Date: 20080528

Docket: A-277-06

Citation: 2008 FCA 190

CORAM: **NOËL J.A.**
BLAIS J.A.
RYER J.A.

BETWEEN:

SHARIFA ALI AND ROSE MARKEL

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 22, 2008.

Judgment delivered at Ottawa, Ontario, on May 28, 2008.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: NOËL J.A.
BLAIS J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal from a decision of Justice Woods (the "Tax Court Judge") of the Tax Court of Canada (2006 TCC 287) dated May 18, 2006, dismissing the appeals of Sharifa Ali and Rose B. Markel (the "appellants") from reassessments of the 2000 and 2001 taxation years, in the case of Ms. Ali, and the 2001 taxation year, in the case of Ms. Markel, that were issued pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"), on the basis that the cost of certain herbs, vitamins and supplements (the "Dietary Supplements") that were purchased by each of them,

pursuant to prescriptions issued by a naturopath, does not qualify as a medical expense, within the meaning of paragraph 118.2(2)(*n*) of the ITA.

[2] For the purpose of computing the tax payable under Part I of the ITA by an individual for a taxation year, subsection 118.2(1) of the ITA permits that individual to deduct an amount, referred to as the medical expense tax credit (the "METC"), in respect of the total of the individual's medical expenses that are established to have been paid for by the individual within the time period specified in that provision. For the taxation years under consideration in these appeals, paragraphs 118.2(2)(*a*) to (*q*) of the ITA specify the types of medical expenses that qualify for the purposes of the METC. It is clear that the METC is not available in respect of all types of medical expenses in those years.

[3] In the taxation years under consideration, the appellants purchased Dietary Supplements and claimed that the cost of those items was a medical expense of the kind referred to in paragraph 118.2(2)(*n*) of the ITA. That provision reads as follows:

(2) For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid	(2) Pour l'application du paragraphe (1), les frais médicaux d'un particulier sont les frais payés :
. . .	[…]
(*n*) for drugs, medicaments or other preparations or substances (other than those described in paragraph 118.2(2)(*k*)) manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical	*n*) pour les médicaments, les produits pharmaceutiques et les autres préparations ou substances — sauf s'ils sont déjà visés à l'alinéa *k*) — qui sont, d'une part, fabriqués, vendus ou offerts pour servir au diagnostic, au traitement ou

state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist;	à la prévention d'une maladie, d'une affection, d'un état physique anormal ou de leurs symptômes ou en vue de rétablir, de corriger ou de modifier une fonction organique et, d'autre part, achetés afin d'être utilisés par le particulier, par son époux ou conjoint de fait ou par une personne à charge visée à l'alinéa *a*), sur ordonnance d'un médecin ou d'un dentiste, et enregistrés par un pharmacien;
[Emphasis added.]	[Non souligné dans l'original.]

[4] It is common ground that the Dietary Supplements that were purchased by the appellants were purchased "off the shelf" and that such purchases do not satisfy the "recorded by a pharmacist" requirement in paragraph 118.2(2)(*n*) of the ITA. It is also noted that the Crown takes issue with the assertion that the naturopath who prescribed the Dietary Supplements is a "medical practitioner" for the purposes of that paragraph.

[5] In *Ray v. Canada*, 2004 FCA 1, [2004] 2 C.T.C. 40, this Court determined that amounts expended by an individual to purchase vitamins, herbs, organic and natural foods, and bottled water (a list which includes items of the same general nature as the Dietary Supplements) that were prescribed for the treatment of myalgic encephalomyelitis, chronic fatigue and immune dysfunction syndrome, multiple chemical sensitivity, and fibromyalgia (afflictions similar to those from which

the appellants suffer) do not qualify as medical expenses, within the meaning of paragraph 118.2(2)(*n*) of the ITA, because those items were purchased "off the shelf", that is to say the "recorded by a pharmacist" requirement in that provision was not satisfied in respect of the purchase of those items. It is clear that *Ray* establishes that the benefit of the METC in respect of the cost of Dietary Supplements and items of that kind that are purchased "off the shelf" is not provided by paragraph 118.2(2)(*n*) of the ITA.

[6] The appellants complain that the "recorded by a pharmacist" requirement in paragraph 118.2(2)(*n*) of the ITA violates their rights under subsection 15(1) and section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter"). Those provisions read as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[7] The Tax Court Judge undertook a detailed analysis of the afflictions suffered by the appellants, the regulation of natural health products, the legislative history of the deductibility and creditability of medical expenses under the ITA, as well as the applicable income tax and Charter jurisprudence. In particular, at paragraph 73, the Tax Court Judge stated:

> [73] … One empathizes with the fact that the tax credit does not extend to the costs incurred by the appellants.

