

Date: 20071031

Docket: A-588-06

Citation: 2007 FCA 352

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

SYLVAIN MARCEAU

Respondent

Hearing held at Québec, Quebec on October 31, 2007.

Judgment from the bench at Québec, Quebec on October 31, 2007.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

Date: 20071031

Docket: A-588-06

Citation: 2007 FCA 352

**CORAM: LÉTOURNEAU J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

SYLVAIN MARCEAU

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Québec, Quebec on October 31, 2007)

TRUDEL J.A.

[1] The *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act), allows a tax credit to an individual who has a severe and prolonged mental or physical impairment limiting his or her ability to perform an everyday activity, including feeding himself or herself.

[2] What does “feeding oneself” mean in subparagraph 118.4(1)(c)(ii) of the Act? That is the question raised by this appeal, which is from an amended decision of the Tax Court of Canada on September 12, 2006 by Judge Tardif (the judge).

Facts and proceedings

[3] Mr. Marceau is the father of a child who was born in December 1997. The child has [TRANSLATION] “38 food allergies, apart from others . . . which cause her to have attacks of eczema, asthma or rhinitis”: appeal book, p. 17. In his tax return for 2004 the respondent requested for his daughter, a dependent within the meaning of the Act, the disability tax credit (DTC), and this was denied by the Minister of National Revenue (MNR). The respondent appealed the reassessment sent to him by the MNR for the 2004 taxation year. The judge ruled in his favour: hence the appeal at bar.

Tax Court of Canada decision

[4] At trial the respondent and his spouse explained the many problems caused for them by the dietary constraints of their daughter. They both described how meal preparation took several hours since recipes had to be chosen or invented and anallergic food found and meticulously prepared, avoiding any source of contamination.

[5] The parents also testified to other problems with the child, related to her many allergies, but more of a dermatological nature, indicating however [TRANSLATION] “that the appeal [to the trial judge] essentially concerned food preparation”: appeal book, pages 17 and 49. In short, the child is developing normally in all spheres of activity in everyday life. She has no visual or hearing deficiency and no problems speaking or moving about. She is also not suffering from any deficiency in her mental abilities. According to the parents, the only everyday activity which is severely limited for the child is eating: appeal book, cross-examination of mother, pages 48 and 49.

[6] Relying on *Nantel v. R.*, 2000 T.C.C. No. 345 (*Nantel*), and *Johnston v. R.*, [1998] 2 C.T.C. 262 (F.C.A.) (*Johnston*), the trial judge concluded that the father was entitled to the credit requested because in 2004 the child had attained a “physical disability that was severe and that it limited her daily activities markedly, continuously and on a prolonged basis”: paragraph 18 of amended judgment.

[7] The judge further concluded that “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”: paragraph 19 of amended judgment.

[8] Accordingly, the judge did not focus on the time the mother had to spend on choosing and preparing food and meals, so much as the fact that it was impossible for the child to do it for herself.

[9] The trial judge made two errors of law: first, he ignored the legislative amendment defining what feeding oneself entails for purposes of the Act; also, he mistakenly took the youth of the child into account as a criterion determining entitlement to the DTC.

Analysis

[10] The relevant sections of the Act are sections 118.3 and 118.4, but in particular paragraph 118.4(1)(e), which states:

Nature of impairment

118.4 (1) . . .

(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 . . .

Déficiences grave et prolongée

118.4 (1) . . .

(e) le fait de s'alimenter ne comprend pas :

(i) les activités qui consistent à identifier, à rechercher, à acheter ou à se procurer autrement des aliments,

(ii) l'activité qui consiste à préparer des aliments, dans la mesure où le temps associé à cette activité n'y aurait pas été consacré en l'absence d'une restriction ou d'un régime alimentaire . . .

[11] As mentioned earlier, the trial judge relied on *Nantel* and *Johnston*, cited with approval by this Court in *Hamilton v. Canada*, 2002 FCA 118 (*Hamilton*). In that case, Mr. Hamilton had to spend an excessive amount of time on obtaining food suitable for his personal consumption and on the preparation of his meals because of the coeliac illness from which he was suffering. This Court

found that he was entitled to the DTC provided for in subsection 118.4(1) of the Act. The Act has subsequently been amended and paragraphs (e) and (f) added to subsection 118.4(1). It is apparent that these legislative amendments were made to counter the interpretation given to the DTC by the courts, in particular by *Hamilton: Kash v. Canada*, 2006 TCC 662; Department of Finance, *Budget Plan 2003: Supplementary Information and Notice of Ways and Means Motion*, Appendix 9, at pp. 363 and 364; Comments by David Sherman, *Income Tax Act 2007*, 15th ed., Carswell, Toronto, 2007, at p. 980.

[12] Consequently, individuals whose ability to prepare a meal is significantly limited for reasons other than a dietary restriction continue to be entitled to the DTC (*Sherman, supra*). In the case at bar, the parties' child had no reason other than her dietary restrictions for claiming the DTC, and that is why the 2003 amendments were a bar to the respondent's request.

[13] As the excessive amount of time spent preparing food is no longer a factor to be considered in obtaining the DTC, what about the individual's age? Age is not a factor taken into account by the legislature in establishing eligibility for the DTC.

[14] One can only have respect and sympathy for the parents of the young child who have so exceptionally devoted themselves to ensuring her welfare and that of her brother, who for his part suffers from a severe speech defect and mental disability: appeal book, page 45.

[15] However, the Court cannot accept the interpretation given to the legislative provision in effect by the trial judge, by adding to the wording an eligibility factor that is not there. The appellant was right when she argued that the judge only mentioned paragraph 118.4(1)(e) of the Act in his amended reasons for the first time, and did not apply it.

[16] The appeal will consequently be allowed, the decision of the Tax Court of Canada set aside and, pursuant to section 18.25 of the *Tax Court of Canada Act*, the respondent will be entitled to the costs incurred by this appeal, which we set at \$1,500.

“Johanne Trudel”

J.A.

I concur.

Gilles Létourneau J.A.

I concur.

Marc Noël J.A.

Certified true translation

Brian McCordick, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-588-06

(APPEAL FROM JUDGMENT OR ORDER OF (see comment in left margin) OF (DATE), DOCKET No. (DOCKET NUMBER). Use if required: otherwise delete.)

STYLE OF CAUSE:

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: October 31, 2007

REASONS FOR JUDGMENT OF THE COURT DELIVERED FROM THE BENCH BY: Trudel J.A.

APPEARANCES:

Alain Gareau

FOR THE APPELLANT/
PLAINTIFF

Jean-Philippe Trudel

FOR THE RESPONDENT/
DEFENDANT

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE APPELLANT/
PLAINTIFF

FOR THE RESPONDENT/
DEFENDANT