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Signed at Ottawa, Canada, this 20th day of January 2003.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 15th day of March 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20030120
Docket: 2002-649(IT)I

BETWEEN:

PIERRE RICHARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

P. R. Dussault, J.T.C.C.

[1] This appeal was heard under the informal procedure. It is an appeal from an assessment for 2000 by which the Minister of National Revenue ("the Minister") denied the appellant the credit for mental or physical impairment provided for in sections 118.3 and 118.4 of the *Income Tax Act* ("the Act"), which the appellant had claimed in respect of his minor son.

[2] In making the assessment, the Minister assumed, *inter alia*, the facts set out in subparagraphs (a) to (h) of paragraph 3 of the Reply to the Notice of Appeal.

[TRANSLATION]

- (a) in his tax return for the 2000 taxation year, the appellant, among other things, claimed \$1,230 ($\$7,234 \times 17\%$) as a disability credit for his son X (hereinafter "the child");¹
- (b) the appellant gave the Minister a Disability Tax Credit Certificate (T-2001) (hereinafter "the certificate") signed by Dr. Marina Attié, a neuropsychologist (hereinafter "the doctor"), on October 11, 2001;
- (c) on the certificate, the doctor diagnosed the child with Asperger Syndrome;
- (d) the appellant sent the Minister a neuropsychological assessment report signed by the doctor on October 1, 1999 (hereinafter "the report");
- (e) in her report, the doctor stated the following:
 - (i) on her observation of the child: [TRANSLATION]
"we are in fact struck by his excellent language level, his language being, however, neither monotone nor ritualized; all things considered, his communication skills appear to us to be relatively adequate";
 - (ii) regarding his intellectual functions: [TRANSLATION]
"based on the results obtained on the WISC-III intelligence test, the child ranks right in the average for his age; there is also no disparity between the verbal register and the non-verbal register; the child ranks in the high normal range on the cognitive scales (language skills and perceptual organization skills)";
 - (iii) regarding his language functions: [TRANSLATION]
"the impression the child creates, his vocabulary level is much higher than average";
 - (iv) regarding his perceptual functions: [TRANSLATION]
"the child has a good sense of observation";

¹ At the request of the appellant's agents, the minor child's given name is being kept confidential. In the various documents referred to, his given name is simply replaced by X.

- (v) regarding his attention and memory functions:
[TRANSLATION] "the child is the picture of a calm, docile and industrious child in his way of approaching a task";
- (f) in response to the report, the Minister's representative contacted the doctor for further information;
- (g) the doctor told the Minister's representative the following:
- (i) she knew the child, who has Asperger Syndrome, well;
 - (ii) in general, the child's school functioning was very good, and he was very industrious, with an excellent language level;
 - (iii) the child did not need more supervision than other children his age;
 - (iv) the child understood the concept of danger and did personal care without supervision;
- (h) in light of the foregoing, the Minister determined that the appellant's child did not have a severe and prolonged mental or physical impairment the effects of which were such that his ability to perform a basic activity of daily living was markedly restricted.

[3] Testimony was given by the appellant, Marina Attié, the neuropsychologist, and Patrick Major, an occupational therapist.

[4] The appellant testified at length about his son's neurological disease, which he identified as Asperger Syndrome. In a letter dated October 10, 2000, that the appellant and his spouse, the child's mother, sent the Grade 2 workers at the child's school to inform them and make them aware of the situation, the characteristics of the impairment are summarized as follows (Exhibit A-2):

[TRANSLATION]

October 10, 2000

To all Grade 2 workers at the Centre Académique de Lanaudière

X has a neurological problem known as Asperger Syndrome (AS). AS is a mild form of autism. Persons with this syndrome have average or above-average intelligence. Therefore, with slightly adapted supervision, they can go through school normally even though they have certain characteristics that sometimes make them seem eccentric or strange to most people. We would like to tell you about the special characteristics that affect X's behaviour so that you can understand him better and therefore help him by properly preparing him to deal with these anxiety-producing factors.

