

Docket: 2005-4475(IT)I

BETWEEN:

SYLVAIN MARCEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 25, 2006, at Québec, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Alain Gareau

AMENDED JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2004 taxation year is allowed, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled, in computing his federal tax for the year in question, to the transfer of the unused tax credit for severe and prolonged physical impairment in respect of his daughter, who was then seven years of age, in accordance with the Reasons for Judgment attached hereto.

Signed at Ottawa, Canada, this 21st day of November 2006.

"Alain Tardif"

Tardif J.

Citation: 2006TCC543
Date: 20061121
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BETWEEN:

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REASONS FOR AMENDED JUDGMENT

Tardif J.

[1] This is an appeal under the *Income Tax Act* related to a notice of reassessment for the 2004 taxation year.

[2] The issue is whether the Appellant was entitled, in computing his federal income tax for the year in question, to the transfer of the unused income tax credit of \$1,643 ($\$10,270 \times 16\%$) for severe and prolonged physical impairment in respect of his daughter, who was then seven years of age.

[3] The Appellant is claiming the disability tax credit. The person with the physical impairment is the Appellant's minor child. The Appellant is claiming the disability tax credit in respect of his daughter, who suffers from a very severe food allergy problem, which, according to the Appellant and his wife, consists of more than 60 different allergies.

[4] The Appellant and his spouse explained the numerous problems that their daughter's medical condition caused them. Among other things, the Appellant explained that meal preparations took several hours. He also stated that he and his spouse had to devote many hours to ensuring that their child had the appropriate supervision and to provide her with the moral and psychological support that she needed in light of her health problems.

[5] At the age of seven, her living conditions were so unusual that she had few or no friends. Her health problems isolated her. The Appellant and his wife have another child with another disability.

[6] In my opinion, it is no exaggeration to acknowledge that, in the light of the evidence, the parents of this child devoted most of their available time to their children's well-being.

[7] Indeed, the Appellant's wife said that she did not work outside the home; she was almost entirely devoted to the upbringing and care of her children, and this was so trying on her own health that she suffered from what she called burnouts.

[8] The mother described quite well the gravity of their daughter's medical problem in Exhibit A-1, her letter of July 11, 2005, where she stated:

[TRANSLATION]

...

I will try to prove to you, in writing, that I must devote an enormous time to the preparation of my daughter's meals.

First of all, I must be very creative, so I take special recipe books, look at them, read them, examine the ingredients and use them as a basis to prepare her meals. The recipes are just a starting point because . . . is always allergic to one or more ingredients in the recipe. Thus, I must be constantly creative, and this requires an enormous amount of time and energy. In fact, I often have to create a recipe in my head. Sometimes I have to throw it all out, and at other times, it works.

The next step for me is to ensure that everything is clean: utensils, work surfaces, etc. I must use a clean utensil for each ingredient. If one ingredient touches another one that she can't eat, I have to start everything all over again. (For example, in the fridge, there are several ingredients to which . . . is allergic but which we can't remove because Alexandre eats them, or we do.) We try to be very vigilant with respect to the fridge so that no ingredients contaminate [her] food. We try to set aside a specific area of the fridge for her, but it is difficult to keep things from coming into contact with each other. I must also ensure that no one contaminate foods like mustard with a utensil. In addition, I must keep an eye on things to make sure that there are no splashes from one pot or pan to another, because this would force me to throw the food out due to contamination by an ingredient to which she is allergic.

And preparing food elsewhere is out of the question, because I must absolutely bring all the ingredients and wash each utensil and bowl before cooking. Indeed,

she cannot dine in any restaurant whatsoever unless she brings her own lunch, and the table and other surfaces must be very clean. She must sit somewhat back from the table or at the very end of it. At home, she has her own seat at the table.

Lastly, for her own protection, I must constantly ensure that . . . does not put her fingers in her mouth. I must also check that people have washed their hands and ask them to wash their hands when they come into our home as well as before and after they eat or touch something dangerous to her (e.g. an ice cream cone.) All of this is emotionally draining, and, as you know, it takes me a great deal of time.

[Name of child intentionally omitted.]

...

