



# Protecting the financial futures of special needs dependents

Whether they are aware of it or not, almost all financial advisors have clients within their practice who are caring for dependents with special needs. These families have complex financial and estate planning needs. It's critical that the right decisions be made to protect the financial futures of their disabled loved ones.

A SPECIAL REPORT BY KATE MCCAFFERY | PHOTOS BY UNSPLASH

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# Consult experts when advising clients with disabled dependents

Many advisors might say trusts, Registered Disability Savings Plans (RDSPs), and complex beneficiary designations are beyond the scope of the planning they do for clients. Even those focused on estate and large policy planning may have some misgivings about focusing on the relatively small ticket RDSP.

BY KATE MCCAFFERY

In reality however, statistically speaking, virtually every advisor likely has at least one family in their practice that is caring for a dependent with special needs. Their estate planning needs are more complex, and oftentimes, a family won't think to volunteer information about their special needs dependent if they're not asked directly.

Turning a blind eye to these needs while planning for a family with disabled beneficiaries can have financially catastrophic consequences for some, particularly if they depend on social assistance – another factor they may not disclose if you don't ask – to cover the sometimes large medical bills that can be incurred while caring for someone with a disability.

## Valuable tax credits

In short, there are valuable tax credits these families are eligible for, there are government grants and bonds, worth a substantial amount that families can collect and invest for their disabled dependent's future, and there is social assistance that many families will depend on to create a decent quality of life for their children when the parents are gone – social assistance which can be put in jeopardy quite easily by financial planners or advisors who aren't familiar with the rules.

“The last thing we want is for the (social assistance) recipient to get all kinds of extra money if it's not properly structured,” says **Fred Ryall**, estate planner with **Fred Ryall and Associates** in Ontario.

“Certainly putting money directly into the hands of the person with the disability is one big issue,” agrees **Graeme Treeby**, disability planner with **Special Needs Planning Group** and **Bright Futures Disability Network** in Ontario. “That's pretty typical planning (to name a beneficiary directly) that just doesn't work. For many of our kids it's just not the best thing to do. Instead of using an RESP (Registered Education Savings Plan) for a person who's profoundly disabled, it's also better to put money into an RDSP. It's things like that that we see. People need to deal with financial advisors,

insurance advisors, accountants and lawyers that are well versed in the field. That's really important.”

Any suggestion, meanwhile, that the clients should simply leave assets to one sibling who will take care of the other is equally terrible advice say lawyers, including **Brendon Pooran**, partner with Ontario-based **PooranLaw Professional Corporation**. “You're trusting that sibling to do the right thing. Not only that, what happens if the sibling passes away or gets unduly influenced? (Bankruptcy, marital breakdown being just two scenarios.) That money is gone.” Not supporting a dependent can also result in a client's will being contested.

One complicating factor for those who wish to learn more is the fact that all of the rules concerning social assistance, trust management, some taxation, guardianship and intestacy are provincial – they vary by province and can also change with the politics of the day as governments come and go.

The ability to use discretionary trusts (also known as Henson Trusts), for example, is deeply established in some provinces, but is relatively new in Alberta, after the province introduced changes

to the *Assured Income for the Severely Handicapped Act*, which exempt

assets held in trust when determining whether someone is eligible for the Assured Income for the Severely Handicapped (AISH) program.

“This exemption allows families to set up trusts, including discretionary trusts, to provide for individuals with disabilities without adversely affecting the individual's eligibility for the AISH program,” writes **Jacklynn Pivovar**, partner with Alberta law firm **Milner Thomson LLP**. “Changes to the AISH legislation establish a one-year grace period to allow the disabled person time to move an inheritance or other lump sum payment, which would otherwise be considered a non-exempt asset, into a trust or other exempt asset so that eligibility for AISH is not denied.”

Although the development is a positive one, it is also viewed somewhat skeptically by those with experience in the system.

**Provincial disability benefit programs throughout Canada have recognized for years that a properly designed Henson-type or discretionary trust will not be considered an asset of a disabled beneficiary, thus permitting the recipient to continue receiving such provincial disability benefits.**

— Ken Kramer



“My concern is that it’s not a permanent fixture. It is run as a provincial statute. It’s not federally mandated and therefore subject to governments coming and going,” says Alberta financial advisor, **Jeremiah Renner** of **Two Pillars Financial Solutions Inc.** “I think the Alberta government may be working on repealing the Henson trust rules. They’ve already removed the AISH indexing that was put in a few years ago. Year over year, AISH was increasing by a ratio of inflation to provide a better quality of living for people on the benefit. They’ve taken that away. They’re making some pretty to-the-bone cuts and changes.”

