

BETWEEN:

MARC BENOIT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 22, 2013, at Montréal, Quebec.

Before: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Agents for the appellant: Audrey Boissonneault, student-at-law
 Daria Fleury, student-at-law

Counsel for the respondent: Amelia Fink

JUDGMENT

The appeal from the assessment made pursuant to the *Income Tax Act* for the 2009 taxation year is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is eligible for the disability tax credit, in accordance with the attached Reasons for Judgment.

Signed at Kingston, Ontario, this 31st day of March 2014.

"Rommel G. Masse"

Masse D.J.

Citation: 2014 TCC 95
Date: 20140331
Docket: 2012-2756(IT)I

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REASONS FOR JUDGMENT

Masse D.J.

[1] This is an appeal from an assessment dated July 29, 2010, for the 2009 taxation year, in which the Minister of National Revenue (hereinafter, the Minister) disallowed the disability tax credit (hereinafter, the DTC) of \$7,196 that the appellant claimed for himself.

Factual background

[2] Mr. Benoit is a musician by training and was a professional musician. He worked concurrently as a musician and artistic agent, idea man and researcher for television in Quebec City. He also organized various international festivals in Quebec as director general. He has now been retired for more than two years and can no longer work due to health problems.

[3] In 1998, after years of ups and downs, and being on an emotional roller coaster, Mr. Benoit was diagnosed as being bipolar. This required psychiatric care, which was provided by Dr. Léon-Maurice Larouche. In 2009, he also developed essential tremor. This is a problem with neurotransmitters after which every muscle command is followed by an echo one millisecond later. As a result all his movements become tremors. He is being treated by a neurosurgeon, Valérie Lyne Solan. He has

these tremors all the time, but they are exacerbated by stressful situations. He has a subarachnoid cyst, which exerts pressure on the right frontal cortex of the brain, resulting in memory loss and tremors. He suffers from anxiety and panic attacks related to his bipolar condition and essential tremors. His doctors prescribed medication to treat his bipolar condition, but unfortunately they had side effects. He is in the first stage of hepatic steatosis, which leads to cirrhosis. Since 2009, he has been taking seven or eight medications every day to treat, among other things, his bipolar condition and liver and thyroid gland problems (see Exhibit A-1, tab 11). His general health is stable today but his quality of life, in his words, [TRANSLATION] "is not fun." He is being seen by a psychiatrist, neurologist and endocrinologist and is also under the care of a family doctor. The documents in Exhibit A-1 reflect the fragile state of his health.

[4] Mr. Benoit has memory lapses. These lapses occur frequently amidst his essential tremors. His memory is not reliable and in fact, at the hearing, he testified with notes he had prepared a few weeks prior to the trial because he had trouble remembering the details of his daily activities, although there are very few. If he has a medical appointment, he must write it down everywhere and he tells his spouse so she can remind him; otherwise, he will forget. He is no longer able to memorize a piece of music. Even though before, he was able to memorize a complete concerto and play it, he can no longer do this. He described an incident to us where he was in concert with a singer; he began to shake and panic, and he forgot everything. Thinking it was over, he left in the middle of the concert. That was the end of his career as a musician, as he is no longer able to play in public.

[5] The appellant described to us how his anxiety and panic attacks and his essential tremors affected him. Even the easiest tasks, physical or mental, become insurmountable problems. The appellant feels stress from these problems and things snowball from there. The stress leads to essential tremors. He then panics and loses control of the situation. Any little problem causes panic. Actions requiring fine-motor skills such as tying his shoelaces, picking change up from the ground, or holding a cup of coffee become very difficult for him. As soon as he is under the slightest pressure, he gets stressed and begins to shake, making it nearly impossible for him to complete the task. This stress can be caused simply by someone asking him to move faster, trying to get dressed quickly or eating in the morning; he then becomes unable or nearly unable to function. Half the time he is stressed and when he panics, it takes half an hour for it to subside. He can only overcome it with great effort. It can easily take him an hour to get dressed in the morning. Choosing his breakfast food is very stressful and causes panic episodes. It takes him at least an hour to eat, because of the tremors. He has trouble planning activities and unexpected events cause him stress.