[9] The child did not testify; it was unnecessary for her to do so, because it is obvious to me that a child of that age is not mature enough to make appropriate decisions about what she can and cannot eat.

[10] Even assuming that this young girl is more reasonable and wiser than other children her age, the fact remains that it would be unreasonable to believe that a seven-year-old could always make the right decisions regarding her food intake.

[11] It is not easy, even for adults, to understand the jargon found on food ingredient lists; in fact, ingredient labels on consumer food product packages are often incomplete.

[12] A child who is allergic to only one or two ingredients might conceivably be able to monitor her own diet. However, where a seven-year-old child suffers from roughly 60 allergies, I think that it is unrealistic to expect her to feed herself without the essential and constant assistance of an adult — in this instance, her parents.

[13] The Respondent submits that people with severe dietary restrictions are no longer eligible for the disability tax credit and that the act of feeding oneself does not include activities related to the selection, research, preparation and cooking of foods.

[14] In my view, the important aspect of this case is not so much the time that the mother must devote to choosing and preparing the food and the meals as the disabled person's inability to do so.

[15] Sections 118.3 and 118.4 of the *Income Tax Act* read as follows:

118.3. (1) Where

(a) an individual has a severe and prolonged mental or physical impairment,

(a.1) the effects of the impairment are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy that

(i) is essential to sustain a vital function of the individual,

(ii) is required to be administered at least three times each week for a total duration averaging not less than 14 hours a week, and

(iii) cannot reasonably be expected to be of significant benefit to persons who are not so impaired,

(a.2) in the case of

(i) a sight impairment, a medical doctor or an optometrist,

(i.1) a speech impairment, a medical doctor or a speech-language pathologist,

(ii) a hearing impairment, a medical doctor or an audiologist,

(iii) an impairment with respect to an individual's ability in feeding or dressing themselves, or in walking, a medical doctor or an occupational therapist,

(iv) an impairment with respect to an individual's ability in perceiving, thinking and remembering, a medical doctor or a psychologist, and

(v) an impairment not referred to in any of subparagraphs (i) to (iv), a medical doctor

has certified in prescribed form that the impairment is 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 or would be markedly restricted but for therapy referred to in paragraph (a.1),

(b) the individual has filed for a taxation year with the Minister the certificate described in paragraph 118.3(1)(a.2), and

(c) no amount in respect of remuneration for an attendant or care in a nursing home, in respect of the individual, is included in calculating a deduction under section 118.2 (otherwise than because of paragraph 118.2(2)(b.1)) for the year by the individual or by any other person,

there may be deducted in computing the individual's tax payable under this Part for the year the amount determined by the formula

...

118.4. (1) For the purposes of subsection 6(16), sections 118.2 and 118.3 and this subsection,

(a) an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months;

(b) 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;

(c) a basic activity of daily living in relation to an individual means

(i) perceiving, thinking and remembering,

(ii) feeding oneself or dressing oneself,

(iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,

(iv) hearing so as to understand, in a quiet setting, another person familiar with the individual,

(v) eliminating (bowel or bladder functions), or

(vi) walking;

(d) 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; and

(e) feeding oneself does not include

(i) any of the activities of identifying, finding, shopping for or otherwise procuring food, or

(ii) the activity of preparing food to the extent that the time associated with the activity would not have been necessary in the absence of a dietary restriction or regime; and

(f) dressing oneself does not include any of the activities of identifying, finding, shopping for or otherwise procuring clothing.

[16] This subject has generated a wealth of case law. I have paid special attention to the decision of the Honourable Justice Lamarre Proulx in *Nantel v. R.*, [2000] T.C.J. No. 345, where she referred to a portion from the decision of the Federal Court of Appeal in *Johnston v. R.*, [1998] 2 C.T.C. 262 (F.C.A.), at paragraphs 17, 18, 21, 32 and 33, where this concept was in issue:

[17] The expression "markedly restricted" has been defined to refer to an individual's inability, at all or substantially all of the time, even with therapy and the use of appropriate device and medication, to perform a basic activity of daily living. An individual's ability is also deemed to be markedly restricted if he requires an inordinate amount of time to perform such activity.

