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WOMEN'S LEGAL
EDUCATION & ACTION FUND
FONDS D'ACTION ET D'ÉDUCATION
JURIDIQUE POUR LES FEMMES

Submission to the Office for Disability Issues Employment and Social
Development Canada on Administrative Processes for the Canada
Disability Benefit

December 18, 2023

Prepared by the Women's Legal Education and Action Fund (LEAF)¹

¹ This submission was authored by Cee Strauss, Senior Staff Lawyer at LEAF. Significant portions of the submission draw upon LEAF's Report on [Basic Income, Gender & Disability](#), which was authored by Dr. Sally A. Kimpson, a disabled woman, critical disability studies scholar, Registered Nurse, and health and disability advocate. Roxana Parsa, LEAF Staff Lawyer, and Sukhpreet Sangha, LEAF Public Legal Education Manager, contributed to this submission, as did DAWN Canada staff members.

I. INTRODUCTION

Through these submissions, LEAF adds its voice in solidarity with disability communities to emphasize that **the Canada Disability Benefit (CDB) must do no harm**: its processes should aim to *assist* people with disabilities in gaining access to resources, rather than *stigmatize* people with disabilities by questioning their need for the benefit and routinely investigating the veracity of their claims.

II. DISABILITY POVERTY IS A SUBSTANTIVE EQUALITY ISSUE FOR WOMEN, TRANS, AND NON-BINARY PEOPLE

Disability poverty is an intersectional feminist issue.² Disabled people are among the poorest living in Canada. Disabled women are significantly poorer than disabled men, and are twice as likely to be living alone than non-disabled women. Disabled women who are single, single-parenting, Indigenous, working class, racialized, and/or newcomers live in the deepest poverty.

Although there is little hard data on transgender disabled people, given the high rates of poverty among trans people and statistics on disability and poverty in Canada, we can assume that a significant proportion of disabled trans people are living in poverty.

Living in poverty contributes to the substantive inequality of disabled women, trans, and non-binary people. Because they experience both poverty and ableism, they have unequal access to resources and opportunities like education and employment. Vulnerability to violence is linked to poverty in disabled women's lives. Poverty also limits disabled women, trans, and non-binary people's civic participation and social inclusion. Their social well-being is compromised, affecting their health, and limiting their ability to achieve the equality of outcomes substantive equality promises.

III. THE FEAR OF LOSING BENEFITS AND THE REALITIES OF HYPER-SURVEILLANCE CONSTRAIN DISABLED PEOPLE'S LIVES

² Sally A Kimpson, "Basic Income, Gender and Disability" (2021) at 17 online (pdf): LEAF National <Basic-Income-Gender-Disability-Full-Report-Final.pdf (leaf.ca)>. "Intersectionality reminds those concerned with the lives of disabled women and gender-diverse disabled people that their lives cannot be reduced to single (or "common") characteristics, and that their experiences cannot be properly understood by prioritizing any one single factor." The term "intersectionality" was coined by Black feminist and law professor Kimberlé Crenshaw in 1989.

The type of administrative processes set out in the ODI's Admin RT Participant Information Sheet are present in provincial and territorial benefits, and they substantially constrain disabled peoples' lives.³

As Dr. Kimpson writes,

Disabled women, disability activists, and Critical Disability Studies scholars keenly recognize the kinds of bureaucratic imperatives that disabled people receiving disability benefits have to respond to, and their effects. These are usually summed up as: intrusion into personal lives via investigations and frequent review of income (surveillance); forced intimate self-disclosure; relentless stigma; ... and having to re-qualify annually for continued support for additional disability-related supports and services, or for the benefit itself after leaving employment. Along with the well-documented effects of living in poverty, these particular effects substantially constrain disabled women and gender-diverse disabled people's lives in terms of their ability to participate more fully in community, and in terms of their social inclusion.

The fear of losing benefits structures disabled women's and gender-diverse disabled people's lives and contributes to their economic dependency on income supports. This is related to surveillance, intrusiveness, and heightened scrutiny by providers.⁴

Given the extent to which racialized and Indigenous people are already under surveillance by governmental authorities and the police, it is imperative for any new benefit program to ameliorate conditions of coercion and surveillance rather than exacerbate them. Unfortunately, the way that the questions have been written in the Participant Information Sheet do not indicate that the government is working from a do no harm standpoint.

IV. RECOMMENDATIONS

Recommendation #1: Operate within a Do No Harm framework

³ Kimpson, *ibid* at 67-8.