[8] The Tax Court Judge also referred to the decisions of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657. In particular, she noted that in *Auton*, the Supreme Court of Canada concluded that because funding for a particular type of therapy that was requested to pay for the treatment of autistic infants was not a benefit provided by the legislation that was under scrutiny, subsection 15(1) of the Charter was not infringed.

[9] The Tax Court Judge went on, unnecessarily in my view, to apply the well established *Law* analysis and concluded that having regard to either the comparator group proposed by the appellants or the comparator group that she found to be more appropriate, the differential treatment element of the *Law* analysis was not met. As a result, the Tax Court Judge concluded that an infringement of the appellants' rights under subsection 15(1) of the Charter had not been made out.

[10] With respect to section 7 of the Charter, the Tax Court Judge held that a decision on the part of the state not to provide an economic benefit, in this case the METC, does not amount to a deprivation or a taking away of life, liberty or security of the person. In addition, the Tax Court

Judge held that even if a failure on the part of the state to provide a positive economic benefit could be said to constitute such a deprivation, the law in question is not arbitrary and, therefore, any such deprivation would not be contrary to the principles of fundamental justice so as to engage section 7 of the Charter.

[11] As averted to above, I am of the view that in addressing the subsection 15(1) issue, it was not necessary for the Tax Court Judge to undertake the *Law* analysis as she did, and I expressly refrain from commenting upon her analysis.

[12] In my view, this is a case in which the subsection 15(1) issue can be addressed in a simpler manner. In *Auton*, the Supreme Court of Canada held that subsection 15(1) of the Charter will not be infringed where the benefit that is sought is not one that is provided by the law that is being challenged. In the present case, the benefit claimed by the appellants is the METC in respect of the cost of Dietary Supplements that are purchased "off the shelf". That is what they claimed in their tax returns and it is the entitlement to that claim that they sought to establish in their notices of appeal to the Tax Court of Canada. In *Ray*, this Court confirmed that such a benefit is not one that is provided by paragraph 118.2(2)(*n*) of the ITA. How then can it be discriminatory to deny the appellants a benefit (the METC in respect of the cost of "off the shelf" drugs) that no one gets?

[13] The appellants wish to have the scope of the METC extended to cover "off the shelf" drugs but Parliament has not chosen to do so. In this regard, the words of Chief Justice McLachlin in paragraph 41 of *Auton*, are apposite:

> 41 It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 61; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 55; *Hodge, supra*, at para. 16. [Emphasis added.]

[14] It is apparent from the passage in *Auton* that a legislative choice to accord a particular benefit under the legislation under consideration can potentially give rise to a valid claim that subsection 15(1) of the Charter has been infringed. Paragraph 42 of *Auton* informs that such an infringement can arise if the legislation discriminates directly, by adopting a discriminatory policy, or indirectly, by effect. With respect to the more difficult issue of discrimination by effect, the Supreme Court of Canada stated, in that paragraph, that the non-inclusion of a benefit is unlikely to be discriminatory if that non-inclusion is consistent with the purpose and scheme of the relevant legislation.

[15] With respect to the matter of direct discrimination, the definition of medical expenses in subsection 118.2(2) of the ITA does not explicitly exclude the cost of Dietary Supplements. Moreover, nothing in the provisions of the ITA dealing with the METC points to the express adoption by Parliament of a discriminatory policy with respect to the non-availability of the METC in relation to the cost of Dietary Supplements. Accordingly, I conclude that the legislative choice

not to extend the METC to include the cost of Dietary Supplements in the definition of medical expenses in subsection 118.2(2) of the ITA does not constitute direct discrimination.

[16] The matter of discrimination by effect requires a consideration of whether the non-inclusion of a particular benefit is consistent with the purpose and scheme of the impugned legislation. In *Auton*, Chief Justice McLachlin determined that the non-inclusion of the benefit that was sought was consistent with a legislative scheme that did not purport to be comprehensive, stating at paragraph 43:

> 43 The legislative scheme in the case at bar, namely the *CHA* and the *MPA*, does not have as its purpose the meeting of all medical needs. As discussed, its only promise is to provide full funding for core services, defined as physician-delivered services. Beyond this, the provinces may, within their discretion, offer specified non-core services. It is, by its very terms, a partial health plan. It follows that exclusion of particular non-core services cannot, without more, be viewed as an adverse distinction based on an enumerated ground. Rather, it is an anticipated feature of the legislative scheme. It follows that one cannot infer from the fact of exclusion of ABA/IBI therapy for autistic children from non-core benefits that this amounts to discrimination. There is no discrimination by effect.

[17] With respect to the legislative scheme at issue in this case, the definition of "medical expense" in subsection 118.2(2) of the ITA contains an enumeration of the specific types of costs that are eligible for the METC. This indicates a legislative purpose of limiting the availability of the METC to a specific list of items. Paragraph 118.2(2)(*n*) of the ITA exemplifies this purpose by drawing a line between items that meet the "recorded by a pharmacist" requirement and those that do not. Thus, paragraph 118.2(2)(*n*) of the ITA is fully consistent with the purpose and scheme of the METC legislation which is to only provide the METC in respect of specifically enumerated types of medical expenses and not with respect to all types of medical expenses.

