

Technical Roundtable Recommendations for *Canada Disability Benefit Act* Regulations

Submitted on behalf of the Income Security Advocacy Centre (ISAC)

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INCOME SECURITY ADVOCACY CENTRE
Centre d'action pour la sécurité du revenu

Overview

The Income Security Advocacy Centre (ISAC) is the only legal clinic in Ontario wholly devoted to systemic advocacy on income security issues. ISAC’s mandate is to advance the rights, interests, and systemic concerns of low-income people with respect to income security and employment. ISAC has unique expertise in income security, including the effects of the law on low-income people, the impact that government benefits have on the livelihoods of low-income Ontarians, and the harms that arise when such benefits are denied.

ISAC attended three virtual Canada Disability Benefit technical roundtables, on Understanding Barriers in Application Processes, Appointing Representatives and Legal Capacity, and Administrative Processes. We are thankful for the invitations to participate and were pleased to participate in all three roundtables.

In this brief you will find the comments and recommendations we shared at the three roundtables to assist Employment and Social Development Canada with drafting and developing the regulations under the *Canada Disability Benefit Act*.

ISAC is grateful for the opportunity to provide our expertise to the federal government in order to ensure that the *Canada Disability Benefit Act* regulations eliminate barriers, create accessible administrative law processes, and centre the lived experience of benefit recipients – low-income persons with disabilities.

For questions or comments about the information in this document, please contact ISAC at info@isac.clcj.ca. Further information about the work ISAC engages in can be found at our website at www.incomesecurity.org.

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Roundtable 1: Understanding Barriers in Application Processes (2023-11-27)

The purpose of this roundtable was to understand potential barriers in benefit application processes so that the Canada Disability Benefit (CDB) regulations can consider and address these barriers. The following questions in bold were posed at the roundtable, and our responses are summarized below.

What does a barrier-free application process look like to you?

Dignity for low-income persons with disabilities at the forefront

Abject poverty, in itself, is a barrier to the application process. Acquiring the necessities of life on a daily basis must take priority over filling out forms and collecting documents for a benefit application.¹

There is a stigma associated with living with disabilities, being jobless, and claiming benefits. People who may qualify for benefits may feel ashamed at needing to apply for the CDB. The CDB application process must be designed to welcome and assist those who contact the government to inquire or apply.

Ensuring that applicants are treated with dignity and compassion rather than with intense scrutiny must persist throughout the system. Government administrators must not become cynical, but rather assume that a person is coming as a last resort and may not come again if they are not treated with respect. Self-determination must apply in benefit applications because people living with disabilities understand their own disabilities better than government gatekeepers do.

What barriers have you faced when applying for benefits?

Authenticating identity is a barrier

A stringent identity requirement will prevent the most vulnerable people living with disabilities from accessing the CDB and will exacerbate their poverty. For example, to acquire a social insurance number (SIN), an individual has to provide two identification documents and proof of address. Many people who are houseless with mental health disabilities face difficulties in obtaining or possessing required information due to the cost of identification; the lack of foundational identification required to obtain other pieces of government-issued identification; and the challenges of receiving identification by mail, or loss of identification, due to precarious

¹ See Income Security Advocacy Centre, "Submission to OHRC Consultation on Poverty and Systemic Discrimination in Housing and Mental Health and Addiction Disabilities" (30 September 2022) <<https://incomesecurity.org/wp-content/uploads/2022/10/ISAC-Submission-to-the-OHRC-Consultation-on-Poverty-and-Systemic-Discrimination-in-Housing-and-Mental-Health-and-Addiction-Disabilities-September-2022.pdf>>.

housing.² The social and economic exclusion caused by this identification divide has far-reaching adverse impacts. Stringent identification requirements may also exclude Indigenous Peoples and those with precarious immigration status from accessing the CDB. See ISAC's submissions before the Senate for further information on the barriers of using a SIN and the need for flexible identification options.³

To address this barrier, ISAC recommends the following:

- **Broad options for identification purposes** – Allow more options/documents for applicants to verify identity. Identification should not be limited to possession of a SIN. The system requires flexibility in document collection because stringent identification leads to barriers to access.⁴
- **Government must embrace a responsibility to assist applicants**⁵ – Wherever possible the government should lift the identification burden off the applicant, especially if all other points of entry have been met (i.e., financial eligibility and proof of disability). In some cases, the government should offer financial assistance or waive identification fees for the most vulnerable populations. If the sole purpose of providing identification is to demonstrate identity, beyond whatever identity was provided via medical or financial eligibility processes, then the government must take responsibility to assist applicants and eliminate identification-related barriers that applicants face. This should be apparent in CDB policy directives and the regulations should allude to a shared responsibility for verifying identification.

