

Promises and Pitfalls of the Canada Disability Benefit

Session 1: Clawbacks and Constitutional Issues

Adrian Merdzan
Staff Lawyer, Income Security Advocacy Centre

Note: Information within the following slides is for informational purposes only and is not to be considered legal advice
All information within the following slides is up-to-date as of October 23, 2023

Will the Canada Disability Benefit be nullified by clawbacks from provincial support programs, long-term disability insurance plans and motor vehicle insurers?

Ontario's Social Assistance Programs

Two social assistance programs in Ontario:

- 1. Ontario Disability Support Program Act (“ODSPA”)
 - \$1,308/month (for single family types, most common recipients)
 - Demonstrate financial need and proof of disability to qualify
 - Recently indexed to inflation
 - Annually: \$12,895 (47%) below poverty line and \$5,987 (29%) below deep poverty line*
- 2. Ontario Works Act (“OWA”)
 - \$733/month (for single family types, most common recipients)
 - Demonstrate financial need to qualify
 - Not indexed to inflation
 - Annually: \$18,835 (68%) below poverty line and \$11,927 (58%) below deep poverty line*

*Calculation is based on 2022 Official Poverty Line (MBM) and Deep Income Poverty threshold (MBM-DIP) calculations compared with 2022 rates for unattached single family types on ODSPA/OWA without taking into account other federal and provincial benefits. The 2022 ODSP rate was \$1,228 per month. Note that the MBM and MBM-DIP calculations do not account for the additional costs of disability within their calculations.

Clawback Clauses under the OWA and ODSPA

- The OWA and ODSPA are analogous pieces of legislation that often have mirrored language. However, each piece of legislation has a complex and lengthy general regulation that sets out benefit interaction rules. Accordingly, inclusion of the CDB in certain sections of the regulation is better at insulating the benefit from clawbacks.
- Ideally, the Province would fully exempt the CDB from the calculation of income in social assistance legislation by adding the benefit to the exempt list of federal benefits and avoiding clawbacks of the CDB altogether: see s. 42 of O. Reg. 222/98 under the ODSPA and s. 53 of O. Reg. 134/98 under the OWA.
- However, the Province may instead amend the legislation to create a new section setting out how they plan to treat the CDB. This is what they did for emergency COVID-19 payments, which were partially clawed back from social assistance recipients: see ss. 42.1-42.2 of O. Reg. 222/98 (ODSPA) and ss. 53.1-53.3 of O. Reg. 134/98 (OWA)

Example: Other Benefits Interacting with the ODSPA

	Canada Child Benefit (CCB)	Canada Emergency Response Benefit (CERB)
O. Reg. 222/98 under the ODSPA	s. 42(3.4): The following payments by Canada shall not be included in income: A payment received under section 122.61 of the <i>Income Tax Act</i> (Canada) in or after July 2008.	s. 42.1(2): The first \$200 of [CERB] that is received by each member of a benefit unit and 50 per cent of any remaining amount ... shall not be included in income.
Clawback Calculation	CCB Received: \$2,000 Clawback: \$0 / N/A Amount of CCB Kept: \$2,000	CERB Received: \$2,000 Clawback: $(\$2,000 - \$200) \times 50\% = \$900$ [Social Assistance entitlement reduced \$900] Amount of CERB Kept: \$1,100
Effect	No Clawback	Partial Clawback

Therefore, the Province must fully exempt the CDB as income to prevent clawbacks.

How to characterize the Canada Disability Benefit? As a social benefit, income benefit or other?

Courts characterize the OWA and the ODSPA as “remedial” and “social welfare” legislation

- Courts find that “remedial” and “social welfare” legislation must be given a fair, large, and liberal interpretation to ensure the attainment of its objectives.
- Since the OWA/ODSPA are benefit conferring, any ambiguity in statutory interpretation must be resolved in favour of the claimant because of the importance of the benefits to people who need them.
- See *Gray v. Director of the Ontario Disability Support Program*, (2002) 59 O.R. (3d) 364 (C.A.), at paras. 10-12; *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240, at para. 35; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 36.

Priority v. Double Recovery models

The Added Thorn of a Clawback Clause: Double Collection of Overpayments

- In social assistance legislation, an overpayment occurs when the benefit administrator pays the recipient more than they are entitled to.
- When two or more administrators are providing benefits that interact, each administrator may recover an overpayment over a single event – resulting in an unjust double collection against the recipient.
 - For example, CRA's recovery of CERB from ineligible OWA/ODSPA social assistance recipients has resulted in double collection cases where the Province has not returned clawed back funds.
- A clawback clause entangles the two benefits together and this has add-on adverse consequences for benefit recipients. Eliminating clawbacks also eliminates double collection problems by limiting benefit interaction.