He must always stay in the present moment. He cannot do two things at once and is unable to make simple choices. Today, he does not make financial decisions himself; he must consult someone to make sure his financial choices are wise. I get the sense that these panic episodes paralyze him.

[6] The appellant can barely write because of his tremors. His writing is spasmodic and it takes him a long time to write even a simple sentence, much longer than a person that does not have tremors. The quality of his writing leaves much to be desired (see Exhibit A-2). It is actually doodles or scribbles that are hard to decipher.

[7] He loses his balance and then must find a support otherwise he falls. He walks to relieve stress, but not in public areas since he could fall on the sidewalk due to his poor balance, which bothers people and embarrasses him. He does a little gardening, which reduces his stress, but he does it kneeling down because of his poor balance.

[8] It is clear that the appellant suffers from major depression and his functional limitations are permanent or prolonged (see Exhibit A-1, tab 4). For him, these periods of depression are debilitating, and he experiences them frequently because of his bipolar condition.

[9] In cross-examination, he said he lived alone in 2009, the taxation year in question. However, he received help from time to time from a friend who went to the house once a week to clean, cook and do other things. He stated that he had a driver's licence and regularly drove a car in 2009—once or twice a week—to do his groceries or get the mail. However, it was very stressful and he could not function in traffic jams, when there was a lot of traffic or when he had to drive fast. He would have to pull over onto the shoulder and it could take him up to half an hour to calm himself down enough to continue on his way. When he went to the movies, he could follow the story of the movie but emotional intensity caused him stress and he would start to shake, get cold and his blood pressure would drop. He is able to use a phone and a computer and send emails. At least the documents he prepares on the computer are legible, compared to his handwritten notes. He reads, but not novels because reading a novel requires concentration he does not have. He would read three or four pages and that was all. He is able to do a few home repairs, but only small jobs such as fixing a doorknob, nothing complicated. If he were to drop a screw or small items he would have to pick up, the repair would take a long time.

[10] Dr. Rami Morcos, neurologist, prepared a medical report dated January 20, 2010 (see Exhibit A-1, tab 8, and Exhibit I-1, tab 4). Dr. Morcos noted that the appellant has tremors to the extent that he must hold his cup with two hands in the

morning. At times, the appellant has difficulty judging the distance of the floor when he puts his foot down, leading him to sway and lose his balance. The appellant reported that he would have headaches that last a few hours, two or three times a week. Sometimes Tylenol would help. At times he would have an obstruction when swallowing; he did not choke when eating, however. He can be slow when he speaks and searches for his words. He reported decreased memory.

[11] During 2010, the appellant was without an adequate income. So in March, he applied to the Régie des rentes du Québec for disability benefits, which he has been receiving since September 2010. He also applied for the DTC. It was Dr. Laroche who filled in the forms required to obtain the disability benefits and the DTC.

[12] On March 23, 2010, the appellant sent the Minister a T2201 form, "Disability Tax Credit Certificate" duly completed and signed by Dr. Larouche. On this certificate, Dr. Larouche indicated that since 2008, the appellant has suffered from bipolar affective disorder, hypothyroidism, moderately severe hepatic steatosis, a subarachnoid cyst in the right frontal lobe and tendonitis in the right wrist. The doctor indicated that the appellant is weak and has tremors, dizzy spells, low concentration, little interest and poor nutrition. The T2201 form consists of a series of questions the doctor answers by checking the appropriate box: "Yes" or "No". To the question, "Is your patient markedly restricted in performing the mental functions necessary for everyday life, as described above?", the doctor answered "Yes". The doctor certified that the impairment has lasted or is expected to last for a continuous period of at least 12 months. The appellant became markedly restricted in performing the mental functions necessary for everyday life in 2008 and 2009. The doctor certified that the impairment had not improved and was not likely to improve to such an extent that the patient would no longer be markedly restricted.