Completing the application is a barrier

People living with disabilities often struggle with applying for benefits because the process is complicated, time-consuming, expensive, and burdensome to navigate without support.

To address this barrier, ISAC recommends the following:

- **Wide range of health care practitioners authorized to fill out the application** – In addition to a physician, this should also include nurses, pharmacists, therapists, psychologists, social workers, Indigenous healers, and more.⁶ There is a family physician

² Chris Sanders *et al.*, “You Need ID to Get ID’: A Scoping Review of Personal Identification as a Barrier to and Facilitator of the Social Determinants of Health in North America” (2020) 17:12 International Journal of Environmental Research and Public Health 4227 <<https://www.mdpi.com/1660-4601/17/12/4227/htm>>.

³ Income Security Advocacy Centre, “Brief for the Standing Senate Committee on Social Affairs, Science and Technology’s Study of Bill C-22” (11 April 2023) <<https://incomesecurity.org/wp-content/uploads/2023/04/2023-04-11-ISAC-Brief-for-the-Standing-Senate-Committee-on-Social-Affairs-Science-and-Technologys-Study-of-Bill-C-22-CDB.pdf>>, at 4-5.

⁴ *Ibid.* See also Income Security Advocacy Centre, “Submission to OHRC Consultation on Poverty and Systemic Discrimination in Housing and Mental Health and Addiction Disabilities” (30 September 2022) <<https://incomesecurity.org/wp-content/uploads/2022/10/ISAC-Submission-to-the-OHRC-Consultation-on-Poverty-and-Systemic-Discrimination-in-Housing-and-Mental-Health-and-Addiction-Disabilities-September-2022.pdf>>, at 5-7.

⁵ This is not a novel approach, see Scottish Government, “Social Security (Scotland) Act 2018: benefit take-up strategy – October 2021” (21 October 2021) <<https://www.gov.scot/publications/social-security-scotland-act-2018-benefit-take-up-strategy-october-2021/pages/1/>>.

⁶ See [ODSP Policy Directive 1.2](#) for a list of regulated health care professionals that can complete ODSP applications. ISAC recommends expanding the scope of practitioners that can verify disabilities to further move away from the historic medical model of disability and toward a social or human rights model of disability, see Heather McCain, “Medical Model of Disability versus Social Model of Disability” (Live Educate Transform Society (LET’S): 15 July 2017): <<https://canbc.org/blog/medical-model-of-disability-versus-social-model-of-disability/>>.

shortage in Canada.⁷ Further barriers to access exist for those who may want or need practitioners with shared lived experience or understanding (i.e., 2SLGBTQ+ and racialized communities that want medically sensitive and affirming care).⁸ Enforcing strict medical verification for disabilities adds barriers. Many individuals have a history of trauma in engaging with the medical system (i.e., expectation of biased treatment, post-traumatic stress disorder, deep-rooted fears etc.).⁹

- **Free application process** – The government should pay a wide range of health care practitioners, including the practitioner chosen by the applicant, to fill out the application. Applicants should not have to pay for these forms to be completed.

In addition, we recommend that the government review Prosper Canada’s work on the barriers present in the Disability Tax Credit program as a starting point and a guide to avoiding barriers for applicants in benefit administration.¹⁰

What service channels pose the most barriers (i.e., in-person, over the phone, online) and why?

Disabilities are complex. There is no one size fits all, especially for vulnerable populations who face intersecting barriers. Many people with disabilities do not have access to support. While digital applications have enabled access for many persons with disabilities, many others face barriers, including access to reliable internet, language barriers, poor computer or mobile devices access, and lack of computer literacy and skills.

To address this barrier, ISAC recommends the following:

“No wrong door, one window” policy: Education on income benefits and training government employees to be system navigators

- Include the CDB application in a Wayfinder/single hub online tool that directs people to all benefits and what they may be eligible for based on a questionnaire or other feature.¹¹ Front-line workers and lawyers face difficulties in understanding where eligible people can go to apply for benefits and the processes this entails. A singular hub for federal benefits that would act as a starting point for determining what benefits someone living in poverty may be able to access would help ensure enhanced front-line assistance.

⁷ Kaiyang Li *et al*, “Biopsy of Canada’s family physician shortage” (2023) 11:2 Family Medicine and Community Health <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10186392/>>.

⁸ Kathy Moscou *et al*, “Broken Promises: Racism and Access to Medicines in Canada” (2023) Journal of Racial and Ethnic Health Disparities <<https://link.springer.com/article/10.1007/s40615-023-01598-2>>; Rainbow Health Ontario, “Health in Focus: Racialized 2SLGBTQ Health” <<https://www.rainbowhealthontario.ca/wp-content/uploads/2022/03/Health-in-Focus-Racialized-2SLGBTQ-Health-1.pdf>>.