CHARACTERISTICS

- Anxiety about unknown situations and changes;

How to prevent or react to this:

- Warn him in advance of schedule changes and explain to him in detail how the changed activity will take place.
- Very sensitive sense of taste, smell (significant disdain for certain foods) and hearing (some sounds may become intolerable, which increases his anxiety);

How to prevent or react to this:

- We have agreed that it would be more appropriate for him to eat at home twice a week (Mondays and Thursdays), and he would bring his lunch the other three days.
- Lack of tact in interpersonal relations (X prefers to isolate himself and likes swinging more than any other activity);

How to prevent or react to this:

- It is acceptable for X to want to play alone. It is preferable to respect this choice.
- Hand gestures;

How to prevent or react to this:

- These gestures are uncontrolled, and it is recommended that you let him be.
- Weak gross motor skills (may be evident during physical education, martial arts and dance classes);

How to prevent or react to this:

- You can help him learn how to do physical activities when he needs assistance;

- Finally, you will note that X is fascinated by certain subjects, such as electricity, computers, street lamps and the road network. This is normal for children with Asperger Syndrome;

X is aware that these characteristics distinguish him from others and therefore has lower self-esteem. It might be appropriate to get him to play a tutorial role in activities in which he has distinctive skills (at the computer, for example).

We have hired a psychoeducator (Jocelyne Viens) and an occupational therapist (Patrick Major), who are currently working with X to help him overcome the above-mentioned problems. Jocelyne's work is done on-site, which is why she works at the school one day a week at lunchtime. Patrick's work is done at home.

If you would like additional information, attached is some documentation on Asperger Syndrome. If you have any questions, do not hesitate to contact me (at the telephone number given below).

The understanding you show toward X will benefit him his entire life, and we are very grateful to you for it.

Thank you for your co-operation.

...

[5] During the years at issue, the child was attending (and is still attending) school, which is a regular private school. According to the appellant, X is intelligent and gets excellent grades.

[6] During his testimony, the appellant emphasized in particular his son's perception problems, which are reflected in abnormal social behaviour and very strong anxiety that his parents and the workers, at home and at school, all try to correct through repeated learning of social scenarios and the establishment of a living routine that can make the child feel secure. According to the appellant, this is actually an attempt to program behaviours that are basically deficient as regards the

child's relationships with others and his perception of certain realities that generate anxiety for him, make him lose control and make him quick-tempered. The appellant stated that the child's anger is mainly verbal but can also be expressed physically, especially toward his younger brother, but without excessive violence. For example, his fear of being alone, his fear that his parents will not come to get him at school at a specific time, his fear of the dark, his fear of closed or locked doors, his fear of getting hurt while playing—when all is said and done, his fear of everything requires that someone be present and also requires supervision and sustained effort to plan and organize the child's life to reduce his level of anxiety. Nonetheless, the appellant stated that his son is intelligent and is so manipulative that, for example, he will even talk about killing himself to express his disagreement with a punishment; however, he has never taken any suicidal action. Using a short video extract, the appellant also explained the child's problem with mannerisms, which is reflected in uncontrolled hand movements. The appellant also explained the child's motor skills problems.

[7] Marina Attié, a neuropsychologist, completed the T2201 form. She answered "no" to the following question: "Is your patient able to think, perceive, and remember, using medication or therapy if necessary? (For example, can he or she manage personal affairs or do personal care without supervision?)" She answered "yes" to the following question: "Is the impairment severe enough to restrict the basic activity of daily living identified above all, or almost all, the time, even with therapy and the use of appropriate aids and medication?" (See Exhibit A-3.)

[8] Further to a request by the tax authorities, Ms. Attié also filled out a more detailed questionnaire. Her answers to the questions asked are reproduced in italics:

[TRANSLATION]

...

MENTAL FUNCTIONS (CHILD):

Could your patient distinguish time (day or night, seasons)?

Temporal organization problems.

Did your patient have a concept of danger appropriate to his age?

Yes. ...

Could your patient understand simple instructions in a familiar environment? **Yes.** . . .

Could your patient learn from his mistakes? **No.** Please explain: ***In interacting with his peers, liable to make mistakes that it is difficult for him to fix and of which he is not always aware. Need for social skills training.***

Could your patient do his own personal care in accordance with what is expected of a child of his age? **Yes.** . . .

If you answered no to any of the above questions, please indicate whether the disability presented itself (i) sometimes; (ii) **frequently** or; (iii) all or almost all the time:

Please indicate for which year(s) or period(s) this was the case. ***Disorder diagnosed in 1999 but of congenital origin.***

Did your patient require additional supervision at school? **Yes.** If so, what was the nature and frequency of that supervision (e.g. supervisor/student ratio)? ***Need for psychological and/or psychoeducational support to help the child manage his anxious behaviour and socialization disorders.***

Has the limitation in your patient's abilities had an impact on his academic progress? **Yes.** If so, please explain: ***Many social integration problems. Behaviour sometimes dysfunctional because of unforeseeable anxiety crises.***

Please describe a normal day for your patient (outside the school environment) and explain the supervision level required: ***Need for supervision at school and at home.***

To what extent did your patient succeed in functioning on a day-to-day basis? Please indicate the extent to which he was behind and in what area(s). ***No learning disorders at the time of the assessment but several behavioural exceptionalities requiring psychological or psychiatric counselling.***

Did your patient have to take medication or undergo therapy for his limitation? Please explain: ***To be determined by the child psychiatrist.***

Did the medication or therapy improve his ability to think, perceive and remember? Please explain: ***I did not do a follow-up***

after the diagnostic assessment. As a general rule, such children can make progress with sustained intervention, although the disability is permanent and imposes certain limits.