⁴ See Kimpson, *ibid* ("Disabled women pay very close attention to what their benefit programs do or allow, or conversely do not do or do not allow; anxiety produces vigilance, which is a primary activity in their daily lives in order to strategize in the most effective ways they can to ensure continuation of their benefits....The threat of losing benefits is [experienced as] a tool of coercion exercised by program administrators with complex embodied effects for disabled women, including heightened stress-related symptoms that exacerbate their disabilities (e.g., insomnia, increased blood pressure, fatigue). Pervasive fear and mistrust have the potential to immobilize the women (emotionally and physically), and the fear of losing supports reinforces their economic dependency. Living in unreliable bodies and unstable health means they are unable to depend on their bodies for economic stability or security, and they thus become ever more dependent on income support. This is a particularly pervasive and insidious kind of dependence, affecting disabled women's ability to care for themselves and to exercise autonomy" at 62).

The government should structure its administrative regulations on a Do No Harm principle. As March of Dimes Canada and Prosper Canada state:

[i]ncome benefit programs like the CDB are created, funded, and supported by government and people in Canada to assist and support vulnerable people in Canada – not to harm them and make their lives even more difficult and painful. Yet this is too often the experience of applicants and recipients of current disability benefit programs in this country. Consequently, a crucial principle governing the CDB should be that it do no harm to those it is intended to help.⁵

A Do No Harm framework in this context means assisting and supporting vulnerable people, rather than creating a culture of distrust and stigma by conducting routine investigation as to whether they are fraudulently claiming benefits.

i. Overpayment and Debt Recovery

In some welfare schemes, individuals can have their debt reduced or canceled if they can prove that paying back the debt in full would cause undue hardship. Here, the circumstances in which a debt should be reduced or canceled have already been met: the individuals receiving this benefit are living in poverty. The CDB should therefore be protected monies.

As stated in the Admin RT Participant Information Sheet, debts and overpayments can occur either through error or through instances in which individuals provide outdated, incorrect or false information and as a result receive benefits to which they are not entitled, which then need to be repaid.

Seen through a Do No Harm principle, the government should begin from the assumption that the incorrect information was provided in error. Given the high likelihood that the amount that was overpaid has already been spent, and the fact that the overarching goal of the CDB to *reduce* poverty, the government should not seek reimbursement of any amounts that have been overpaid over and above 10% of the amount.

In addition, the timelines that are often provided to people are not feasible given their life circumstances. For example, if someone is insecurely housed and struggling to pay for food, it will be difficult for them to re-pay whatever is owed within a typical 60- or 90-day timeframe. In addition, the way in which time limits are stated on government documents is often

⁵ See March of Dimes Canada & Prosper Canada, “A Benefit without Barriers: Co-Creating Principles and Recommendations for Canada Disability Benefit Administration” at 10 online (pdf): March of Dimes Canada & Prosper Canada <https://www.marchofdimes.ca/en-ca/aboutus/govtrelations/ourwork/Documents/Canada-Disability-Benefit-Report_EN.pdf>.

confusing. It would significantly reduce confusion to state clearly the date by which an individual must pay their debt.

Finally, individuals will be depending on the CDB to meet basic needs. To ensure benefit recipients' basic needs are met, benefit payments must continue even as a debt is outstanding.

Recommendation #2: The Canada Disability Benefit should be protected monies, as they represent a basic minimum income for poor people with disabilities.

Recommendation #3: Deductions for the collection of overpayments should be limited to 10% of the amount that was overpaid.

Recommendation #4: The timeframe for debt recovery should be as generous as possible.

Recommendation #5: Any time limit issued (e.g. debt payable 90 days from date of decision) should also state the calendar day by which the debt is payable (e.g.: Debt must be paid 90 days from date of decision, which in this case is December 11, 2023).

Recommendation #6: No interest should accrue on the amount owed, and there should never be a collection order placed on an individual's account.

Recommendation #7: Continued payment of the adjusted benefit amount should continue despite a debt being outstanding.

ii. Verifying compliance

- a) The parts of section 44.2(2) of the *Old Age Security Act* that enable the Minister to enter a person's dwelling house or other premises to examine a document are unnecessary and would contribute to the over-surveillance of disabled persons, and in particular of Black, Indigenous, racialized, newcomer, and migrant disabled people.

Recommendation #8: The Minister's powers to examine a document should not enable them to enter a person's home.

- b) Verifications of compliance should be minimal. While identifying individuals who are knowingly deceiving the government may be necessary, any process of doing so must be one in which individuals are treated with respect, provided with all necessary information, and are only asked pertinent questions. Experience with provincial and

territorial benefits programs teaches us that many disabled women and gender-diverse disabled people “encounter income support bureaucracies as markedly complicated, paternalistic, invasive, adversarial, stigmatizing, and demoralizing, engendering feelings of unworthiness.”⁶

Recommendation #9: Verifications of compliance should be minimal, and any process of doing so must be one in which individuals are treated with respect, provided with all necessary information, and are only asked pertinent questions.