⁹ Income Security Advocacy Centre, “Submission to OHRC Consultation on Poverty and Systemic Discrimination in Housing and Mental Health and Addiction Disabilities” (3 October 2022) <<https://incomesecurity.org/wp-content/uploads/2022/10/ISAC-Submission-to-the-OHRC-Consultation-on-Poverty-and-Systemic-Discrimination-in-Housing-and-Mental-Health-and-Addiction-Disabilities-September-2022.pdf>>, at 8.

¹⁰ Prosper Canada, “Disability Tax Credit Journey Map: Barriers and Challenges” (July 2023) <<https://prosperscanada.org/CMSPages/GetFile.aspx?guid=d8618a6d-623f-4305-87b1-460d4d802119>>.

¹¹ See, for example, Prosper Canada, “Benefits Wayfinder” <<https://benefitswayfinder.org/>>.

- Train government employees about the CDB and about how to engage with vulnerable populations so that they can become effective system navigators. This should be a front-line job (i.e., in-person, answering phones, etc.). Under a “no wrong door, one window” policy, front-line government employees should be able to direct anyone to where they should go even if they initially went to the wrong place (e.g., somebody may have gone to Employment Insurance (EI), the EI worker needs to know to take the client to CDB and direct the person there). A system navigator does not have to know everything, they just have to know where to direct people.
- Navigators should start from a principle of finding a channel for someone rather than shutting them down entirely or saying they cannot do anything for them. As noted above under the first discussion question, system navigators must lead with dignity and assume that a person is coming as a last resort and may not come again if they are denied or rejected the first time.

Are there any technologies or other ways of applying for a benefit that you would like to see used?

Proving eligibility for disability benefits in Canada creates administrative, emotional, and financial barriers for persons with disabilities. Moreover, the practice of reapplying results in an unnecessary strain on medical community and public sector resources.¹²

ISAC recommends improving the benefit eligibility process by providing access to the CDB through the following pathways:

Auto-eligibility from provincial/federal programs that have already established proof of disability, financial eligibility, and identification

- Automatic eligibility allows for piggybacking CDB with other applications already undertaken. This reduces time for health care practitioners, applicants, public servants, and government lawyers, saving public costs and resources by avoiding duplication and the need to reprove disability.
- People who are currently on provincial/territorial social or income assistance disability programs (e.g., the Ontario Disability Support Program (ODSP)) or federal disability programs (e.g., the Disability Tax Credit or Canada Pension Plan – Disability) should not have to prove their disability again to receive the CDB. Those who receive compensation under federal or provincial employees’ or workers’ compensation programs also should not have to prove their disability again to receive the CDB.
- In implementing automatic eligibility, legislative drafting must ensure that the ongoing receipt of the CDB is not contingent on the ongoing receipt of the other programs’ “disability” definitions. Rather, receipt of other programs should solely allow a CDB applicant to bypass the condition to prove they are disabled. Future adjudication on their

¹² Senate of Canada, Standing Senate Committee on Social Affairs, Science and Technology, *Breaking Down Barriers: A Critical Analysis of the Disability Tax Credit and the Registered Disability Savings Plan* (June 2018), at 13 <https://sencanada.ca/content/sen/committee/421/SOCI/Reports/2018-06-18_SS5_RDSP-DTC_FINAL_WEB_e.pdf>.

ongoing eligibility for the CDB should be based on the disability criteria set out in the CDB, not the criteria set out in the program that granted them automatic eligibility.

See ISAC's submissions before the Senate for further information on what an automatic eligibility scheme for people on existing disability programs should look like.¹³

Alternatively, **information sharing** at the application stage that can lift the burden of proving disability, financial eligibility, and identification off the applicant if already demonstrated in another program

- ODSP recipients, by nature of receipt of ODSP, have already agreed to have their information shared with certain federal government departments.¹⁴
- Accordingly, with consent from an ODSP recipient, the recipient could authorize ODSP to share their medical reports, financial reports, and verification of identity documents with CDB administrators for the purpose of receiving a determination on whether they also qualify for CDB income support.

In either the automatic eligibility or information sharing process, the government administrator would make a decision under the CDB scheme that granted or denied eligibility *at the application stage only*. In denial cases, applicants must have broad and accessible appeal rights to challenge a denial, must receive detailed reasons by the administrator on why they were denied, and must have the opportunity to provide additional documents that would allow them to qualify.

¹³ Income Security Advocacy Centre, "Brief for the Standing Senate Committee on Social Affairs, Science and Technology's Study of Bill C-22" (11 April 2023) <<https://incomesecurity.org/wp-content/uploads/2023/04/2023-04-11-ISAC-Brief-for-the-Standing-Senate-Committee-on-Social-Affairs-Science-and-Technologys-Study-of-Bill-C-22-CDB.pdf>>, at 2-3.