In your opinion, what are this patient's prospects for the future (e.g. he will finish his schooling, work or live in a self-sufficient manner? *Will be able to finish his schooling and be relatively self-sufficient, although he will always be emotionally fragile (depression) because of his difficulties in being psychosocially functional.*

If possible, please provide any other relevant medical information.

Other comments:

The parents have been provided with a complete report.

...

[9] Ms. Attié did in fact conduct a neuropsychological assessment of the child in September 1999. Her detailed report dated October 1, 1999, was adduced in evidence (see Exhibit I-1). For the purposes of this case, I am reproducing only two extracts, which are found under the headings [TRANSLATION] "Reason for Consultation" and "Recommendation":

[TRANSLATION]

REASON FOR CONSULTATION

The child is being referred to us by the consulting psychologist for a cognitive assessment in order to shed additional light on the observed behavioural disorders. This is a child who is beginning his first year in the regular stream and, although his academic performance is very satisfactory so far, there are questions regarding a certain marginality in his psychosocial development along with certain behavioural peculiarities. X apparently also has some motor skills problems.

...

CONCLUSION AND RECOMMENDATIONS

We are dealing with a young boy of normal intelligence whose simultaneous functions of integration and reasoning seem to us to

be well preserved in both the verbal and the non-verbal register. The child has special skills when it comes to expressive language: excellent vocabulary level, clear, well-articulated formulations. This contrasts with his difficulties in interpreting social situations, which explain his very poor results in the picture arrangement subtest and the difficulties observed in the comprehension (WISC-III) and absurdities (Stanford-Binet) tests. Moreover, X remains very awkward with social interaction and is excessively preoccupied with areas of interest that are uncommon for children his age. His motor mannerisms should also be noted, as well as his anxious behaviour, which is especially triggered by changes in routine. All of this is somewhat suggestive of Asperger Syndrome, although the child surprised us with his adequate relational contact in dyadic relationships, since he is capable of reciprocity and empathy. A more in-depth assessment of this symptomatology could therefore be made by Dr. Laurent Motron, a psychiatrist at Hôpital Rivière-des-Prairies.

In any event, we believe that a number of initiatives could be taken at X's school and that they would certainly have a very positive impact on his psychosocial development. The thrust of these initiatives would basically be to:

- encourage, structure and teach socialization activities;
- diversify his range of interests;
- prepare him for changes in routine and separations;
- enable him to manage anxiety better.

In this regard, we remain available to talk with the school workers about concrete initiatives to which priority should be given to achieve such objectives.

Finally, we are referring X to occupational therapy in the hope that it will improve his motor skills a little. The physical education teacher should be told about the child's problems in this area so that he can adapt his program, where possible, on the basis of the child's limitations.

[10] On cross-examination, the appellant stated that he had not consulted a child psychiatrist as recommended by Ms. Attié because he had already consulted professionals several times. He said that, rather than adding to the child's trauma

through new tests, he preferred working with social scenarios to overcome certain deficiencies. According to him, this moreover achieved results.

[11] In her testimony, Ms. Attié emphasized the perception problems of the child, who, in her opinion, has a great deal of difficulty interpreting non-verbal language, which leads to inadequacy in social relations and generates abnormal anxiety. Although Ms. Attié acknowledged that Asperger Syndrome is usually diagnosed by a psychiatrist, she nevertheless referred to it to designate what she described as [TRANSLATION] "pervasive developmental disorders" requiring special supervision. According to her, the child's difficulty in perceiving non-verbal language makes him anxious and, when he is overcome by such emotions, he becomes incapable of thinking and remembering. However, it was not without hesitation that Ms. Attié confirmed the answers given on the T2201 form (Exhibit A-3).

[12] Patrick Major testified about his work as an occupational therapist with the child, whom he has seen about 35 times at his home. He referred to the child's motor skills problems and his work in this area. He also explained the child's problem understanding social relations, especially other people's reactions, and obeying established rules, which constitute obstacles, constraints or requirements that make him anxious. Mr. Major explained the use of social scenarios to help the child understand social rules, stressing that the process is a long one that must constantly be repeated. He also referred to perception problems that cause the child to have uncontrolled fears, like his fear of closed doors.

