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## The New RDSP: A Comparison to Henson Trusts

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### Introduction

This article examines two distinct tax and estate planning tools which may be used by families with disabled beneficiaries: the so-called "Henson trust" and the Registered Disability Savings Plan (RDSP). While most advisors and practitioners in the field are familiar with Henson trusts, the RDSP is a new tool in planning for special needs individuals in Canada. A general overview of Henson trusts and RDSPs is provided and a discussion of the utility of each structure follows.

### Henson Trusts

Trusts known as "Henson trusts" are structured so as to ensure that a disabled beneficiary retains his or her eligibility for government benefits. In addition to various federal programs which are generally available only to low-income families with disabled individuals, provincial benefits are often conditional on the disabled individual's need. Provincial plans include the Ontario Disability Support Program (ODSP),

Alberta's Assured Income for the Severely Handicapped Program, and British Columbia's Employment Assistance for Persons with Disabilities. In many cases it will be desirable to maintain the benefits available from various government programs.<sup>1</sup>

Taking the example of the ODSP, to qualify for the benefits available under the program, an individual must be disabled, his or her assets may not exceed \$5,000 (excluding, among other things, a principal residence and automobile), and his or her income must be less than \$6,000 over a 12-month period.<sup>2</sup> With regard to the limitation on assets, unless a trust is worded carefully, a disabled beneficiary's interest in an *inter vivos* or testamentary trust will be included in calculating the value of the individual's assets for the purposes of ODSP eligibility.

The concept of a Henson trust arose out of the 1987 *Henson* decision.<sup>3</sup> In that case, a father established a testamentary trust for his mentally handicapped daughter under his Will. The Will specifically stipulated that the trustees had absolute discretion as to the disposition of the trust capital and that the daughter could not compel the trustees to distribute any income to her from the trust. These instructions were accepted by the Courts

• as creating a type of trust that did  
• not affect the disabled daughter's  
• eligibility for disability benefits in  
• any way, since her interest in the  
• trust assets could not be character-  
• ized as a liquid asset which would  
• otherwise reduce or eliminate her  
• entitlement to benefits.

• While the value of the assets held  
• in a Henson trust will not be  
• included in calculating a disabled  
• beneficiary's assets for purposes of  
• ODSP eligibility, distributions to the  
• beneficiary will be included as  
• income of the beneficiary and thus  
• must be limited to \$6,000 for each  
• 12-month period. (Disability-related  
• expenses paid for out of the trust  
• are not included in the \$6,000 limit.)  
• The value of such government  
• benefits must therefore be weighed  
• against the amounts the disabled  
• beneficiary might otherwise receive  
• from the trust. Where the amounts  
• available for distribution significantly  
• exceed potential government ben-  
• efits, it may be desirable to forego  
• the government assistance in favour  
• of greater distributions from the  
• trust.

## • **Registered Disability • Savings Plan**

• An outline of the RDSP program  
• was presented in the 2007 Federal  
• budget and the ensuing legislation  
• came into force on Dec. 1, 2008.<sup>4</sup>  
• The RDSP was introduced in  
• accordance with recommendations  
• of the Report of the Minister of  
• Finance's Expert Panel on Financial  
• Security for Children with Severe  
• Disabilities, which was delivered in  
• December of 2006.

• The RDSP is loosely modelled after  
• the registered education savings plan  
• (RESP) structure, but with a lifetime  
• maximum of \$200,000 per  
• beneficiary to be invested tax-free  
• until withdrawal (RESPs have a

\$50,000 maximum). Mirroring the  
RESP program, the RDSP program  
is three-pronged and includes an  
RDSP for eligible individuals, a  
Canada Disability Savings Grant  
("Disability Grant") and a Canada  
Disability Savings Bond ("Disability  
Bond") for low- and modest-income  
families. The RDSP program has  
been implemented through amend-  
ments to the *Income Tax Act*  
(Canada) (the "Act") and through  
the enactment of a new statute, the  
*Canada Disability Savings Act*.  
The RDSP, Disability Grant and  
Disability Bond programs are  
discussed in turn below.