¹⁴ See [ODSP Policy Directive 12.2](#) for a list of information sharing agreements between Ontario government ministries, other provinces, and departments of the federal government.

Roundtable 2: Appointing Representatives and Legal Capacity (2023-12-08)

The purpose of this roundtable was to understand how to handle the issue of appointing representatives and legal capacity under the *Canada Disability Benefit Act*.

We have reviewed and endorse the Appointing Representatives and Legal Capacity technical roundtable submissions provided by ARCH Disability Law Centre. In addition to ARCH's submissions we wanted to respond to the following question raised at the roundtable.

If a person or an organization is managing a benefit on behalf of another person, how should the Government ensure that the money will actually be used to support the person?

Persons with disabilities and their supporting family members have paid excessive fees to certain Disability Tax Credit (DTC) promoters for their assistance in making a DTC request. Promoters have charged people with disabilities 25-30% of their DTC in perpetuity to pay for the promoter's assistance with a successful DTC application.¹⁵ To avoid situations where predatory promoters can profit off persons with disabilities, ISAC recommends the following to eliminate incentives for predatory, for-profit companies to appear:

A simplified application and appeals process for the CDB

Complicated DTC application processes limit the ability of underfunded non-profit companies, charities, community legal clinics, etc. from being able to provide a DTC application service. Accordingly, this gap is filled by predatory, for-profit companies.

Additionally, the DTC appeal process is through the tax system, allowing unregulated tax professionals to represent persons with disabilities. DTC's specialized appeal process is lengthy, intimidating, onerous, expensive, and inaccessible for low-income people living with disabilities.

A clause that ensures the government pays medical professionals to complete forms

Costs associated with getting medical professionals to fill out DTC forms entice those living in poverty to seek outside support. Predatory, for-profit companies provide upfront support and are paid, often in perpetuity, by their client's future benefit gain, which is unfortunately more palatable for many clients who cannot dig into their already dire expenses to fill out a form.

¹⁵ See Jeannie Stiglic, "Disability tax credits under investigation" (CBC News: 9 February 2011) <<https://www.cbc.ca/news/canada/disability-tax-credits-under-investigation-1.1016518>>. This CBC investigation is not an isolated incident. See for example an organization not featured in the CBC report, National Disability Credit Alliance, who on their website indicate: "We charge a 25% contingency fee only if we are successful in getting you a financial benefit from the government": <<https://thendca.ca/faq.html>>.

Roundtable 3: Administrative Processes (2023-12-11)

The purpose of this roundtable was to seek input regarding the five administrative processes that typically feature as part of a well-designed benefit program: (i) the correction of administrative errors; (ii) the recovery of overpayments and debts; (iii) compliance and enforcement; (iv) reconsiderations; and (v) appeals.

To create a timely and accessible administrative process for low-income people with disabilities, all five administrative processes must incorporate the following two key principles:

1. Broad, flexible, and robust appeal rights to an administrative tribunal; and
2. Government onus for the decisions it makes within the appeal process (i.e., for decisions that are before the Social Security Tribunal of Canada).

The importance of these points is explained below, followed by detailed responses to each of the five processes discussed during the roundtable.

1. Broad, flexible, and robust appeal rights means **no limited appeal rights**:

The CDB regulations should indicate that *any* Minister decision made under the CDB is subject to reconsideration, as this would permit the Social Security Tribunal to have jurisdiction over the matter. There should be no limited appeal rights.

A limited appeal right occurs when the route to get to an administrative tribunal is limited to certain situations. This usually occurs in federal income security schemes when a Minister's decision is not subject to reconsideration, as the Social Security Tribunal requires a reconsideration decision from Service Canada to bring an appeal.

An example of a federal limited appeal right can be found in [ss. 27.1\(1\) and 28\(1\)](#) of the *Old Age Security Act*, which limits appeals to benefit determinations without contemplating overpayments. Accordingly, due to their exclusion through the limited appeal clause, Old Age Security and Guaranteed Income Supplement overpayment cases must be judicially reviewed to Federal Court, a far more onerous and less cost-effective process than bringing an appeal to the Social Security Tribunal. An easy solution to this issue is to ensure that any Minister decision made under the CDB is subject to reconsideration, as this would permit the Social Security Tribunal to have jurisdiction over the matter.