Recommendation #10: All verifications of compliance must take into account an individual’s unique communication and access needs resulting from their disability.

iii. Offences and administrative monetary penalties

The regulation should not establish any offences, and administrative monetary penalties should be payable in instalments. This is because deliberate cheating in social welfare is actually quite rare,⁷ and when women do commit welfare fraud, it is often because of ‘need’ rather than ‘greed’.⁸ Not only do fraud offences fail to act as a general deterrent (because fraud is a crime of survival), investigating instances of fraud increases surveillance of people in poverty, who are already an over-surveilled population.⁹

⁶ Kimpson, *ibid* note 2 at 60 (See also: “Women know that their eligibility status is at risk in any given encounter with officials during which they are vulnerable to exposure, some of it coerced. In response, women learn (some more effectively than others) to act strategically by managing their personal information as best they can, only answering questions asked and not volunteering any further information. Here the effects are evident: this form of self-regulation, which arguably keeps them from asking for services that might be costly to providers, has deeply limiting effects, creating narrowness in their lives in terms of participation and social inclusion, and compromising their well-being” at 60).

⁷ Jennifer Robson, “Radical Incrementalism and Trust in the Citizen: Income Security in Canada in the Time of COVID-19” (2020) 46:S1 Canadian Public Policy S1 (“Generally, studies of cheating in social welfare and taxation find that deliberate non-compliance is quite rare (Andreoni, Erard, and Feinstein 1998; CRA 2017b; Kleven et al. 2011; Mosher and Hermer 2005; Saad 2014” at S9).

⁸ Isabelle Semmelhack, *Beyond ‘Deserving’: An Examination of the Moral Regulatory Function of Welfare Policing During the COVID-19 Pandemic* (Masters of Arts, Queen’s University, 2021 (“...women who commit fraud intentionally, are likely to do so out of ‘need’ as opposed to ‘greed,’ casting doubt on the effectiveness of sentencing practices premised on the notion of general deterrence ([Carruthers] 261). Yet, the harsh sentencing meted out for welfare fraud has its greatest impact on single mothers, who are most likely to accept early guilty plea bargains to avoid jail time, which could compromise their parental custody” at 8); see also Janet Mosher & Joe Hermer, “Welfare Fraud: The Constitution of Social Assistance as Crime” (2005) Ottawa: Law Commission of Canada.

⁹ Kathy Dobson, “Welfare Fraud 2.0? Using Big Data to Surveil, Stigmatize, and Criminalize the Poor” (2019) 44 Canadian Journal of Communication 331 (fraud tracking tools “cost more than budgeted for, fail to save taxpayers’

If offences are established in the CDB regulations, LEAF strongly urges that no custodial or conditional sentences be contemplated. While the intention of drafters and legislators may be to capture fraudulent conduct of able-bodied actors, the risk of these penalties being applied to disabled individuals in need of benefits is too great. The experience of Kimberley Rogers, who died in her home on a conditional sentence in 2001, exemplifies with distressing clarity why conditional sentences are not appropriate in cases of welfare or disability benefits fraud.¹⁰

In addition, if offences are established, recourse to them should only occur in circumstances where there is a deliberate misrepresentation and where a warning to the person is not appropriate. This would mirror the recently enacted s. 486.6(1.1) of the *Criminal Code*,¹¹ which was created by Bill S-12.¹²

Finally, LEAF urges that any penalties, be they offences or administrative monetary penalties, account for questions of capacity. An individual should not be held responsible for “misrepresenting” their situation if they do not have the capacity to have engaged in the type of mischief being targeted by penalties provisions.

Recommendation #11: The regulation should not establish any offences, and administrative monetary penalties should be payable in instalments.

Recommendation #12: If offences are established, there should be no provision for custodial or conditional sentences.

Recommendation #13: If offences are established, recourse to them should only occur in circumstances where there is a deliberate misrepresentation and where a warning to the person is not appropriate.

Recommendation #14: If fraud has occurred, that finding should not affect an individual’s ability to access other social assistance benefits.

Recommendation #15: An individual should not be penalized for providing misleading information if they do not have capacity to have knowingly misrepresented themselves.

money through the promised goal of uncovering welfare ‘cheats’, and, to date, have yet to increase efficiencies and the delivery of services to those who need them most (Kennedy, 2012; Knaus & Davey, 2017; Office of the Auditor General of Ontario, 2015). Perhaps most troubling of all, however, is the uncontested practice and degree of surveillance and social sorting resulting from the data mining, which is being used to not only surveil but also stigmatize and criminalize those who live in poverty” at 338).