[13] The appellant's agents argued that the child's mental impairment meets the criteria set out in sections 118.3 and 118.4 of the *Act*. Moreover, Ms. Attié, a neuropsychologist, provided the necessary certification of the impairment on the prescribed form.

[14] The appellant's agents relied primarily on the interpretation of the provisions on the credit for mental or physical impairment applied in *Radage v. Canada*, [1996] T.C.J. No. 730 (Q.L.), an interpretation that was confirmed by the Federal Court of Appeal in *Johnston v. Canada*, [1998] F.C.J. No. 169 (Q.L.). Although they expressed the view that thinking, perceiving and remembering are separate activities, they nevertheless emphasized that these activities are interrelated. While the problems of the appellant's child relate more to the function of perceiving, since he is still unable to perceive non-verbal language, that disability and the anxiety it causes affect his other functions, namely, thinking and memory. According to them, the disability is permanent and its effects may make themselves felt in an unforeseeable way, which means that it can be said that the

impairment is still present and that an inordinate amount of time is required to correct it.

[15] Counsel for the respondent found contradictions with the form, the report and Ms. Attié's testimony. He also noted that the distinction made between perceiving verbal and non-verbal language is one not made in the *Act*. Relying on Judge Bowman's analysis in *Radage*, he argued that perceiving refers to the reception and recognition of all and not just some sensory data about the external world. He stressed that Ms. Attié noted in her report that the child was calm, asked questions and could initiate a conversation. He also pointed out that the child is currently in Grade 4, that he is not at all behind and that the appellant himself testified that his son got excellent grades. The evidence also shows that the child can use a computer, which means that, if he is indeed unable to perceive some things, this certainly affects his social behaviour but does not mean that he cannot perceive anything and that he is unable to think or perceive all or substantially all of the time. All things considered, counsel for the respondent took the view that the evidence shows that the T2201 form filled out by Ms. Attié does not reflect reality.

[16] Although counsel for the respondent noted that each case turns on its own facts, he did refer to the decisions in *Case v. Canada*, [1996] T.C.J. No. 216 (Q.L.), and in *Congo v. Canada*, [1996] T.C.J. No. 671 (Q.L.), which involved social-behavioural situations more serious than the one at issue in this case and in which it was held that the diagnosed mental impairment was not severe enough to result in the credit.

[17] To be entitled to the credit for mental or physical impairment, the basic requirements are that an individual have a severe and prolonged mental or physical impairment the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted: paragraphs 118.3(1)(a) and (a.1) of the *Act*. Paragraph 118.3(1)(a.2) requires the certification of such an impairment by a designated professional, and paragraph 118.3(1)(b) requires that the necessary certificate be filed with the Minister for a taxation year.

[18] Paragraph 118.4(1)(a) specifies that an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months.

[19] Paragraph 118.4(1)(b) establishes that an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the

individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living.

[20] Paragraph 118.4(1)(c) sets out a list of activities that are considered basic activities of daily living in relation to an individual. Those activities include perceiving, thinking and remembering under subparagraph 118.4(1)(c)(i).

[21] Finally, paragraph 118.4(1)(d) states that, for greater certainty, no other activity, including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living.

[22] As Judge Bowman noted in his analysis in *Radage*, perceiving, thinking and remembering are concepts that cannot easily be defined in a few sentences. However, despite that difficulty, Judge Bowman recognized the need to establish certain criteria or guidelines that are meaningful in everyday life to be able to apply sections 118.3 and 118.4 of the *Act*. Moreover, while he acknowledged that the determination of an impairment must be made on a case-by-case basis and that the assessment of the severity of an impairment is a matter of common sense, he nevertheless emphasized a number of legal principles on which the determination must be based. Those principles are set out at paragraph 45 of the judgment as follows:

...

- (a) The legislative intent appears to be to provide a modest amount of tax relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons. The intent is neither to give the credit to everyone who suffers from a disability nor to erect a hurdle that is impossible for virtually every disabled person to surmount. It obviously recognizes that disabled persons need such tax relief and it is intended to be of benefit to such persons.
- (b) The court must, while recognizing the narrowness of the tests enumerated in sections 118.3 and 118.4, construe the provisions liberally, humanely and compassionately and not narrowly and technically. In *Craven v. The Queen*, 94-2619(IT)I, I stated:

The application of the inflexible tests in section 118.4 leaves the court no room to apply either common sense or compassion in the interpretation of the disability tax credit provisions of the Income Tax

Act--provisions that require a compassionate and commonsense application.