2. Government onus for decisions it makes means **no reverse onus**:

The CDB regulations should state that the onus lies on the Minister to satisfy the Tribunal that the decision of the Minister is correct. Under social assistance in Ontario, the legislation states the reverse: "The onus lies on the appellant to satisfy the Tribunal that

the decision of the administrator/Director is wrong”: *Ontario Works Act, 1997*, s. 28(11); *Ontario Disability Support Program Act, 1997*, s. 23(10). This is a reverse onus that causes significant harm. To ensure this additional burden on CDB claimants does not exist, the CDB regulations should expressly note the onus lies with the Minister to justify their own decisions.

Correction of Administrative Errors

An administrative error occurs when the government makes a mistake when administering a benefit. Administrative errors can cause claimants to face unfair or compounded harm due to the errors or omissions of the Minister’s staff.

To reduce the harm caused by administrative errors, ISAC recommends that the CDB regulations or policy directives include the following:

- The Minister must bear the onus of correcting and upholding administrative errors given the power disparity between an individual and the state. A reverse onus is fundamentally unfair when comparing government resources to the resources an individual must accumulate to assert their rights.
- The Minister should have the power to unilaterally fix administrative errors where correction of the error causes no harm to the recipient/applicant (e.g., error would not result in any financial or other penalty to recipient/applicant, instead correcting the error would result in full financial remuneration for the claimant).
- Where harm has occurred and this has been identified by the recipient/applicant at any stage of an appeals process, the Minister should be required to conduct a review of the item raised by the claimant and seek to resolve the issue without requiring the Tribunal to adjudicate.
 - When the Minister is responsible for an error, this should be a key reason for the waiver of any harm caused. Waiver would mean that the government takes full responsibility for the harm and the recipient is not left in a worsened state.
- Where the Minister has conducted a review and still found no error, the recipient must have a right to challenge this Minister’s decision before a Tribunal appeal process. The onus at the appeal process should be on the Minister to prove their review and explain why the harm placed on the recipient was maintained. The Minister must bear the onus to prove on a balance of probabilities so that it first establishes its case and the recipient/applicant is made aware of that evidence ahead of the hearing.¹⁶

¹⁶ An example of the reverse onus in the administrative error context can be seen in the practicalities of a matter dealing with [s. 32](#) of the *Old Age Security Act*, R.S.C., 1985, c. O-9, which states:

Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or a portion of a benefit, to which that person would have been entitled under this Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made. [Emphasis added.]

In appeals under this section, due to reverse onus, the claimant must establish that they received erroneous advice and relied upon it, and, further, that but for the erroneous advice their OAS benefits would not have been reduced. However, if government

Recovery of Overpayments and Debts

An overpayment occurs when the government provides an amount to a recipient that exceeds what they are entitled to. Strict overpayment collection in income benefit schemes fails to comprehend the intersecting lived experience of poverty and disability. This experience can include no access or limited access to alarm clocks, calendars, transportation, cell phones, computers, email addresses, and mailing addresses; low literacy levels or illiteracy; higher risks of substance dependence; heightened susceptibility to domestic violence or abuse; and a history of negative experiences in interacting with the state.¹⁷

Overpayments often arise from innocent mistakes and demanding recovery can impose unnecessary hardship on people living below the poverty line. To better serve the community that the CDB seeks to target, flexibility in recovery is paramount and the government must share responsibility for overpayments.

To reduce the harm caused by strict overpayment collection, ISAC recommends that the CDB regulations or policy directives include the following:

- The Minister should bear the onus to prove that an overpayment should be collected. This appeal right must be broad and accessible and not limited to judicial review, but rather available to bring before an administrative tribunal.
- The first principle under this category should not be strict recovery in all cases. Instead, opportunities for waiver or reduced recovery must be first principles due to the hardship factors associated with living in poverty.
 - Forgoing strict overpayment recovery is in line with legal precedents on this matter, see *Surdivall v. Ontario (Disability Support Program)*, [2014 ONCA 240](#). Notably, at paras. 42-44, the Court of Appeal for Ontario notes that taxpayer accountability is upheld when taxpayer funds are being spent reasonably, honestly, and fairly.
 - Hardship factors extend beyond financial hardship – living in poverty means that an overpayment becomes detrimental to your health, causes you to endure nuisance from collection agencies, and results in you going without assistive devices, medication, food, or other life-saving supports to pay back your debt.
- The Minister should never pursue overpayment collection where the cost of recovering the overpayment exceeds the actual amount of the overpayment. There should be an explicit Ministry policy that forgoes recovery in this instance.
- Often times administrative errors, failure of the Minister to conduct timely file reviews, and other issues outside of the control of recipients can contribute to significant overpayments.

onus was implemented, the Minister would have to establish that the remedial action that the Minister took was appropriate, allowing the claimant to instead discuss why the remedial action was inappropriate in their specific case. This is a more reasonable and accessible approach to take for people living in poverty with disabilities who are trying to assert their rights.