[13] On June 4, 2010, the Minister asked Dr. Larouche to provide clarifications on how the appellant's impairment limits his ability to carry out one or more basic activity of daily living. The Minister asked the doctor to complete another form by checking the statement for each question that best corresponds to the appellant's ability to carry out everyday activities, with help from therapy, and the appropriate medication and devices. The questions and corresponding statements are reproduced below (see Exhibit A-1, tab 2, and Exhibit I-1, tab 8):

[TRANSLATION]

MENTAL FUNCTIONS NECESSARY FOR EVERYDAY ACTIVITIES

Which statement describes your patient's ability to carry out the basic skills of daily living (for example, personal hygiene, everyday purchases, outings)? Your patient:

- (a) **[check] is able to carry out these activities without assistance.**
- (b) requires assistance, but ONLY for complex tasks, during periods of exacerbation or in stressful situations.
- (c) all or substantially all of the time requires assistance (i.e. your patient cannot be left alone).

Which statement describes your patient's ability to express himself or herself? Your patient is:

- (a) **[check] able to express himself or herself without difficulty.**
- (b) unable to express himself or herself but ONLY when the subject is complex, during periods of exacerbation or in stressful situations.
- (c) all or substantially all of the time unable to express himself or herself.

Which statement describes your patient's ability to remember? Your patient:

- (a) has no trouble remembering most of the time.
- (b) **[check] is unable to remember, but ONLY in situations with many steps or complex instructions, during periods of exacerbation or in stressful situations.**
- (c) is unable to remember simple or new instructions, and all or substantially all of the time requires constant supervision to ensure his or her safety and well being.

Which statement describes your patient's ability to find solutions to practical solutions met on a daily basis? Your patient:

- (a) **[check] is able to find solutions by himself or herself without difficulty.**
- (b) requires significant assistance to find solutions, but ONLY when the task is complex (for example, tasks that require abstract reasoning, planning or organization), during periods of exacerbation or in stressful situations.
- (c) all or substantially all of the time requires significant assistance to find solutions to minor problems (for example, your patient is unable to find another route or way to get home if a road is closed in his or her neighbourhood).

Which statement describes your patient's ability to make a judgment in everyday situations? Your patient is:

- (a) **[check] able to make an appropriate judgment most of the time.**
- (b) unable to make an appropriate judgment, but ONLY when the task is complex (i.e. making a financial decision), during periods of exacerbation or in stressful situations.
- (c) all or substantially all of the time unable to make an appropriate judgment.

Which statement describes your patient's ability to be independent when planning his or her daily activities? Your patient is:

- (a) **[check] able to plan his or her own daily activities most of the time.**
- (b) unable to plan his or her own daily activities, but ONLY when the task is complex (i.e. planning an outing or trip), during periods of exacerbation or in stressful situations.
- (c) all or substantially all of the time unable to plan his or her own daily activities (i.e. needs someone to establish a routine and constantly tell him or her what to do).

Which statement describes your patient's ability to perform the mental functions necessary for the everyday activities described in the question below?

NOTE: To be considered an "inordinate amount of time", performing the mental functions necessary for everyday life must take considerably more time than the average person of the same age without an impairment.

Your patient:

- (a) does not take an inordinate amount of time to perform the functions.
- (b) **[check] takes an inordinate amount of time to perform the functions, but ONLY when the task is complex (i.e. a task that requires abstract reasoning), during periods of exacerbation or in stressful situations.**
- (c) all or substantially all of the time takes an inordinate amount of time to perform the functions.

[14] Dr. Larouche indicated that the limitations noted in the questionnaire began in 2007 and 2008. Dr. Larouche indicated that it is likely that the appellant's capacity to perform the mental functions necessary for everyday life would improve with the help of medication or therapy, within a year or two.

[15] The Minister, relying on Dr. Larouche's report, disallowed the DTC of \$7,196 the appellant claimed for himself for the 2009 taxation year. Despite the fact his capacity to perform the mental functions necessary for everyday life is limited, he was found to be inadmissible for the DTC because his capacity to perform these functions is not markedly limited all or substantially all of the time.