Depending on the province, getting monies out of a discretionary trust can also have different impacts on provincial social assistance benefits.

Federally too, a recent **Supreme Court of Canada** decision, *S.A. v. Metro Vancouver Housing Corp., 2019*, affirmed that a Henson-style discretionary trust set up for a disabled beneficiary is not that beneficiary’s asset, but left the door open to allow social assistance programs to develop their own policies and means tests which could include discretionary trust assets.

#### Discretionary trust

“Provincial disability benefit programs throughout Canada have recognized for years that a properly designed Henson-type or discretionary trust will not be considered an asset of a disabled beneficiary, thus permitting the recipient to continue receiving such provincial disability benefits,” says **Ken Kramer**, QC, principal and senior associate counsel with British Columbia-based **KMK Law**.

“The recent Supreme Court of Canada decision, *S.A. vs. Metro Vancouver Housing Corp., 2019*, affirmed that a Henson-type discretionary trust continues to be a viable vehicle for planning for a person with a disability. However, the Supreme Court decision left the door open for provincial social assistance programs, like the housing co-op, to effectively contract outside of these legal parameters, thus developing their own individual policies which may be inconsistent with the

intention of the law,” he adds. “Hence, while we should applaud the decision, it is important to appreciate its limitations and to ensure that as planners, we consider these issues fully.”

Henson Trusts, as they’re known in Ontario, are absolute discretionary trusts, often testamentary trusts, where appointed trustees have full, absolute and unfettered discretion to spend trust funds, or not, for the beneficiary’s benefit. Because the beneficiary has no control over the funds and no ability to demand funds from the trust, also because the trusts are structured in such a way that the beneficiary also cannot collapse the trust for their own benefit, it is generally not counted as an asset when it comes to eligibility for social assistance programs.

“I’m not a lawyer and don’t hold myself out as such, but I do look at whether or not the Henson Trust wording is in the typical format. I probably reject 50 per cent of them – one of the most common things I see are clauses being left out. Other times I see people giving specific instructions on what to spend. As soon as you do that it’s no longer a Henson Trust,” says Treeby. “It’s really important to deal with a lawyer who knows what they’re doing.”

Once the trust is set up in the client’s will, they are sometimes funded by joint first-to-die policies or joint last-to-die policies. “It depends on the family’s needs. There is no cookie cutter answer,” Ryall says. “We work with the lawyers and we work with the accountants to figure out the best structure for the client.”

For tax and management purposes, meanwhile, the trust, once it is established, is considered a resident of the province where the trustee resides, not the beneficiary. “In managing trusts, if the mind and the management is in Alberta but the beneficiary is in Ontario, then the trust is taxed as an Alberta trust. Federal rates are consistent but provincial rates vary from province to province,” says **Tom O’Dwyer**, lead tax advisor with British Columbia based **Ability Tax and Trust Advisors**.

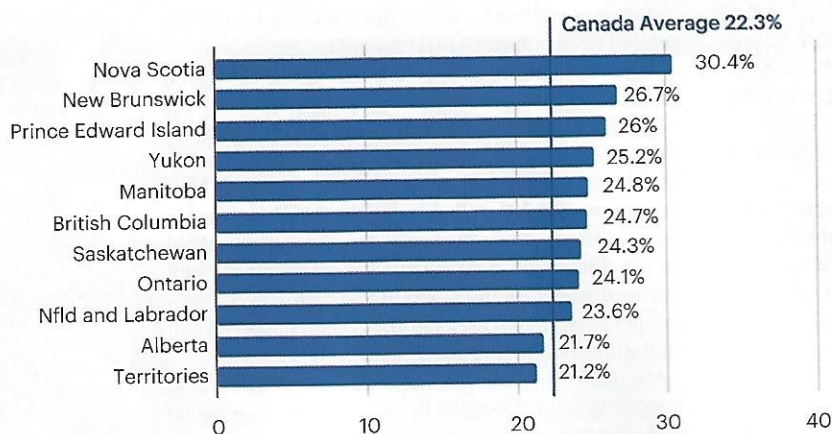
In managing trusts it is also necessary to consult with accountants who are familiar with a disabled beneficiary’s needs and entitlements to ensure planning benefits such as the preferred beneficiary and the Qualified Disability Trust (QDT) elections are utilized.