¹⁷ Income Security Advocacy Centre, “Submission to OHRC Consultation on Poverty and Systemic Discrimination in Housing and Mental Health and Addiction Disabilities” (30 September 2022) <<https://incomesecurity.org/wp-content/uploads/2022/10/ISAC-Submission-to-the-OHRC-Consultation-on-Poverty-and-Systemic-Discrimination-in-Housing-and-Mental-Health-and-Addiction-Disabilities-September-2022.pdf>>, at 3, 7-8.

There must be an emphasis on shared responsibility in cases where the Minister may be at fault for the size of an overpayment due to delay or bureaucratic mishandling that does not unduly burden a recipient.

- Regulations could implement a collections limitation period in line with the *Income Tax Act*. This timeline should be shortened from what exists in the *ITA* to account for the need and limited resources of CDB recipients, including an opportunity to waive the debt after the collections limitation period expires.¹⁸
- Regulations should indicate that the Minister has no right to recovery if the event causing the overpayment debt is not acted on in a timely manner (e.g., “x” days). There could be a clause in place that limits the length of time for recovery (e.g., if ongoing event was “x” years ago, Minister cannot claim for full “x” years of overpayment, can only go back “x” months at most).
- Debts or overpayments under the CDB must not be paid using other federal tax credits or poverty reduction measures that a recipient relies on to live. This is vital money for those in poverty and they cannot go without these credits. This approach aligns with the principle of no clawbacks and insulating or protecting the money provided under the CDB.
- The protection from seizure or garnishment must continue after the benefit is deposited into a bank account. This is express in Ontario’s social assistance legislation, and it should also exist for federal benefits.¹⁹

Compliance and Enforcement

To reduce the harm caused by punitive compliance and enforcement, ISAC makes the following recommendation:

Do not criminalize poverty and the poor

Fraud should be very narrowly defined and difficult to prove. In contract law, fraudulent misrepresentation is a very difficult test to meet and the person claiming fraud must prove the other person acted fraudulently. In that area of law, establishing fraud is a very high threshold (i.e., cannot just be I did not tell you something, rather the test for fraud requires an intent to deceive or mislead). However, due to the reverse onus, the Minister can claim fraud and force the recipient into proving that they did not commit fraud. This unchecked power is unjust and further highlights the need for government onus over a reverse onus scheme.

In the provincial social assistance sphere, fraud is invoked as a scare tactic. This approach has had dire consequences. The 2002 Kimberly Rogers Inquest and Recommendations must be reviewed and implemented in any compliance and enforcement scheme undertaken in the CDB. Kimberly Rogers was pregnant and under house arrest in an overheated apartment because she was criminalized for welfare fraud (her crime was receiving both student loans

¹⁸ Canada Revenue Agency, “Collections limitation period” (23 February 2017) <<https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/collections-limitation-period.html>>.

¹⁹ *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A, s. 23; *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 18; [OW Policy Directive 6.15](#); and [ODSP Policy Directive 5.16](#).

and Ontario Works at the same time). The impact of the provincial government's fraud policies ultimately resulted in the loss of life to suicide.²⁰ Kimberly's case cannot be repeated.

Reconsiderations

Individuals living with disabilities who disagree with a decision made by the Minister must have the opportunity to request a reconsideration of that decision. This step is taken before making a formal appeal. Therefore, any Minister decision under the CDB regulations should be eligible for reconsideration. There should be no regulations that limit this ability or power. This is especially important if appeals are routed to the Social Security Tribunal since this is a requirement to proceed with an appeal there for federal income security benefits.²¹

Expansive procedural rights, clearly communicated

When administering and explaining an initial decision, the individual must have all their procedural rights (e.g., informed of their right to request a reconsideration, received a recommendation that they seek legal advice, provided information on all their appeal rights, told about important dates, the effect of the decision on them, and their recourse options, etc.) communicated in clear and plain language. The Minister should also ensure that the decision is not vague and that it provides responsive justification related to the specific claimant's case.

The individual should also have an opportunity to request a longer period than a 90-day deadline to make the request for reconsideration that preserves their appeal rights. Living in poverty is a barrier. Sometimes a person does not receive a decision when the Minister thinks they do, so the Minister must be flexible when providing timelines.

ISAC recommends that drafters consider including a policy directive that directs government caseworkers to issue new decisions that restart the 90-day timeline where the circumstances warrant this extension. For example, where the person may be out of time but is reaching out to the Minister at first instance on the substantive issue and does not want to lose their right to appeal.

The Supreme Court of Canada has noted that the importance of a decision to an individual and its impact on them weighs in favour of granting more procedural protections.²² Income benefits like the CDB, are relied on by people living with disabilities in poverty to survive, and therefore form the utmost importance to them and their livelihood.