[18] This distinction was recognized by this Court in *Ray*, in which Sharlow J.A., at paragraph 12, stated:

> [12] In my view, it is reasonable to infer that the recording requirement in paragraph 118.2(2)(*n*) is intended to ensure that tax relief is not available for the cost of medications purchased off the shelf. There are laws throughout Canada that govern the practice of pharmacy. Although the laws are not identical for each province and territory, they have common features. Generally, they prohibit a pharmacist from dispensing certain medications without a medical prescription, and they describe the records that a pharmacist is required to keep for medications dispensed by prescription, including information that identifies the prescribing person and the patient. There is no evidence that pharmacists anywhere in Canada are required to keep such records for the substances in issue in this case.

This conclusion was also reached by the Tax Court Judge who, at paragraph 136 of her reasons, stated:

> [136] In summary, in enacting s. 118.2(2)(*n*), Parliament had to decide where to draw the line between therapeutic substances that qualify for tax relief and those that do not.

[19] In my view, it cannot be said that the non-inclusion of the cost of the Dietary Supplements in the definition of medical expenses in subsection 118.2(2) of the ITA, in general, or paragraph 118.2(2)(*n*) of the ITA, in particular, is inconsistent with the purpose and scheme of the METC legislation. Rather, the non-inclusion of that benefit is fully consistent with the purpose of only extending the benefit of the METC to a specific enumeration of medical expenses. Accordingly, I am of the view that the non-inclusion of the benefit claimed by the appellants from the legislation in question does not constitute discrimination by effect.

[20] Having reached the conclusion that the benefit sought by the appellants is not a benefit provided by the law and that the legislative choice not to provide such a benefit does not give rise to direct discrimination or discrimination by effect, I am of the view that the appellants' subsection 15(1) argument need not be further considered. In so concluding, I note that a similar conclusion was reached by the Supreme Court of Canada in *Auton*, at paragraph 47:

> 47 I conclude that the benefit claimed, no matter how it is viewed, is not a benefit provided by law. This is sufficient to end the enquiry.

[21] In addition to their subsection 15(1) argument, the appellants contend that the reassessments that denied their METC claims in respect of the "off the shelf" Dietary Supplements have caused them anxiety or stress such that the issuance of those reassessments has led to a real or imminent deprivation of their life, liberty or security of the person, contrary to section 7 of the Charter. It would be a remarkable proposition if the demonstration of anxiety or stress at the prospect of having to pay income taxes were a sufficient basis upon which to be excused from having to pay such taxes. Moreover, there is no suggestion that the appellants cannot have access to the Dietary Supplements without the METC that they have claimed.

[22] In my view, the ability to resist an income tax assessment on the basis of section 7 of the Charter has been sufficiently dealt with by Justice Rothstein at paragraphs 29 and 30 of the decision of this Court in *Mathew v. Canada*, 2003 FCA 371, in which he stated:

> [29] I will accept that the power of reassessment of a taxpayer implicates the administration of justice. However, I do not accept that reassessments of taxpayers result in a deprivation of liberty or security of the person.

> [30] If there is a right at issue in the case of reassessments in income tax, it is an economic right. In *Gosselin*, McLachlin C.J.C., for the majority, observed that in *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 1003, Dickson C.J.C., for the majority, left open the question of whether section 7 could operate to protect "economic rights fundamental to human…survival". However, there is no suggestion in *Gosselin* that section 7 is broad enough to encompass economic rights generally or, in particular, in respect of reassessments of income tax. I am, therefore, of the view that the appellants have not demonstrated a deprivation of any right protected by section 7 of the Charter.
>
> [Emphasis added.]

[23] Since I have reached the conclusion that the "recorded by a pharmacist" requirement in paragraph 118.2(2)(*n*) of the ITA does not violate the rights of the appellants under subsection 15(1) or section 7 of the Charter, it is unnecessary for me to address the Crown's assertion that the naturopath who prescribed the Dietary Supplements is not a "medical practitioner" for the purposes of that provision.

[24] For the foregoing reasons, I would dismiss the appeals with costs.

"C. Michael Ryer"
J.A.

"I agree
Marc Noël J.A."

"I agree
Pierre Blais J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-277-06
(APPEAL FROM A JUDGMENT OF THE TAX COURT (WOODS J.) DATED MAY 18, 2008, NOS. 2002-1457 (IT); 2003-1265 (IT) and 2003-2720 (IT))	
STYLE OF CAUSE:	**SHARIFA ALI AND ROSE MARKEL** Appellants **and** **HER MAJESTY THE QUEEN** Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 22, 2008
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	NOËL J.A. BLAIS J.A.
DATED:	MAY 28, 2008

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