As of January 2016, any income earned within a testamentary trust will be taxed at graduated rates for the first 36 months, and at the highest marginal rate subsequently, unless an exemption is available. One exemption is the QDT, which permits the income earned within a testamentary trust – the terms of the trust are established in your client’s will – to be taxed at the graduated rates of the beneficiary with a disability. Inter vivos or living trusts established while the trust settlor is alive, cannot benefit from this exemption. The QDT must also meet certain requirements, most notably that the person with a disability must be eligible annually for the DTC and must elect on an annual basis, with the trustee, that the trust in question is a QDT – a situation which may be challenging when the person with a disability has capacity issues. Only one trust per year may qualify as a QDT. **A**

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— Graeme Treeby

#### Disability rate, ages 15 years and over, by province or territory



Source: Statistic Canada, Canadian Survey on Disability 2017

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# Protect your client's benefits by staying informed about provincial programs

To help preserve benefits while estate planning, it helps to first understand your own province's disability benefits program. These are standalone programs in some provinces, or a subset of the province's welfare program in others.

BY KATE MCCAFFERY

**F**or some clients, the monthly living allowance they receive from social assistance is necessary, but not nearly as necessary as the related medical and dental benefits they receive.

In Alberta, an AISH program (Assured Income for the Severely Handicapped) "recipient might have \$15,000 a month in medical expenses that are being covered by benefits. The \$1,685 a month they get to help pay their rent becomes secondary. You could afford to float that if you had to, but the medical bills would wipe out most individuals and families pretty quickly," says Alberta financial advisor **Jeremiah Renner** of **Two Pillars Financial Solutions Inc.** "You don't want to lose medical benefits or their placement in public programs."

Regardless of your client's needs, to preserve current and future benefits, it is necessary to know which assets are exempt when the relevant authority reviews the beneficiary's application and ongoing eligibility for assistance.

In Ontario, for example, a disabled beneficiary receiving Ontario Disability Support Program (ODSP) income support may have up to \$40,000 in the bank if they are single, \$50,000 for a couple plus an additional \$500 for each dependent. Alberta allows AISH recipients to have non-exempt assets up to \$100,000 and British Columbia allows a designated Person with Disabilities (PWD) \$100,000 if they are single, or \$200,000 for a couple if both adults have the PWD designation. Other provinces are considerably less generous in their allowances.

Other exempt assets your clients might be able to invest in include different trust structures depending on the province, an RDSP, a principal residence, personal vehicles and prepaid funerals. (Note: Residences, vehicles and prepaid funerals are not exempt in every province.) Depending on the province where you reside, a Tax Free Savings Account (TFSA) funded to certain limits may be considered an exempt asset. In other provinces, the cash surrender value of an insurance policy may be an exempt asset.

In addition to varying from province to province, exempt assets can also be subject to change from year to year.

"Every time we have a new government there are new rules and one reverses what the other one did," says **Debbie Hartzman**, certified financial planner (CFP) with **Ontario-based Professional Investments**. "It's constant and ongoing. It's not like a will where you can set it and forget it until there's a major life event. You need to review things almost every year to make sure you're not off side and to make sure

you're taking advantage of what's available to you."

The order you might fund or invest in the different instruments at your disposal will also depend entirely on your client and their dependents.

"If there are not a certain number of assets it is very top-heavy to deal with a Henson Trust. I think that's probably why the government came up with the RDSP in 2008 when it did," Hartzman adds. "If it's anything less than a quarter of a million dollars I think a Henson Trust is a total waste of time."

On the flip side, however, the use of a discretionary (Henson) trust may be preferable if the beneficiary is not capable of managing money themselves, if they are easily influenced or if they are unable to draft a will.

"One of the shortfalls with this kind of planning is that, in some cases, the beneficiary is unable to generate a will, in which case the intestacy laws kick in at the beneficiary's passing," Renner points out. "You've loaded up their RDSP, you've given them \$90,000 in assets, you have a primary residence in their name and a vehicle set up for them but when they die, the whole thing basically gets cashed out. It's a very inefficient transfer. Some people really don't like the fact that all of this planning goes into it only to basically explode at the end and be at the whims of the legal system."

(Instead of allowing the laws of intestacy to take over, the gift-over clause in a discretionary trust allows the assets to be directed to a third party on the beneficiary's death.)