²⁰ A number of resources on this matter, including the status of key recommendations from the Inquest can be found at Income Security Advocacy Centre, "Inquest into the Death of Kimberly Rogers" (9 September 2014) <<https://incomesecurity.org/isac-cases/inquest-into-the-death-of-kimberly-rogers/>>.

²¹ Social Security Tribunal of Canada, "Forms for Canada Pension Plan (CPP), Old Age Security (OAS) and Guaranteed Income Supplement (GIS) appeals" <<https://sst-tss.gc.ca/en/your-appeal/social-security-tribunal-forms>>.

²² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 25.

Appeals

Individuals living with disabilities who disagree with a decision about the Canada Disability Benefit must have a right to challenge that decision through an independent, accessible, transparent, and timely dispute resolution process.²³

Making an administrative tribunal an accessible appeal process

CDB claimants must have broad appeal rights because denying them the Benefit will have a profound effect on their basic livelihood and access to food, housing, medication, and other disability supports. Accordingly, claimants must have accessible avenues to challenge decisions that deny them the CDB. A tribunal is a less formal appeal right that ensures flexible evidentiary requirements, emphasis on preliminary dispute resolution, and expertise in working with self-represented parties.

Any overpayment, any finding that impacts a recipient's entitlement, or any decision in the application process that does not grant CDB should be subject to a right to appeal to an administrative tribunal. There should be no limited appeal right clause that prevents certain Minister decisions from being subject to reconsiderations.

Internal tribunal appeal processes (e.g., tribunal-heard reconsiderations of initial hearings, leaves to appeal to a tribunal's appeal division, etc.) should have powers that allow them to grant a wide range of relief. If the Social Security Tribunal is chosen, this Tribunal currently explicitly has powers within its Appeal Division that allow the Appeal Division to provide any remedy that the General Division can provide.²⁴

The tribunal should also have accessible communications and clearly explained pathways with navigator tools and plain language. If the Social Security Tribunal is chosen, this Tribunal has effective communications already in place for other appeal mechanisms that should also be extended for CDB appeals.²⁵

Adjudicators who sit on an administrative tribunal for the CDB should also possess special expertise about the topic they are considering. All adjudicators should receive robust training concerning the CDB, their adjudicative functions (i.e., how to conduct hearings, draft plain language decisions, etc.), and how to effectively be trauma-informed and serve people with disabilities. The government should also consider ensuring that a set number of tribunal members who are appointed have lived experience of disabilities (including at the management level) to continue with the spirit of "nothing about us, without us".

Lastly, in appeals from a federal tribunal to the Federal Court of Canada, the CDB regulations should outline a **statutory appeal mechanism** instead of requiring Tribunal appellants to rely on a judicial review mechanism. This should ensure an as of right appeal and would allow for

²³ See ISAC's submissions before the Senate for further information on what an independent, accessible, transparent, and timely dispute resolution process should look like, Income Security Advocacy Centre, "Brief for the Standing Senate Committee on Social Affairs, Science and Technology's Study of Bill C-22" (11 April 2023) <<https://incomesecurity.org/wp-content/uploads/2023/04/2023-04-11-ISAC-Brief-for-the-Standing-Senate-Committee-on-Social-Affairs-Science-and-Technologys-Study-of-Bill-C-22-CDB.pdf>>, at 1-2.

²⁴ *Department of Employment and Social Development Act*, S.C. 2005, c. 34, s. 59.

²⁵ Social Security Tribunal of Canada, "Social Security Tribunal of Canada" <<https://sst-tss.gc.ca/en>>.

a Federal Court standard of review for correctness on errors of law rather than reasonableness.²⁶

Dispute resolution as the driving factor

There must be numerous built-in opportunities for dispute resolution. The Minister's representative should be engaged throughout the appeal process in the lead up to the administrative tribunal hearing and seek to resolve issues wherever possible so that the person living with disabilities is not continually pushed to a tribunal to assert their rights.

Persons with disabilities must also be involved in the development and implementation of the dispute resolution process. An administrative tribunal will not be accessible or effective if it contributes to a lengthy waiting period for dispute resolution. If claimants have to wait years before receiving a hearing date or a decision they will be left in limbo and in poverty for a longer period of time. The process must be timely and accessible.

²⁶ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), at paras. 7, 12-15, and 37. For precedent language on inserting statutory appeal mechanisms, see Ontario's social assistance legislation that routes to the Ontario Divisional Court, *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A, [s. 36](#); *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, [s. 31](#).

Further Recommendations for the *Canada Disability Benefit Act* Regulations

In addition to the above, ISAC also provided the following recommendations while attending the three technical roundtables:

Clawbacks of any kind are counter to the intention and goals of the CDB

The biggest barrier of all would be allowing provincial governments to clawback the CDB from their provincial social assistance schemes as this would turn the CDB into a transfer payment instead of a poverty reduction benefit.