### **RDSP**

An individual's eligibility for the  
federal RDSP program is based  
upon eligibility for the disability tax  
credit in section 118.3 of the Act,  
age (under 60) and status as a  
resident of Canada. The disabled  
"eligible person" is the plan  
beneficiary and only one RDSP is  
permitted for each beneficiary. Any-  
one, including the plan beneficiary,  
the beneficiary's family members  
and persons not related to the  
beneficiary, may contribute to an  
eligible individual's RDSP.

As with RESPs and unlike with  
registered retirement savings plans  
(RRSPs), contributions to an RDSP  
will not be deductible  
from the contributor's income.<sup>5</sup>  
However, any income earned on  
contributions will accrue tax-free  
until paid out of the RDSP to the  
plan beneficiary. Disability Grants  
and Disability Bonds will also be  
taxable in the beneficiary's hands  
upon distribution.

Contributions to an RDSP will be  
limited to a lifetime maximum of  
\$200,000 in respect of a particular  
beneficiary, with no annual limit on  
contributions. Contributions will be  
permitted until the end of the

calendar year in which the plan  
beneficiary turns 59, and payments  
out of the RDSP will be mandatory  
beginning in the following year. Only  
the plan beneficiary or the  
beneficiary's legal representative is  
entitled to receive payments from  
the RDSP and refunds to other  
contributors are not permitted.

While the 2007 budget papers  
suggested that there would be an  
ability to encroach on the income  
and capital of the RDSP "in such  
amounts and for such purposes as  
the plan may provide,"<sup>6</sup> limitations  
have been placed upon encroach-  
ment abilities with the introduction  
of an "assistance holdback amount."  
Essentially, an encroachment prior to  
the calendar year in which the plan  
beneficiary turns 60 (termed a  
"disability assistance payment")  
from an RDSP will be disallowed  
if the payment would cause the  
fair market value of the RDSP's  
assets to fall below the assistance  
holdback amount. The *Canada  
Disability Savings Regulations*  
define "assistance holdback  
amount" as follows:

"assistance holdback amount"  
means, at a particular time, the  
total amount of bonds and grants  
paid into an RDSP within the  
10-year period before the  
particular time, less any amount  
of bond or grant paid in that  
10-year period that has been  
repaid to the Minister.

Under this definition, encroachment  
may not be permitted with respect to  
certain government contributions to  
the RDSP, prior to the year in which  
the beneficiary turns 60. It should be  
noted however, that provision is  
made in the *Canada Disability  
Savings Act* for waivers of  
payments and repayments on the  
basis of an undue hardship.<sup>7</sup>  
The RDSP legislation provides that a  
parent or legal guardian can open

and be the "account holder" of an RDSP for a minor disabled person. As well, a "public department, agency, or institution that is legally authorized to act for the beneficiary" of the RDSP can open a Plan for the minor disabled person. If the disabled person is an adult, he or she can be the account holder, provided he or she is competent.

If the disabled person is not competent to enter into a contract with the financial institution, a "qualified person" would open the account and be the account holder. Under the legislation, a qualified person is "a guardian, ... or an individual who is legally authorized to act for the beneficiary; or a public department, agency, or institution that is legally authorized to act for the beneficiary." Interest-ingly, the legislation appears to permit a parent who was the account holder while the beneficiary was a minor to continue as the account holder once the beneficiary reaches the age of majority; otherwise, it may be necessary for a parent or, more likely, other relative such as a sibling, to become the legal guardian of the adult disabled person in order to open an RDSP and be the account holder. This requirement may prove costly and cumbersome for families who, until now, have been able to deal with the disabled person's assets without a guardianship order.<sup>8</sup>

### Canada Disability Savings Grant

RDSP contributions made in a given year will qualify for direct government assistance in the form of Disability Grants at matching rates of 100, 200 or 300%, depending upon net family income and the amount contributed. Under the current proposals, a family with a net family income of over \$74,357<sup>9</sup> will receive a maximum annual Disability Grant of \$1,000 (100% of

the first \$1,000 contributed), while those with a lesser net family income will be eligible for a maximum annual Disability Grant of \$5,500 (300% of the first \$500 and 200% of the next \$2,000). In a departure from the RESP program structure, after the year in which an RDSP beneficiary turns 18, the relevant "net family income" for such purposes will be that of the beneficiary and his or her spouse or common-law partner. There will be a lifetime Disability Grant limit of \$70,000 for plan beneficiaries.