"Look at each situation uniquely. I think financial advisors really need to take that to heart," says **Sheh-naz Hussain**, founder and CEO of **Intuitive Financial Solutions in Ontario**. "I think a mistake that we sometimes make is thinking we need to go out and sell a product. We don't," she adds. "We need to understand the family's needs and their unique objectives, especially when it comes to families with special needs children. Being a great and active listener, building trust and working with the family are the fundamental building blocks. When we do that, the solutions and the products that are available will fall into place." ■

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— Debbie Hartzman

# Educate your clients about the Disability Tax Credit

Asking a family if anyone qualifies for the Disability Tax Credit, and explaining what the DTC is to families who probably qualify, should be a basic part of the initial process advisors go through with every new client.

BY KATE MCCAFFERY

**K**nowing that a disability tax certificate exists, or knowing that a family probably qualifies for one, is essential information for a planner as it tends to signal the need for a host of higher planning efforts and advice. The DTC is needed before clients can open an RDSP, for example.

To qualify for the DTC, a medical practitioner must certify on form T2201 that their patient is either blind, restricted in basic activities of daily living (ADLs) or in need of life sustaining therapy. In addition, the person's impairment must be prolonged (has lasted or is expected to last at least 12 months) and present all or substantially all of the time (90 per cent of the time). The form is daunting, in that it also tells the medical practitioner who is filling out the documentation, that it is mandatory to describe the patient's impairment and how it affects each of the basic ADLs – information a doctor may not know if the patient hasn't discussed the matter in depth with them. (The difference between being "markedly" restricted and "significantly" restricted is also relatively unclear, but checking the wrong box can result in a patient being declined for the DTC.) Further complicating matters, the CRA also routinely requests follow up information from those filling out the forms.

"The CRA actually used to phone doctors in the middle of the day," says **Geoffrey Zaldin**, who specializes in financial and estate planning for individuals with special needs, and co-founder of **Special Needs Financial Inc.** "Now it's almost always a written request for follow-up information." The CRA's process and bedside manner being what it is, is not only off-putting to practitioners, but chilling as well.

"I think doctors are getting scared. They are considering the amount of time they need to take (to fill out the forms), knowing that they are likely to get a second and sometimes a third request for information. They're getting frustrated. Some doctors will actually not sign a disability tax credit form," he adds.

Zaldin and others who advise clients in the matter say it's important to have a lot of patience when applying. Clients should discuss clearly with their doctor how the applicant's disability impacts their ADLs.

Some clients may need to visit more than one health professional to get the paperwork completed. Others still will need to apply more than once. Worse, those who are already approved may also hear back from the CRA years later.

Once a family is approved for the DTC, however, they may be eligible to backfile, up to ten years, to recoup the taxes they would've saved had the DTC been in place. Families can also backfile 10 years to collect the amount they would've saved had the child disability benefit been in place, if the caregiver credit had been used, and for medical expenses. The amounts families can recoup can often be significant. In back-filing their taxes, it is a worthwhile exercise to shop around and interview tax specialists, as fees for this service can vary considerably. (Anywhere between \$100 and 30 per cent of the total amount recouped are not unheard of.) Clients with the DTC are also eligible for the relatively new home accessibility tax credit for those who require disability-related home renovations.

**Ken Pope**, an Ontario special needs and disability estate planning lawyer, says over the last 20 years he's known of cases where people who have been previously approved for the disability tax credit have received CRA letters saying they are no longer approved. "Many families will look at this letter from Canada Revenue and say, 'Oh well.' And they won't try again." Pope advises that if they feel that their disabled family member is still eligible for the credit, they should be sure to apply again. ▀

Once a family is approved for the Disability Tax Credit they may be eligible to backfile, up to ten years, to recoup the taxes they would've saved had the DTC been in place.

# The ins and outs of Registered Disability Savings Plans

Alongside trusts, Registered Disability Savings Plans (RDSPs) are often a cornerstone part of planning for a dependent with special needs. To get one, the beneficiary must first qualify for the DTC.

BY KATE MCCAFFERY

Up to \$200,000 in private contributions may be contributed to an RDSP in total

**R**DSPs can be established by the person with the disability or by their parents if the beneficiary is under the age of majority. If the beneficiary has reached the age of majority but their contractual competency to enter into a plan is in doubt, a plan can be opened by a spouse, common law partner or parent.

Once open, the government will make two different kinds of payment into the plan, the Canada Disability Savings Grant and the Canada Disability Savings Bond. The grant is obtained when private contributions are made into the plan.