¹⁰ “Inquest into the Death of Kimberley Rogers” (12 September 2014), online: Income Security Advocacy Centre, <<https://incomesecurity.org/isac-cases/inquest-into-the-death-of-kimberly-rogers/>>.

¹¹ *Criminal Code*, RSC 1985, c C-46.

¹² Canada, Bill S-12, *An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act*, 1st sess, 44th Parl, 2021-2022-2023.

iv. Reconsiderations

Consistent with the principle that CDB administrative processes should aim to assist people with disabilities in gaining access to resources, LEAF recommends that the reconsideration process should be as meaningful and robust as possible. In particular, all decisions should be eligible for reconsideration. In addition, the reconsideration process should be a thorough one. Appeals are time-consuming, emotionally distressing, and procedurally complex. If a resolution can be found at the reconsideration stage, this should be prioritized.

Given the access needs of individuals applying for the CDB, and the potential difficulty of reaching those individuals, LEAF recommends that reconsideration processes be transparent and plain language, and that all efforts are made to connect with applicants regarding their right to reconsideration. This may mean communicating with community intermediaries.

Finally, there must be flexibility regarding how an individual can submit a request for reconsideration. Because some individuals will prefer digital formats, others will prefer paper ones, and still others will wish to speak with a representative, the government must make all formats equally available and actively supported by all CDB program staff.

Recommendation #16: Reconsideration processes should be robust and meaningful.

Recommendation #17: All decisions should be eligible for reconsideration.

Recommendation #18: All efforts must be made to ensure that an individual is aware that they have the option of requesting a reconsideration.

Recommendation #19: The time limits within which an individual must request a reconsideration should be as generous as possible. Any time limits issued should also state the calendar day by which one must request a reconsideration (e.g.: Must request a reconsideration within 90 days, which in this case is December 11, 2023).

Recommendation #20: All explanations regarding one's rights for reconsideration must be explained in plain language.

Recommendation #21: The government must make all formats by which to request a reconsideration equally available and actively supported by all CDB program staff.

v. Appeals

LEAF recommends that there be an administrative appeal process before appealing the decision to a court. LEAF recommends that the regulations establish a statutory right of appeal, and that all reconsideration decisions be eligible for appeal.

Regarding forum, the tribunal system, rather than the court system, is better suited to individuals who cannot secure legal representation and who are low-income. In addition, those lawyers who can assist in appeals will likely be more familiar with the tribunal system than the court system. An appeal that lies directly to a court of law would make it more difficult for clinic lawyers to support their clients.

The government should explore whether it makes the most sense for that to flow through the existing Social Securities Tribunal, taking into account what you hear from other groups in your consultation, particularly regarding the experiences of individuals and litigants moving through that tribunal.

There should be a focus on ensuring that whatever tribunal hears administrative appeals has robust processes and procedures in place to accommodate people with disabilities, and that the tribunal itself has the requisite expertise to hear appeals that raise issues related to disability.

Given the access needs of individuals applying for the CDB, and the potential difficulty of reaching those individuals, LEAF recommends that appeal processes be transparent and plain language, and that all efforts are made to connect with applicants regarding their statutory right to appeal. This may mean communicating with community intermediaries.

Because of a lack of funding for legal aid across the country, it is difficult for people to access legal services regarding social assistance denials. Women and gender-diverse people who are Black, Indigenous, and racialized are more likely to be unable to afford legal representation.¹³ LEAF recommends that federal funding for legal aid be increased.

Recommendation #22: All reconsideration decisions should be eligible for appeal, and anyone who has received a negative reconsideration decision should be able to appeal that decision.

Recommendation #23: The regulations should establish a statutory right of appeal.

Recommendation #24: LEAF recommends that there be an administrative appeal process before appealing the decision to a court.

¹³ Lucinda Vandervort, “Access to Justice and the Public Interest in the Administration of Justice” (2012) 63 UNB LJ 125 at 129.

Recommendation #25: A tribunal hearing an appeal of a CDB decision must have robust processes and procedures in place to accommodate people with disabilities.

Recommendation #26: A tribunal hearing an appeal of a CDB decision must have the requisite expertise to hear appeals that raise issues related to disability.

Recommendation #27: All explanations regarding one's right to appeal (including who has the right to appeal and on what grounds) must be explained in plain language.

Recommendation #28: All efforts must be made to connect with applicants regarding their statutory right to appeal.