### Canada Disability Savings Bond

Annual Disability Bonds, which will not be contingent on contributions to an RDSP, will be paid into the RDSPs of beneficiaries of lower-income families. The maximum annual Disability Bond of \$1,000 will be paid where net family income does not exceed \$20,883. The Disability Bond will gradually be reduced to nil where net family income exceeds \$37,177. There will be a lifetime limit of \$20,000 on Disability Bonds paid in respect of an RDSP beneficiary.

The Government of Canada extended the deadline for opening an RDSP, making contributions and applying for the matching grant and the income-tested bond for the 2008 contribution year to March 2, 2009, from Dec 31, 2008. The 2009 RDSP contribution year began March 3, 2009.

## A Comparison

In most provinces and territories, the Henson trust is accepted as a legitimate planning tool for disabled beneficiaries. Until recently, it was unclear whether RDSP contributions and distributions would affect eligibility for disability benefits. In recent months most of the provinces and territories, including Ontario, have

amended the regulations relating to disability benefits such that RDSP amounts will be ignored when determining eligibility for benefits.<sup>10</sup>

Whether or not Henson trusts are used, all families planning for disabled individuals should consider making use of the RDSP program in order to take advantage of the significant government contributions available.<sup>11</sup> The proposed structure of the Disability Grant program is such that even wealthy families may be eligible to receive upwards of \$50,000 from the federal government (where contributions of at least \$1,000 are made to an RDSP every year and are made beginning in the year of the disabled individual's birth). Where funds are limited and the family of the disabled individual has a lower net family income, subject to the above assumptions, in most cases priority should be given to contributing to an RDSP over settling a Henson trust, in light of the potential for the direct government assistance (up to a maximum of \$90,000 for low-income families) – keeping in mind the potential hurdle of obtaining a legal guardianship order, which would otherwise not necessarily be required.

In conjunction with Henson trusts and other planning tools for disabled individuals, tax and estate planners should encourage participation in the new RDSP program, as it should provide much needed financial support for special needs individuals and their families.

## Endnotes

<sup>1</sup> For a more detailed discussion of various federal and provincial benefits available for disabled individuals, please see, e.g., Martin J. Rochweg, *Tax and Estate Planning for Special Needs Individuals*, Report of Proceedings

of the 57th Tax Conference, 2005 Tax Conference (Toronto: Canadian Tax Foundation, 2006), 8:1-14.

<sup>2</sup> *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Schedule B, ss. 3-5; O. Reg. 222/98. The Ontario government raised the income qualification on Nov. 30, 2008. If an ODSP recipient's income exceeds \$6,000 in a 12-month period, his or her benefits may be clawed back on a dollar-for-dollar basis.

<sup>3</sup> *Ontario v. Henson* (1987), 28 ETR 121 (Ont. Div. Ct.); aff'd. (1989), 36 ETR 192 (Ont. CA).

<sup>4</sup> The *Canada Disability Savings Act* was introduced in federal Bill C-28. Bill C-28 was passed on Dec. 14, 2007. Under Bill C-28's "coming into force" provisions, the *Canada Disability Savings Act* come into force on a day or days to be fixed by order of the Governor in Council (s. 138). The relevant Order fixes Dec. 1, 2008 as the date of coming into force of the *Canada Disability Savings Act* (S.C. 2007, c.35, s. 136).

<sup>5</sup> The Expert Panel Report on Financial Security for Children with Severe Disabilities recommended non-deductibility of contributions (the RESP model over the RRSP model) because the panel gave significant weight to the objective of targeting more of the benefits of the RDSP to those with lower incomes. As stated at page 19 of the Report, "Such a deduction creates more benefit for those with higher incomes, those who, arguably, need a lesser incentive to save than do those with lower incomes."

<sup>6</sup> Federal Budget, Supplementary Information, March 19, 2007: Registered Disability Savings Plan.

<sup>7</sup> See s. 11 of the *Canada Disability Savings Act* (not yet in force).