Those with family income below \$95,259 in 2019 or \$97,069 in 2020 (beneficiary adjusted family net income thresholds are indexed each year to inflation) can attract \$3,500 in matching grants each year by contributing \$1,500. Those with family incomes above those amounts are matched every dollar for dollar to a maximum of \$1,000 each year.

Family income is based on the parents' income initially and on the beneficiary's own family income beginning in the year the beneficiary turns 19. To get the maximum eligible grants and bonds when the beneficiary turns 19, the beneficiary must file tax returns in the years they turn 17 and 18, as well.

If the RDSP is new, but the disability is not, there is also a 10-year carry forward of entitlements that allow beneficiaries to attract up to an additional \$11,000 in bonds if they qualify, and up to an additional \$10,500 in grants each year if they make a sufficient contribution.

A full discussion about all of the rules related to the RDSP can be found on the Canada.ca website, in guide RC4460 *Registered Disability Savings Plan*, and in two reports: *Planning with RDSPs* and *Advanced planning with RDSPs* by **Jamie Golombek**, managing director of tax and estate planning with **CIBC** financial planning and advice.

Golombek says one common misconception people have about the RDSP is who owns the assets. Unlike an RESP for education, where parents can always get their contributions back, "with an RDSP, the minute you put the money in there you can never get it back. It has been given irrevocably to that particular beneficiary."

## Government contributions

All told, the government will contribute up to \$70,000 over the beneficiary's lifetime if contributions are timed properly. The bond, meanwhile, is paid into the plan if the beneficiary's family income falls below \$47,630 in 2019 or \$48,535 in 2020. (Again, as with the grant, a beneficiary's adjusted family net income thresholds are indexed each year to inflation.) No contribution on the beneficiary's part is necessary to receive the bond. The lifetime bond limit is \$20,000. Whenever a grant or a bond is paid, the government's funds must remain in the plan for 10 years before the funds are vested and become the beneficiary's property.

When withdrawing amounts, the government takes back \$3 for every \$1 withdrawn, up to the *assistance holdback amount* (AHA) maximum – that is the total amount of bonds and grants paid into the RDSP within the last 10 year period that haven't already been repaid to the government.

One exception where the government does not require the AHA to be repaid is when the RDSP holder gets certification from a medical doctor or nurse practitioner that the beneficiary is not likely to live more than five years, and elects to make the plan a Specified Disability Savings Plan (SDSP).

"Withdrawals from an SDSP will not trigger a repayment of the AHA, as long as the taxable portions of all withdrawals made in the year do not exceed \$10,000 (unless the LDAP formula requires a greater amount to be paid)," the government writes in its guide RC4460. Once the election is made, no more contributions can be made to the plan, the plan will not be entitled to any new grant or bond payments and beneficiaries will not be entitled to carried forward grant and bond amounts.

Payments that can be made from an RDSP include disability assistance payments (DAPs) and lifetime

## RDSP take up of DTC eligible Canadians

Age	RDSP Beneficiaries	Individuals who are DTC Eligible	Take-up rate	
			2016	2017
0 to 18	41,987	211,626	19.10%	19.84%
19 to 34	54,073	134,283	36.50%	40.27%
35 to 49	49,190	120,151	37.90%	40.94%
Total 0 to 49	145,250	466,060	29.00%	31.17%

Source: Employment and Social Development Canada, Canada Disability Savings Program - Annual Statistical Review 2017.

disability assistance payments (LDAPs). A DAP is a singular payment that can be requested at any time. In all cases, a DAP is not permitted if, after the payment, the fair market value of the property held by the RDSP is less than the assistance holdback amount. LDAP payments, once started, must be paid at least annually until either the plan is terminated or the beneficiary has died. At the very latest, these payments must begin by the end of the year in which the beneficiary turns 60.

The amount which can be distributed as an LDAP payment, meanwhile, is determined by a formula which takes into consideration a number of factors including the RDSP's value and the beneficiary's age.

#### Primarily government-assisted plan

If the total of all government grant and bond payments is more than the total of all private contributions, the RDSP then becomes a primarily government-assisted plan or PGAP. During a PGAP year, all DAPs, including LDAPs must not exceed the greater of the LDAP formula or 10 per cent of the fair market value of the plan assets at the beginning of the year.