[16] On March 17, 2010, Dr. Larouche filled in a form for Revenu Québec, "Certificate Respecting an Impairment" for the appellant for 2008 and 2009 (Exhibit A-1, tab 14). Question number 7 on this form states as follows:

Mental functions — Is your patient's ability to exercise the mental functions necessary for daily living markedly restricted?

Answer **yes** only if, even with therapy and the use of medication, your patient is all or substantially all of the time unable to exercise the mental functions necessary for daily living (or requires an inordinate amount of time to do so).

The mental functions necessary for daily living include memory, problem-solving, goal-attainment, judgment and adaptive functioning.

Revenu Québec considers your patient's ability to be markedly restricted if he or she lacks the mental capacity to manage personal affairs (provide himself or herself with food, clothing, etc.) or see to personal care (feed, wash or dress himself or herself) without supervision.

[17] To this question, Dr. Larouche answered "Yes". However, Dr. Larouche answered "No" to question number 8, which states as follows:

Cumulative effect of multiple restrictions (applicable only since 2005) — Is your patient affected by restrictions in more than one of the basic activities of daily living (referred to in questions 2 through 7) to such a degree that the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a single basic activity of daily living?

Answer **yes** only if, even with therapy and medication, the restrictions and their cumulative effect are present all or substantially all of the time.

Dr. Larouche indicated that his patient's impairment dated back to February 2008 and it was a permanent impairment.

[18] Therefore, there seem to be contradictions or at least differences between the T2201 certificate (Exhibit A-1, tab 1) and the "Certificate Respecting an Impairment" (Exhibit A-1, tab 14) on one hand and the additional report the Minister requested in June 2010 (Exhibit A-1, tab 2) on the other. It is the Court's responsibility to resolve these differences, if possible.

Appellant's position

[19] The appellant alleges that he suffers from severe and prolonged impairments to his physical or mental functions such that his ability to carry out more than one basic activity of daily living is markedly restricted. He is all or substantially all of the time limited in this capacity, even with therapy and medication. The appellant states that he meets the criteria under sections 118.3(1) and 118.4 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (the Act) and he is therefore eligible for the DTC.

Respondent's position

[20] The respondent alleges that, although the appellant suffers from severe and prolonged impairments, and although his capacity to perform the mental functions necessary for everyday life is limited, the appellant is not "all or substantially all of the time", within the meaning of section 118.4, markedly restricted in his ability to perform these functions. The appellant is therefore not eligible for the DTC under subsection 118.3(1).

Legislative provisions

[21] The relevant provisions of the Act are as follow:

118.3 (1) Where

- (a) an individual has one or more severe and prolonged impairments in physical or mental functions,
- (a.1) the effects of the impairment or impairments are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living or 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 an impairment in physical or mental functions the effects of which are such that the individual's ability to perform a single basic activity of daily living is markedly restricted or would be so restricted but for therapy referred to in paragraph (a.1), a medical practitioner has certified in prescribed form that the impairment is a severe and prolonged impairment in physical or mental functions 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...

...

- (a.3) in the case of one or more impairments in physical or mental functions the effects of which are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted, a medical practitioner has certified in prescribed form that the impairment or impairments are severe and prolonged impairments in physical or mental functions the effects of which are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted and that the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a single basic activity of daily living, where the medical practitioner is, in the case of
- (i) an impairment with respect to the individual's ability in feeding or dressing themselves, or in walking, a medical doctor or an occupational therapist, and
 - (ii) in the case of any other impairment, a medical doctor,
- (b) the individual has filed for a taxation year with the Minister the certificate described in paragraph (a.2) or (a.3), and
- (c) ...

[calculation of DTC]

...

- (4) Where a claim under this section or under section 118.8 is made in respect of an individual's impairment
- (a) if the Minister requests in writing information with respect to the individual's impairment, its effects on the individual and, where applicable, the therapy referred to in paragraph (1)(a.1) that is required to be administered, from any person referred to in subsection (1) or (2) or section 118.8 in connection with such a claim, that person shall provide the information so requested to the Minister in writing; and
 - (b) if the information referred to in paragraph (a) is provided by a person referred to in paragraph (1)(a.2) or (a.3), the information so provided is deemed to be included in a certificate in prescribed form.