In my view I stated the test unduly narrowly in that case. I have heard many disability tax credit cases since that time and my thinking has evolved. My present view of the approach that should be taken is more accurately set out in such cases as *Noseworthy v. The Queen*, 95-1862(IT)I, *Lawlor v. The Queen*, 95-1585(IT)I, *Hillier v. The Queen*, 95-3097(IT)I, and *Lamothe v. The Queen*, 95-2868(IT)I and 95-3949(IT)I. If the object of Parliament, which is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provision must be given a humane and compassionate construction. Section 12 of the Interpretation Act reads as follows:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

- (c) If there is doubt on which side of the line a claimant falls, that doubt should be resolved in favour of the claimant.
- (d) The provisional meanings assigned above to the words "perceiving, thinking and remembering" are more in the nature of guidelines than definitions. They are:

Perceiving: The reception and recognition of sensory data about the external world that conforms reasonably to common human experience.

Thinking: A rational comprehension, marshalling, analysis and organization of that which the person has perceived and the formulation of conclusions therefrom that are of practical utility or theoretical validity.

Remembering: The mental activity of storing perceived data and of retrieving it in a manner that enables the person reasonably to perform the function of thinking.

In these guidelines I have emphasized the need to recognize the way in which one function depends on the others, and to attempt to relate the use of those functions to some meaningful result in everyday life.

- (e) Finally there must be considered -- and this is the most difficult principle to formulate -- the criteria to be employed in forming the judgement whether the mental impairment is of such severity that the person is entitled to the credit, i.e. that that person's ability to perceive, think and remember is markedly restricted within the meaning of the Act. It does not necessarily involve a state of complete automatism or anosia, but it should be of such a severity that it affects and permeates his or her life to a degree that it renders that person incapable of performing such mental tasks as will enable him or her to function independently and with reasonable competence in everyday life.

[23] In *Johnston, supra*, Létourneau J.A. of the Federal Court of Appeal agreed with the approach taken by Judge Bowman in *Radage, supra*, that the provisions on the credit for mental or physical impairment must be given a "humane and compassionate construction", but emphasized that the scope of these provisions is limited in their application to "severely impaired persons".

[24] In this case, it is basically a matter of assessing the severity of the impairment. Bearing in mind the principles stated by Judge Bowman in *Radage, supra*, reproduced above, I cannot conclude that, "all or substantially all of the time" during the years at issue, even with the appropriate therapy, the appellant's son was "unable (or require[d] an inordinate amount of time)" to perform activities relating to "perceiving, thinking and remembering". The detailed neurological report completed by Ms. Attié, and especially the report's conclusions and recommendations reproduced at paragraph [9] above, do not support such a conclusion, nor do the questionnaire answers reproduced at paragraph [8] above. I will repeat here only the observations that deal directly with the possible improvement of the condition and the child's prospects for the future. On page 3 of the questionnaire (Exhibit I-2), Ms. Attié stated:

...

I did not do a follow-up after the diagnostic assessment. As a general rule, such children can make progress with sustained intervention, although the disability is permanent and imposes certain limits.

...

Will be able to finish his schooling and be relatively self-sufficient, although he will always be emotionally fragile (depression) because of his difficulties in being psychosocially functional.

[25] The appellant himself stated in his testimony that the occupational therapist's work and the use of social scenarios had achieved some results. Moreover, we know that the child attended and still attends a regular school, that he is not at all behind and that, as the appellant testified, he gets excellent grades. In her report, Ms. Attié concluded, *inter alia*, that the child was not only of normal intelligence but also that the "simultaneous functions of integration and reasoning" seemed "well preserved in both the verbal and the non-verbal register". She also noted "special skills when it comes to expressive language: excellent vocabulary level, clear, well-articulated formulations." To this we might add some other special skills, especially skills in using a computer. Moreover, I note that the parents did not consider it appropriate to act on Ms. Attié's recommendation that a psychiatrist be consulted. This certainly does not mean that the child has no impairment or no problems. However, as noted by the appellant, it must be recalled that personal presence, supervision and the initiatives taken both at home and at school also proved to mitigate the effects of the problems identified. All things considered, I find that it cannot be concluded from all of the evidence adduced that the child's impairment is so severe that, "all or substantially all of the time", he is unable "(or requires an inordinate amount of time)" to perform activities relating to "perceiving, thinking and remembering", as the *Act* requires.

[26] Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 20th day of January 2003.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 15th day of March 2004.

Sophie Debbané, Revisor