"Banks and advisors don't always explain the complex RDSP rules properly, especially the PGAP concept and they sometimes don't inform people about the fact that they must wait 10 years," says **Geoffrey Zaldin** of **Special Needs Financial**. "I've had clients who were told by the banks that they can use RDSP assets for whatever purpose they want – take a vacation, use it for a down payment for a house – all of which is false. Advisors need to let their clients know that they won't be able to access the full value of their RDSP right away. Let them know there are restrictions. The beneficiary can access the money, but if they do, they might need to give back some of the

government money – but it is still an option. That's why it is so important to find a knowledgeable advisor who can help guide you on how to best use the RDSP."

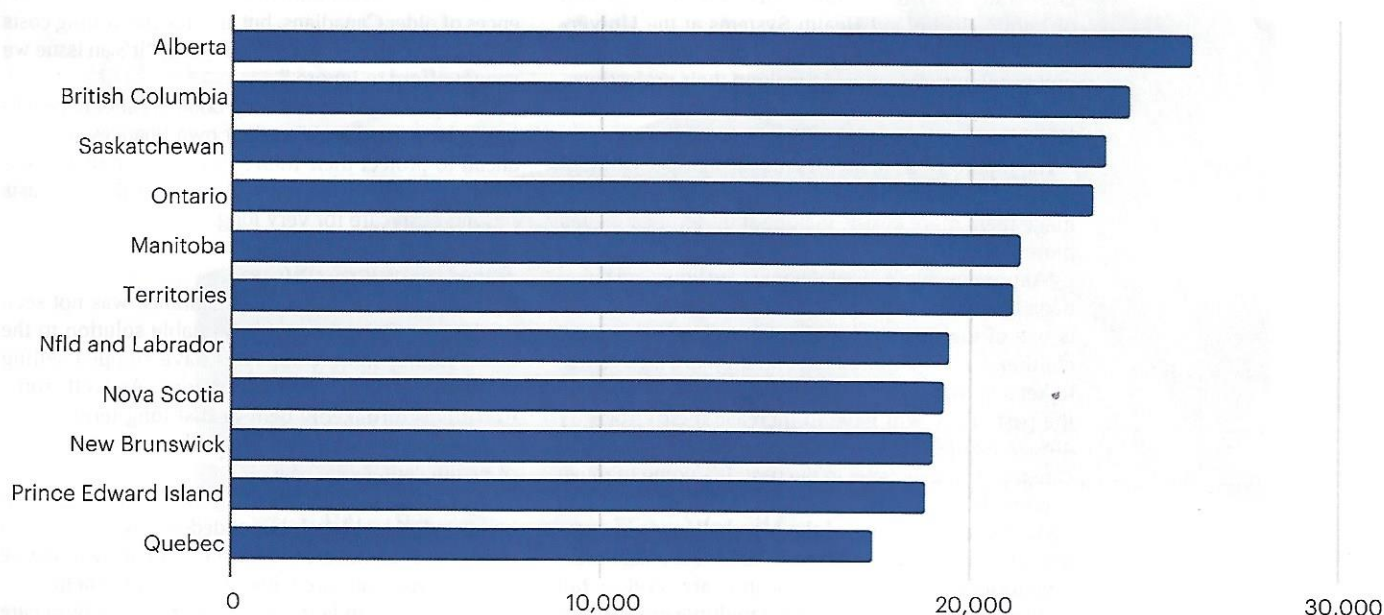
All told, up to \$200,000 in private contributions may be contributed to an RDSP in total. Contributions can be made into an RDSP until the beneficiary turns 59. Government matching (grants) and bonds are paid until the beneficiary turns 49.

"I had one client who was 52 years old when her mother died and left her \$125,000. She was over 49 so no grants or bonds, but she was on ODSP. You were only allowed \$5,000 in the bank at that time. So we set up an RDSP for her, put the inheritance into the RDSP, and she got to keep all of her benefits. She doesn't get any grants or bonds, but she can put up to \$200,000 in there and keep all of her benefits," says **Ken White** of Ontario-based Guelph Financial and branch manager for **Investment Planning Counsel**. "And being that there were no grants or bonds, there is no penalty to start taking it out. She didn't need to wait 10 years."

When estate planning with a beneficiary's parents and grandparents, it is also good to know that under certain circumstances it is also possible to roll RESP assets into an RDSP. If the beneficiary is dependent on them for support, parents and grandparents may also roll their registered retirement plan assets over into an RDSP, up to the maximum contribution limits. Rolled over amounts do count as private contributions but do not attract matching grants. **A**

Contributions can be made into an RDSP until the beneficiary turns 59

#### Average RDSP value by province/territory (in dollars)



Source: Employment and Social Development Canada, Canada Disability Savings Program - Annual Statistical Review 2017.