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;
 - (b.1) an individual is considered to have the equivalent of a marked restriction in a basic activity of daily living only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual's ability to perform more than one basic activity of daily living (including for this purpose, the ability to see) is significantly restricted, and the cumulative effect of those restrictions is tantamount to the individual's ability to perform a basic activity of daily living being markedly restricted;
- (c) a basic activity of daily living in relation to an individual means
 - (i) mental functions necessary for everyday life,
 - (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;
- (c.1) mental functions necessary for everyday life include
 - (i) memory,
 - (ii) problem solving, goal-setting and judgement (taken together), and
 - (iii) adaptive functioning;

- (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.

[Emphasis added.]

Analysis

[22] The DTC is a non-refundable tax credit that provides tax relief to people with a severe and prolonged impairment in physical or mental functions. A taxpayer is eligible for the DTC in a taxation year if the following requirements set out in subsection 118.3(1) of the Act are met:

- (a) the individual has one or more severe and prolonged impairments in physical or mental functions;
- (b) the effects of the impairment or impairments are such that the individual is either:
 - (i) markedly restricted in the ability to perform a basic activity of daily living or would be markedly restricted but for life-sustaining therapy; or
 - (ii) significantly restricted in the ability to perform more than one basic activity of daily living and the cumulative effect of the significant restrictions is equivalent to being markedly restricted in the ability to perform a basic activity of daily living; and
- (c) a medical practitioner certifies that the individual meets the above-mentioned requirements.

[23] An impairment is prolonged when it has lasted or may reasonably be expected to last for a continuous period of at least 12 months. An individual's ability to perform a basic activity of daily living is markedly restricted if all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is unable or requires an inordinate amount of time to perform a basic activity of daily living. An individual is considered to have the equivalent of a marked restriction in a basic activity of daily living only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual's ability to perform more than one basic activity of daily living is significantly restricted, and the cumulative effect of those restrictions is tantamount to the individual's ability to perform a basic activity of daily living being markedly restricted. Feeding oneself or dressing oneself, among other things, is considered among the mental functions necessary for everyday life. However, feeding oneself does not include 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. Memory, problem solving, goal-setting and judgment (taken together) are included among the mental functions necessary for everyday life.

[24] To meet the requirement of taking an inordinate amount of time to perform an activity, the activity must take significantly longer than for an average person with no impairment. The issue of whether an individual takes an inordinate amount of time to perform an activity is a question of fact. In *Johnston v. Canada*, [1998] F.C.J. No. 169 (QL), Justice Létourneau, of the Federal Court of Appeal, defined the expression "inordinate amount of time" at paragraph 18, as follows:

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.

[25] In general, it is the effect of one or more impairments of the physical or mental ability of a person to perform the basic activities of daily living—an effect that differs from one person to another—rather than a medical condition in itself, that determines whether a person is eligible for the DTC.

[26] The appellant and the respondent cited many decisions in support of their respective assertions. It goes without saying that while certain decisions may enlighten the Court, each case stands on its own merits and must be decided on its own facts according to the burden of proof and the degree of proof required. The

exercise of comparing the facts in another case, which may present certain similarities with those in a given case, therefore cannot replace the application of the statutory provisions, and of the requirements stated therein to the circumstances proven in a given case: see *Gilbert v. Canada*, [2001] T.C.J. No. 600 (QL) at para. 32.

[27] In *Radage v. Canada*, [1996] T.C.J. No. 730 (QL), [1996] 3 C.T.C. 2510, Judge Bowman of the Tax Court of Canada clearly explained, at paragraph 45 (QL) of his reasons for judgment, the legislative intent when adopting sections 118.3 and 118.4

...

- (5) ...I shall try to state briefly those principles upon which this decision is based:
- (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.

...

- (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.

