretionary trust for a disabled person are not spent in this manner, then the disabled beneficiary risks having those trust disbursements characterized as income, which will be deducted from disability benefits.

While the use of a discretionary (Henson) trust is prevalent in British Columbia, jurisprudence referring to it in the context of disabled persons is limited. One notable decision is *Crowe v. Bollong*²². This case involved the hearing of an action for damages in professional negligence against a notary. The settlor in this decision intended to provide financial protection for her disabled child by settling a trust to be administered at the discretion of the trustees. However the notary set up a bare trust, which resulted in the beneficiary becoming ineligible for GAIN

²² [1998] B.C.J. No. 771.

benefits. The bare trust was successfully converted to a discretionary trust, whereby the beneficiary could receive and maintain her GAIN benefits. The disabled beneficiary sued the notary for the GAIN benefits that she would have received during the relevant period. The court found in favour of the beneficiary because the bare trust was not intended by the settlor, and the notary was negligent for not executing what the settler intended. The importance of this case for the purpose of this paper lies in its recognition of Henson Trusts in British Columbia.

Alberta

The provincial benefits for disabled persons in Alberta are referred to as AISH benefits and are administered under the *Assured Income for the Severely Handicapped Act*²³ and its regulations, the *Assured Income for the Severely Handicapped Regulation*.²⁴ In order to qualify for AISH, an applicant must have a severe and permanent disability that substantially prevents them from earning a living.²⁵

Under section 9(2) of the Regulations, the Director has the power to determine a person's eligibility for disability benefits and can deem that the person is entitled to receive all or part of the principal of any trust for which that person is a beneficiary. In other words, a trust, regardless of whether it is a discretionary trust, is deemed an asset of the beneficiary. This was not always the case in Alberta. In the past, AISH benefits could be maintained by providing that the funds held in trust for a handicapped child would be held in a fully discretionary trust. This changed in October 1999, with the modifications made to the AISH legislation.

Similar to the situation in B.C., a disabled person can have any combination of assets up to \$100,000 without eligibility for AISH being affected. It is also worthy to note that some assets, such as homes and vehicles, are totally exempt from assistance calculations.

According to the Alberta government, discretionary trusts will affect whether a disabled person can receive AISH benefits. The Alberta Association for Community Living (the "AALC"), in their October 2004 publication, stated that Alberta is the only province that imposes a limit on discretionary (Henson) trusts by including these trusts within its asset measures. Moreover, the

²³ R.S.A. 2000, c. A-45.

²⁴ A.R. 203/99.

²⁵ Alberta Senior Community and Supports, "AISH: A Guide", online: <<http://www.senoirs.gov.ab.ca/aish>>.

AALC suggests that when AISH includes a discretionary trust as an asset, it is contradicting the specific legal nature of the trust by acting as if it were under the control of the individual. As such, the concept of a Henson trust does not exist in Alberta.

The obvious option in maintaining full AISH benefits for a disabled beneficiary of a trust is to ensure that the assets held in trust, in addition to other non-exempt assets, are valued at less than \$100,000. This, however, is not of assistance where a settlor's estate exceeds this value. Recently, some newly proposed options for trust planning in Alberta have emerged.

The use of a "sprinkling" discretionary trust (i.e. where there are multiple beneficiaries of a discretionary trust) is one option. Section 8(1) of the Regulations indicates that where there are multiple beneficiaries of a discretionary trust, the value of those assets will be distributed equally among the number of beneficiaries in determining the share of assets held in trust by a disabled beneficiary. The idea behind the concept is this: where a settlor would want to avoid affecting a disabled beneficiary's AISH benefits, he or she could name a number of children or grandchildren as discretionary beneficiaries. In effect, those trustees would have it in their discretion to use the trust capital for the needs of the disabled beneficiary.

Another proposed trust arrangement calls for the use of multiple trusts held for both disabled and non-disabled beneficiaries (for example, siblings). Multiple trusts could be set up for different purposes: one for paying the trustee's fees, another for the maintenance of the disabled beneficiary's needs, and yet another for the needs of the non-disabled beneficiary. The trustees would be permitted to transfer trust income from one trust to another, making sure that the trust for the maintenance of the beneficiaries' needs never exceeds the threshold of \$100,000.

Quebec

It is widely recognized that a Henson trust is available for use in estate planning for disabled children in Quebec. Kenneth Sepope in his article entitled *Planning for the Future*,²⁶ describes how he would set up a Henson trust in Quebec:

In the case of Quebec, where civil law based on the *Code Napoleon* is the system in force, I ordinarily set up a Henson trust with an escape clause: should the trust be found to be incapable of

²⁶ K. Sepope, "Planning For The Future: Henson Trusts Are Now Better Than Ever", *Abilities*, Issue 57, pages 31-33, winter 2003,

accomplishing its purpose, then the assets will go to a third party. That third party (say, a brother or sister) would have the moral obligation to use the assets in the interests of the person with a disability. Of course, that eventually would be discussed beforehand with those concerned.²⁷

In Quebec, there is no specific legislation that has the sole objective of providing financial benefits for persons with special needs. There are, however, several laws that contain special provisions which allocate financial benefits to such persons. For example, in the *Act Respecting Income Support, Employment Assistance and Solidarity*, section 25 allocates supplementary and monetary benefits to persons being deemed as having severely limited capacity.

²⁷ *Ibid.* at 33.