<sup>8</sup> In Ontario, a simplified process may be available through the Office of the Public Guardian and Trustee.

<sup>9</sup> All references to net income thresholds are in 2007 dollars and are to be indexed for inflation for 2008 and subsequent years.

<sup>10</sup> Under the Yukon's *Social Assistance Act*, accumulated savings in an RDSP will not be included in the calculation of liquid assets (para. 10(2)(c)). However, cash withdrawn from an RDSP for purposes other than those authorized by the plan will be included in calculating monthly income (para. 8(3)(o)).

In Ontario, Bill 94 (a Private Member's Bill), proposed to exclude funds held in an RDSP from the determination of assets for ODSP purposes. Since the Bill was introduced, the Province announced on Nov. 30, 2008 that RDSP contributions will not impact eligibility for ODSP and ODSP recipients can withdraw funds from an RDSP without it affecting ODSP benefits. (See <http://www.mcass.gov.on.ca/mcass/english/news/releases/081130.htm>). The regulations to the following Acts have subsequently been amended to provide that RDSPs are exempt as assets and/or income:

- Social Housing Reform Act, 2000 - O. Reg. 298/01;
- Ontario Works Act, 1997 - O. Reg. 134/98;
- Ontario Disability Support Program Act, 1997 - O. Reg. 222/98;
- Ontario Disability Support Program Act, 1997 - O. Reg. 223/98; and

- Ontario Disability Support Program Act, 1997 - O. Reg. 224/98.

The following Alberta acts and regulations were amended in 2008 and all have references to RDSPs as being exempt as either assets and/or income:

- Public Trustee Investment Regulation, Alta. Reg. 24/2006;
- Income Supports, Health and Training Benefits Regulation, Alta. Reg. 60/2004; and
- Assured Income for The Severely Handicapped General Regulation, Alta. Reg. 91/2007.

British Columbia has issued a statement that it will exclude RDSPs as assets for determining eligibility for provincial disability benefits. The Province has also exempted all income from RDSPs. Further,

The government of Saskatchewan issued a News Release on Sept. 4, 2008, stating that RDSP assets and income received from RDSPs will be exempted from social assistance calculations in Saskatchewan. No bill setting out this exemption has been tabled to date.

The government of Newfoundland and Labrador issued a News Release on March 31, 2008, stating that RDSPs will be exempted from the calculation of Income Support benefits in that Province. No bill setting out this exemption has been tabled to date.

Quebec's 2007/2008 budget makes reference to the RDSP proposals in the 2007 federal budget and states the following in respect of the taxable portion of distributions from RDSPs:

Moreover, so that the taxable portion of amounts received under

(continued on page 9)

a designated beneficiary might hold the RRSP or RRIF in trust for others. There have been (at least) two other decisions elsewhere in Canada, both issued in 2004, that made similar findings – for example, the British Columbia Supreme Court decision in *Neufeld v. Neufeld Estate*, 5 E.T.R. (3d) 188, and the Saskatchewan Court of Queen's Bench decision in *Nelson v. Little Estate*, 13 E.T.R. (3d) 223.

However, Herold, J. made no reference to either of them.

In the face of *McConomy*, it may now be incumbent upon estates practitioners to question the client who holds a RRSP or RRIF with a beneficiary designation as to whether the person(s) so designated is intended to be the beneficial owner of the money or property comprising

the plan or fund and, if so, to document that intention – at least where there is a risk of the type of dispute that occurred in this case.

\* \* \* \* \*

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### The New RDSP

(continued from page 4)

a registered disability savings plan by the plan beneficiary are not included in the calculation of, on the one hand, the amount of assistance granted by tax credits that reduce or are adjusted with income and by the property tax refund and, on the other, the premium payable under the

Quebec prescription drug insurance plan or the 1% contribution to the Health Services Fund (HSF) payable by individuals, such portion of the amounts received will be included in the calculation of the beneficiary's taxable income.

<sup>11</sup> British Columbia and the Vancouver Foundation will provide people with disabilities \$150 towards their RDSP. (See <http://>

[www.vancouverfoundation.bc.ca/specialprojects/endowment150.htm](http://www.vancouverfoundation.bc.ca/specialprojects/endowment150.htm)).

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