[Emphasis added.]

[28] In *Brown v. Canada*, [2002] T.C.J. No. 199 (QL), [2002] 2 C.T.C. 2846, Judge Miller of the Tax Court of Canada was to consider the case of a young man who suffered a brain injury after an accident, at age 10. Mr. Brown lived alone and seemed to have been left to fend for himself for most of his youth. He had a limited ability to understand and remember. He was easily distracted. He had trouble with organization and was easily frustrated. He liked to listen to music and walk in the woods. He played some guitar. Despite his significant disabilities, Mr. Brown was

able to achieve a certain degree of independence. Everything he did, he did for himself.

[29] Judge Miller, addressing the applicability of the provisions of sections 118.3(1) and 118.4 of the Act, stated the following at paragraph 20 of his reasons for judgment:

... The sections just cited taken together stipulate that a basic activity of daily living (in this case - perceiving, thinking and remembering) is markedly restricted only if, substantially all of the time, the individual is unable to perceive, think and remember or require some inordinate amount of time to do so. In summary, the elements required for Mr. Brown to obtain the credit are:

1. a severe and prolonged mental impairment;
2. the effects of the impairment are such that Mr. Brown is unable, substantially all of the time, to perceive, think and remember;
3. a certificate filed with the Minister of a medical doctor or a psychologist in prescribed form attesting to the first two points.

[30] Judge Miller quoted the principles stated by Judge Bowman in *Radage, supra*, that I cited above, and continued as follows at paragraph 24:

Applying these principles to the situation before me, I am satisfied that Mr. Brown deserves the humane and compassionate construction of the provisions suggested by Associate Chief Judge Bowman and adopted by the Federal Court of Appeal in the case of *Johnston v. The Queen* 98 D.T.C. 6168. Here is a man, who as a youngster suffers a severe brain injury and is left until well into adulthood with some sense of knowing he is different, but no knowledge why. He is not directed by family to seek help but is left completely to his own devices, and indeed he copes. By coping, has he shown that his mental impairment is not so severe that he is unable to perceive, think or remember? Coping is relative. He copes by listening to music, playing parts of three or four songs on his guitar and heading out into the country. He does not list in his coping mechanisms any activities that require organized rational thoughts beyond a very basic level. He has survived despite his impairment; he has not overcome the impairment.

Judge Miller concluded as follows at paragraph 28:

My finding about the severity of the impairment and more pointedly its impact on Mr. Brown's ability to handle life is not without some doubt. I fall back on, and take some comfort in, Associate Chief Judge Bowman's principle in which he enunciated, that if there is doubt, doubt should be resolved in favour of the claimant. I do so in this case and I allow the Appellant's appeal for the 1998 taxation year and refer the matter back to the Minister for reassessment in accordance with this finding.

[31] As I indicated earlier, in this case, the T2201 certificate (Exhibit A-1, tab 1), Dr. Larouche's additional medical report of June 2010 (Exhibit A-1, tab 2) and the "Certificate Respecting an Impairment" from March 2010 (Exhibit A-1, tab 14) are problematic. They are not detailed medical reports in which the doctor could freely and completely express himself by presenting subjective and objective observations that support his medical opinion. These reports are only forms that contain questions the doctor must answer by checking the appropriate box, not for the purpose of providing a complete, detailed and well-formulated medical opinion for each case, but only for the purpose of providing the most appropriate answer from among two or three possible answers. These forms do not leave the doctor much freedom to express himself. By the way they are presented and worded, these forms do not seem to inspire much confidence in the medical opinions found therein. The method of checking one of two or three predetermined answers is not the best way to obtain a just result. The Federal Court of Appeal noted the following in *MacIsaac v. Canada*; *Morrison v. Canada*, [1999] F.C.J. No. 1898 (QL) at paragraph 6:

It is not obvious that putting the questions as they are in this form results in a thorough consideration by the doctor of the questions confronting him. Putting checks in boxes is perhaps not the best way of eliciting a just result. Nevertheless the Act requires such certificates as a prerequisite to obtaining disability tax credits.

