

Federal Court of Appeal



Cour d'appel fédérale

A-273-96

CORAM: HUGESSEN J.A.  
DÉCARY J.A.  
CHEVALIER D.J.

B E T W E E N :

**THERESA A. THOMAS**

APPLICANT

AND:

**HER MAJESTY THE QUEEN**

RESPONDENT

Heard at Halifax, Nova Scotia, Wednesday, December 11, 1996.

Judgment rendered from the Bench, December 11, 1996.

REASONS FOR JUDGMENT OF THE COURT  
DELIVERED BY:

HUGESSEN J.A.

Federal Court of Appeal



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BETWEEN:

**THERESA A. THOMAS**

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REASONS FOR JUDGMENT OF THE COURT  
(Delivered from the Bench at Halifax, Nova-Scotia,  
Wednesday, December 11, 1996)

HUGESSEN J.A.

In dismissing the taxpayer's appeal against the Minister's disallowance of her claim to a disability credit under subsections 118.3(1) and

118.4(1) of the *Income Tax Act*<sup>1</sup> for the 1992 taxation year the learned Tax Court

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<sup>1</sup> S.C. 1970-71-72, c. 63, as amended

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,
  - (a.2) a medical doctor, or where the impairment is an impairment of sight, a medical doctor or an optometrist, has certified in prescribed form that the individual has 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,
- (b) the individual has filed for a taxation year with the Minister the certificate described in paragraph (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 by reason of paragraph (2)(b.1) thereof) for the year by the individual or by any other person,

for the purposes of computing the tax payable under this Part by the individual for the year, there may be deducted an amount determined by the formula

$$A \times \$4,118$$

where

A is the appropriate percentage for the year.

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 may 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 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 and 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; and
- (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.

judge said:

However, to succeed, Mrs. Thomas must satisfy the very restrictive conditions of the *Act*, one of these being that all or substantially all of the time in 1992, even with therapy and the use of appropriate devices and medication, she must have been unable, or must have required an inordinate amount of time, to perform a basic activity of daily living. The only activities contemplated by the *Act* with which Mrs. Thomas has some difficulty were dressing herself, speaking, walking, perceiving, thinking and remembering.

There is some evidence that at particular times, Mrs. Thomas had difficulty performing the first three activities. However, in 1992 she did not have to stay in bed for a 24-hour period because of a very bad reaction to offending chemicals. When exposed to them, she reacted with different symptoms varying in degree of seriousness. She would often feel some fatigue, as a result at [*sic*] which she required a longer time than normal to perform a given activity.

I have not been convinced by Mrs. Thomas's evidence that she was all or substantially all of the time unable to perform these activities or that she required an inordinate amount of time to do so. This is supported also by the fact that in her doctor's certificate no mention is made of difficulty with these three activities.

[Emphasis added]

(Applicant's Record, page 128)

With respect, it appears clear to us that in making this last statement the learned judge committed a manifest error. One of the medical certificates produced answers "No" to the question whether the patient can walk normally. The other specifies that she requires "a very prolonged time" to dress herself.

The taxpayer herself, whom the judge did not disbelieve, said that she took twenty to twenty-five minutes to walk a distance which should normally take seven minutes. While the judge was not, of course, obliged to accept any of these statements at their face value, he was not entitled to overlook them, as he appears to have done.

The application for judicial review will be allowed, the decision will be set aside, and the matter will be returned to the Tax court for a new hearing.

  
\_\_\_\_\_ J.A.

FEDERAL COURT OF APPEAL

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REASONS FOR JUDGMENT OF THE COURT

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**COURT FILE NO.:** A-273-96

**STYLE OF CAUSE:** Theresa A. Thomas v.  
Her Majesty the Queen

**PLACE OF HEARING:** Halifax, Nova Scotia

**DATE OF HEARING:** Wednesday, December 11, 1996

**REASONS FOR JUDGMENT  
OF THE COURT:** Hugessen J.A.  
Décary J.A.  
Chevalier D.J.

**RENDERED FROM THE BENCH BY:** Hugessen J.A.

**APPEARANCES:**

Ms. Theresa A. Thomas the Applicant on her own behalf

Mr. Peter Leslie for the Respondent

**SOLICITORS OF RECORD:**

George Thomson  
Deputy Attorney General of Canada  
Ottawa, Ontario for the Respondent