[18] No definition has been given of what constitutes an inordinate amount of time in the performance of the basic activities of daily living. In my view, the expression "inordinate amount of time" refers to an excessive amount of time, that is to say one much longer than what is usually required by normal people. It requires a marked departure from normality.

...

[31] Counsel for the Respondent argued before us, and it was accepted by the learned Judge, that the notion of "feeding" refers to a person's capacity to take food from a plate and bring it to his mouth. I strongly disagree. There is no doubt that a two-year-old child can take food from a plate and put it in his mouth, but there is also no doubt that nobody would assert that that child is able to feed himself. I agree with this statement of Bonner T.C.J. in *M.R. Hodgins v. The Queen* ([1995] E.T.C. 515):

I turn next to feeding oneself. That involves, in my view, something more than eating a meal prepared by another person. One cannot feed oneself unless one is capable of taking basic food stuffs in the form commonly available in a grocery store and cooking or otherwise preparing and setting out a meal. The test is feeding oneself, not simply eating a meal. The language of the legislation is clear in that respect. The requisite ability to feed oneself

involves the ability to prepare a reasonable range of food and not just to prepare and set out snacks, junk foods or frozen dinners. Here the limitations on the movement of the Appellant's hands required the assistance of her husband in meal preparation to a degree that supports a conclusion that the Appellant was incapable of feeding herself. [Emphasis not in original.]

[32] The notion of feeding, in my view, also involves the ability to prepare a meal which conforms to a medically prescribed diet and medication which maintains one's state of health or prevents its deterioration.

[33] To limit the notion of feeding to the ability to eat a meal is to overlook the objective of the statute which, it bears repeating, is to financially assist those who, because of their disability, require assistance in fulfilling such a basic activity of daily living. To include the preparation of a reasonable meal in the notion of feeding is, on the contrary, fully consistent with such objective and the spirit of the disability credit.

[17] The Honourable Justice Lamarre Proulx, for her part, wrote the following at paragraphs 16, 17 and 18 of her decision:

16 According to this decision, a person's ability is markedly restricted if the person requires an inordinate amount of time to perform a basic activity of living. The phrase "inordinate amount of time" refers to a much longer time than is normal. The notion of feeding oneself involves the ability to prepare a meal that conforms to the diet required by the person's condition. The activity of feeding oneself includes meal preparation.

17 When it comes to the activity of feeding oneself, it is not just the act of putting food in one's mouth that must be considered. Looking for and preparing food must be as well. If these latter two activities have to be performed by someone other than the person with the impairment, that person's time must be taken into account in assessing whether it takes an inordinate amount of time to perform a basic activity of living. As regards celiac disease, I have not found that a person suffering therefrom requires very much more time for feeding himself or herself than is required by normal people. In the instant case, however, I feel that the time spent looking for and preparing food greatly exceeds the time usually spent by normal people on those activities.

18 It is impossible not to consider the rare food allergies of the appellant's daughters to be a severe and prolonged impairment and not to find that much more time than usual is required to overcome that impairment and remain autonomous. The description given by Ms. Gareau shows that she currently requires an inordinate amount of time--in comparison with what is normal--to prepare the food required by her daughters, as do her daughters themselves. If these problems diminish in the future as a result of medical discoveries that are to be desired, so much the better. However, given what these individuals currently have to do when it comes to eating, there is no doubt that they require more time than is normal to look for and prepare their food.

[18] While the conditions of the Act are unambiguous, and, above all, very strict, I find that the physical disability of the child in this case was severe, and that it limited her daily activities markedly, continuously and on a prolonged basis in 2004.

[19] Once the child reaches a sufficient stage of maturity and wisdom, and, above all, becomes reasonably able to say no and to discipline herself and to feed herself in keeping with her countless dietary restrictions, the situation with respect to the credit in issue will eventually change.

[20] For all these reasons, I allow the appeal.

Signed at Ottawa, Canada, this 21st day of November 2006.

"Alain Tardif"

Tardif J.

CITATION: 2006TCC543

DOCKET NO.: 2005-4475(IT)I

STYLE OF CAUSE: SYLVAIN MARCEAU v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: September 25, 2006

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATED: November 21, 2006

APPEARANCES:

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