[32] In this case, Mr. Benoit submitted to the Minister a T2201 certificate as he was required to do. The Minister feels, after reviewing the certificate and the additional information, that the appellant is not eligible for the DTC. Therefore, it is the Court's duty to determine whether the appellant met the criteria found at sections 118.3 and 118.4.

[33] In this case, it is indisputable that the appellant suffers from a severe and prolonged impairment and has for at least 12 months. In my opinion, his situation is not expected to improve in the near future. By this I mean in one or two years. The cumulative effect of his bipolar disorder, his major depression, his anxiety, his panic and essential tremors is that the appellant is markedly restricted in his ability to perform more than one activity of daily living, without therapy.

[34] Do the appellant's impairments result in his being "all or substantially all of the time", within the meaning of section 118.4, markedly restricted in his ability to perform these activities? I think the answer is yes. Like the appellant in *Brown, supra*, the appellant in this case has adapted and lives independently, but this does not mean that his mental impairment is not so severe as to render him incapable of

perceiving, thinking or remembering. He adapts by avoiding stressful situations, and if by chance he finds himself in a stressful situation, he adapts by removing himself from that situation as quickly as possible.

[35] As for memory, it is clear the appellant's memory is not reliable. He testified using notes he had prepared ahead of time. He has difficulty remembering the details of his daily activities. He cannot remember his medical appointments without writing them down everywhere, on a calendar and many other places, and without asking someone to remind him of these appointments. Even though before, he had the ability to memorize a complete concerto, he is no longer able to. This is a significant loss of his ability to memorize and remember. His memory problems are exacerbated by stress. Although the memory loss can be triggered by very little stress, the results of the loss are very serious and can be disastrous for him; for example, the episode during the concert, described earlier.

[36] As for his ability to concentrate, he can follow the plot of a movie, but not if it evokes emotions—this is too stressful. He can only read three or four pages of a book before he loses track. He cannot concentrate in traffic when driving a vehicle. He cannot function in a traffic jam, heavy traffic or when driving fast, and must pull over onto the shoulder to calm down in these situations. He lives in the present and has trouble planning his life. He cannot tolerate unexpected events. He is not able to make simple choices such as deciding what to eat in the morning. He cannot do two things at the same time. Financial decisions are beyond him and he must consult someone to make sure he is not making bad decisions.

[37] Mr. Benoit suffers from essential tremors almost all the time. These tremors aggravate his anxiety and panic attacks. For him, this results in the simplest tasks becoming very difficult. Tying shoelaces, picking things up from the ground, holding a cup of coffee, getting dressed, eating and writing are all activities that, for the average person, do not require much time or effort. But for Mr. Benoit, they are big challenges and take an inordinate amount of time to perform. These activities are examples of basic activities of daily living, and for Mr. Benoit, they require an inordinate amount of time that is not the case for the average person of the same age without an impairment. Instead of taking a few seconds or minutes, Mr. Benoit needs an hour or sometimes more.

Conclusion

[38] Having reviewed all the evidence and considered the applicable legislative provisions and case law, I feel that Mr. Benoit deserves the humane and

compassionate interpretation of the provisions suggested by Judge Bowman in *Radage, supra*, and Judge Miller in *Brown, supra*. I therefore find that the cumulative effect of his bipolar disorder, his major depression, his anxiety level, his panic and essential tremors results in Mr. Benoit's being markedly restricted in his ability to perform more than one basic activity of daily living. Mr. Benoit's impairments are such that he is "all or substantially all of the time", within the meaning of section 118.4, markedly restricted in his ability to perform these activities.

[39] If there is any doubt, I grant the benefit of this doubt to Mr. Benoit.

[40] For these reasons, I allow the appeal and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is eligible for the disability tax credit.

Signed at Kingston, Ontario, this 31st day of March 2014.

"Rommel G. Masse"

Masse D.J.

Translation certified true
on this 9th day of May 2014.
Elizabeth Tan, translator

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PLACE OF HEARING: Montréal, Quebec

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Deputy Judge

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