Recommendation #29: Any time limits regarding appeals should state the calendar day by which one must submit the application to the court (e.g.: Must file for appeal within 90 days, which in this case is December 11, 2023).

Recommendation #30: The appellant should have the choice to determine the format of the appeal hearing (e.g. video conference, phone, or in-person).

Recommendation #31: Federal funding for legal aid should be increased.

Summary of Recommendations

1. Operate within a Do No Harm framework
2. The Canada Disability Benefit should be protected monies, as they represent a basic minimum income for poor people with disabilities.
3. Deductions for the collection of overpayments should be limited to 10% of the amount that was overpaid.
4. The timeframe for debt recovery should be as generous as possible.
5. Any time limit issued (e.g. debt payable 90 days from date of decision) should also state the calendar day by which the debt is payable (e.g.: Debt must be paid 90 days from date of decision, which in this case is December 11, 2023).
6. No interest should accrue on the amount owed, and there should never be a collection order placed on an individual's account.
7. Continued payment of the adjusted benefit amount should continue despite a debt being outstanding.
8. The Minister's powers to examine a document should not enable them to enter a person's home.
9. Verifications of compliance should be minimal, and any process of doing so must be one in which individuals are treated with respect, provided with all necessary information, and are only asked pertinent questions.

10. All verifications of compliance must take into account an individual's unique communication and access needs resulting from their disability.
11. The regulation should not establish any offences, and administrative monetary penalties should be payable in instalments.
12. If offences are established, there should be no provision for custodial or conditional sentences.
13. If offences are established, recourse to them should only occur in circumstances where there is a deliberate misrepresentation and where a warning to the person is not appropriate.
14. If fraud has occurred, that finding should not affect an individual's ability to access other social assistance benefits.
15. An individual should not be penalized for providing misleading information if they do not have capacity to have knowingly misrepresented themselves.
16. Reconsideration processes should be robust and meaningful.
17. All decisions should be eligible for reconsideration.
18. All efforts must be made to ensure that an individual is aware that they have the option of requesting a reconsideration.
19. The time limits within which an individual must request a reconsideration should be as generous as possible. Any time limits issued should also state the calendar day by which one must request a reconsideration (e.g.: Must request a reconsideration within 90 days, which in this case is December 11, 2023).
20. All explanations regarding one's rights for reconsideration must be explained in plain language.
21. The government must make all formats by which to request a reconsideration equally available and actively supported by all CDB program staff.
22. All reconsideration decisions should be eligible for appeal, and anyone who has received a negative reconsideration decision should be able to appeal that decision.
23. The regulations should establish a statutory right of appeal.
24. LEAF recommends that there be an administrative appeal process before appealing the decision to a court.
25. A tribunal hearing an appeal of a CDB decision must have robust processes and procedures in place to accommodate people with disabilities.
26. A tribunal hearing an appeal of a CDB decision must have the requisite expertise to hear appeals that raise issues related to disability.
27. All explanations regarding one's right to appeal (including who has the right to appeal and on what grounds) must be explained in plain language.
28. All efforts must be made to connect with applicants regarding their statutory right to appeal.

29. Any time limits regarding appeals should state the calendar day by which one must submit the application to the court (e.g.: Must file for appeal within 90 days, which in this case is December 11, 2023).
30. The appellant should have the choice to determine the format of the appeal hearing (e.g. video conference, phone, or in-person).
31. Federal funding for legal aid should be increased.

Organizational Background

LEAF is a national, charitable, non-profit organization that works towards advancing the substantive equality of all women, girls, trans, and non-binary people through litigation, law reform, and public education. Since 1985, LEAF has intervened in over 130 cases – many of them before the Supreme Court of Canada – that have advanced gender equality in Canada.

LEAF has considerable expertise in articulating how laws and policies advance or undermine substantive equality for women and girls, especially for those who experience discrimination on multiple and intersecting grounds like sex, gender, marital or family status, race, sexual orientation, disability, Indigenous ancestry, and socio-economic status.

LEAF has also developed unique expertise in the economic disadvantages faced by women perpetuated by structural and systemic discrimination, or the “feminization of poverty”. Most recently, LEAF has been involved in efforts to advocate for both a Canada Disability Benefit and a basic income to address longstanding issues of gender and racial socioeconomic inequality in Canada. In September 2021, LEAF released a report titled [Basic Income, Gender & Disability](#) authored by Dr. Sally A. Kimpson, RN, PhD. This report set out what a Canada Disability Benefit should look like to ensure that such a benefit could foster economic independence and provide access to opportunities for disabled women and gender-diverse disabled people to choose how they want to live.