Implementing internal clawbacks within the CDB (i.e., through income or earning exemptions) would create a system of double collection/recovery²⁷ off the backs of recipients. For example, the same employment income could be clawed back from both the provincial social assistance and the CDB legislation. Given the framing of the CDB as a supplement, as opposed to replacement, all income or earning exemptions should remain within the existing provincial scheme and the CDB scheme should not contemplate or create any new internal clawbacks.

Additionally, the CDB should be exempted or protected from clawbacks of any kind, especially for those from any other federal benefits or departments. People living with disabilities in poverty will rely on the steady and predictable receipt of the CDB to ensure they can pay their bills, remain housed, clothed, and fed. Allowing the Canada Revenue Agency or other federal departments to clawback CDB entitlement to recuperate outstanding federal debts will impact these essential needs, causing significant harm.

Continue using *Accessible Canada Act* definitions in the CDB regulations

The *Accessible Canada Act* (“ACA”), a key pillar in the Government’s Disability Inclusion Action Plan, outlined key definitions that underwent extensive consultation and followed a human-rights based approach to disability.²⁸

The definition of “barrier” should be integrated into the CDB regulations, and language around the government’s responsibility to remove barriers should be present. Moreover, the government should provide an accessible appeal route or other path for recourse where the government has erected barriers.

ISAC also endorses the continued use of the *ACA* definition of “disability” in the CDB regulations after that was how disability was defined in the *CDB Act*.

²⁷ See Income Security Advocacy Centre, “Promises and Pitfalls of the Canada Disability Benefit: Clawbacks and Constitutional Issues” (23 October 2023) <<https://incomesecurity.org/wp-content/uploads/2023/11/OsgoodePD-Presentation-Clawbacks-and-Constitutional-Issues-October-23-2023.pdf>>, at 4-5, 9.

²⁸ *Accessible Canada Act*, S.C. 2019, c. 10, s. 2.

Use a single person or individual benefit unit design

Ensuring that the benefit unit is based on an individual/single person design rather than a family design will remove opportunities for abuse by ensuring that the benefit follows the individual.²⁹

In addition to a host of other issues the family benefit unit design causes in the ODSP scheme, on the topic of legal capacity, the nature of a family benefit allows Ontario to make decisions on capacity if “satisfied” that income support is not being used for the benefit of the individual *or other members of the family benefit unit*.³⁰ ISAC does not believe that the federal government should be making capacity decisions as part of CDB administration. A single/individual benefit unit will reduce abuse and is the more favourable path forward.

Eliminate retroactive payment caps

The CDB regulations must ensure there is no cap placed on retroactive payments to eligible recipients. For example, if a benefit should have been granted three years ago, but was delayed due to appeal process delays or other factors, all three years must be paid out to the recipient. This is currently the process that takes place in Ontario’s provincial social assistance legislation, which does not limit retroactive calculations.³¹ Unfortunately, under the *Canada Pension Plan*, the legislation limits retroactive payments for CPP-D recipients to 11 months due to a combination of restrictive provisions.³²

Caps on retroactive payments are punitive as they can penalize an individual who may require more time to apply to a benefit for a host of reasons that could include living in poverty, limited education, language barriers, etc. Accordingly, to accommodate and eliminate barriers for people living with disabilities accessing income supports, there should be no retroactive payment caps in the CDB.

²⁹ Senator Ratna Omidvar, “C-22: When Deciding Benefit Eligibility, Should Assets Held by Spouses & Other Family be Considered?” (25 April 2023) <<https://www.youtube.com/watch?v=7btoO8d01jl>>.

³⁰ See [ODSP Policy Directive 10.2](#), where in certain conditions, the Director may appoint a person to assist a recipient to manage his/her income support if the Director is satisfied that the recipient is using or is likely to use their income support in a way that is not for the benefit of themselves or other members of the benefit unit.

³¹ As there is no retroactive limit, there are no explicit provisions in the Ontario social assistance scheme that deal with caps on retroactive payments. However the regulatory scheme does acknowledge that retroactive calculations occur and are paid out, see O. Reg. 222/98, [s. 53\(2\)](#); O. Reg. 134/98, [s. 64\(1\)](#).

³² See *Canada Pension Plan*, R.S.C., 1985, c. C-8, ss. [42\(2\)\(b\)](#), [69](#), which together create a retroactive payment cap of 11 months. Subsection 42(2)(b) provides an initial cap of 15 months retroactive to an application date as a deemed date of disability, while s. 69 indicates that payments will only occur four months after the deemed date of disability.