**Date: 20080926**

**Docket: A-435-07**

**Citation: 2008 FCA 286**

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**DEBBIE SCOTT**

**Respondent**

Heard at Fredericton, New Brunswick, on September 24, 2008.

Judgment delivered at Ottawa, Ontario, on September 26, 2008.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DESJARDINS J.A.
NOËL J.A.

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## REASONS FOR JUDGMENT

**TRUDEL J.A.**

### Overview

[1] This is an appeal from the decision of Madam Justice Campbell (the judge) of the Tax Court of Canada delivered orally on June 26, 2007, [2007 TCC 610] that allowed an appeal from the reassessment of the Minister of National Revenue (the Minister) made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") for the 2002 taxation year and referred the reassessment back to the Minister for reconsideration and reassessment.

[2] The appeal to the Tax Court was allowed on the basis that the respondent was entitled to claim the cost of the tuition fees paid to Rothesay Netherwood School ("Rothesay") as a medical expense pursuant to paragraph 118.2(2)(*e*) of the Act. Hence, the within appeal.

## Legislative framework

[3] Paragraph 118.2(2)(*e*) of the Act provides:

| | |
|---|---|
| **Medical expenses** | **Frais médicaux** |
| (2) For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid | (2) Pour l'application du paragraphe (1), les frais médicaux d'un particulier sont les frais payés: |
| … | […] |
| (*e*) for the care, or the care and training, at a school, institution or other place of the patient, who has been certified by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient; | *e*) pour le soin dans une école, une institution ou un autre endroit — ou le soin et la formation — du particulier, de son époux ou conjoint de fait ou d'une personne à charge visée à l'alinéa *a*), qu'une personne habilitée à cette fin atteste être quelqu'un qui, en raison d'un handicap physique ou mental, a besoin d'équipement, d'installations ou de personnel spécialisés fournis par cette école ou institution ou à cet autre endroit pour le soin — ou le soin et la formation — de particuliers ayant un handicap semblable au sien; |
| [Emphasis added] | [Je souligne] |

[4] The requirements that the taxpayer has to meet in order to claim expenses under paragraph 118.2(2)(*e*) are set out in *Collins v. Canada* [1998] T.C.J. No. 396 at paragraph 20 as follows:

1. The taxpayer must pay an amount for the care or care and training at a school, institution or other place.
2. The patient must suffer from a mental handicap.
3. The school, institution or other place must specially provide to the patient suffering from the handicap, equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.
4. An appropriately qualified person must certify the mental or physical handicap is the reason the patient requires that the school specially provide the equipment, facilities or personnel for the care or the care and training of individuals suffering from the same handicap.

**Issues**

[5] The first two requirements were not disputed before the Tax Court and are not at issue before this Court.

[6] The third and fourth requirements were the focus of the parties at trial and constitute the main issues on appeal, which are:

1. Is Rothesay a school that specially provided to the respondent's son equipment, facilities or personnel for the care or care and training of other persons suffering from the same handicap?

2. Was the respondent's son certified as someone who, by reason of his mental or physical handicap, required the special equipment, facilities or personnel provided by Rothesay?

**Standard of Review**

[7] These issues being questions of mixed fact and law, the judge's conclusions will stand absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paragraph 36.

**Facts**

[8] The salient facts that were considered by the judge in her reasons can be summarized as follows:

- The respondent's son was diagnosed with several learning disabilities in Grade 3. These disabilities include Attention Deficit Disorder (ADD), auditory processing disorder, obsessive compulsive disorder, as well as associated behavioural issues (2007 TCC 610 based on the certified transcript of reasons [Reasons], page 3 at lines 15-25 and page 5 at lines 7-17).

- Although the respondent's son coped well from Grade 3 to Grade 6, he had problems completing homework and had serious social issues. In Grade 7, he underwent different programs to help him adjust and was prescribed medication for his obsessive compulsive behaviours. These measures, far from being successful, had a number of adverse effects (Reasons, page 4 at lines 1-7).

- After consulting teachers, the parents and students, as well as her son's paediatrician (Dr. Zelman), the respondent decided to enrol her son in Rothesay. Rothesay was known for its smaller class size and success with students with disabilities similar to those of her son. According to the respondent Rothesay provided the essential daily and nightly structure as well as control for the behaviour of her son (Reasons, page 5 at lines 1-6).

- The respondent claimed the cost of tuition fees at Rothesay in the amount of $12,900 as a deductible medical expense in respect of her 2002 taxation year. The Minister reassessed the respondent on the basis that the amount claimed was not a deductible medical expense pursuant to paragraph 118.2(2)(*e*) of the Act.

**First Issue**

[9] I now turn to the first issue: Is Rothesay a school contemplated by paragraph 118.2(2)(*e*) of the Act?

[10] The third of the *Collins* factors requires Rothesay to be a school that specially provided to the student equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.

[11] To satisfy this requirement, first of all, the respondent's son must have a specific need. Second, the expenses of Rothesay must be inextricably tied to this specific need resulting from his disability: *Lister v. Canada*, 2006 FCA 331 at paragraph 15. Third, Rothesay must be an institution that is capable of addressing the need of a group with disabilities similar to those of the respondent's son.

[12] The judge heard from three witnesses. These witnesses were the respondent, Dr. Zelman who was qualified as an expert witness, and Mr. Kitchen, the head of the school at Rothesay. The three witnesses commented on various aspects of education at Rothesay in general, as well as on the ways in which the respondent's son had benefited from that school.

[13] The evidence revealed that Rothesay is a university prep school catering to any student who meets the criteria for admission, that is:

a) the student wants to attend school;

b) the student is committed to try to the best of his or her ability in everything he or she does; and

c) the student works hard academically and "finds the success to graduate through the school" (transcript, pages 47-48);

[14] All students have access to the same services and the tuition fees are the same for all. The school's focus is not on the provision of medical services and it does not specially provide equipment, facilities or personnel for the care of students with particular needs such as those of the respondent's son.

[15] The type of institution that provides special care for the purposes of paragraph 118.2(2)(*e*) was addressed by this Court in *Lister* (*ibid.*). In *Lister*, where it was held that the test is one of purpose, our Court disallowed the deduction of expenses for a seniors' residence on the basis that provision of medical services was incidental to accommodation services provided by the residence.

[16] On behalf of the Court, my colleague, Madam Justice Sharlow, wrote at paragraph 18:

> (…) However, given the context of subsection 118.2(2), an organization that functions mainly as a provider of residential accommodation should not fall within the scope of paragraph 118.2(2)(*e*) merely because it incidentally provides some medical services to its residents.

[17] For reasons that remain nebulous, the decision of our Court in *Lister* was not presented to the judge. Considering the record, I believe the judge would have concluded differently had she had the benefit of our Court's interpretation of subsection 118.2(2) in *Lister*.

[18] The fact that some of the services offered to the general student body were beneficial to the respondent's son and other students with special needs is insufficient to bring Rothesay within the ambit of the provision under study.

[19] This being said, I will address the remaining issue.

**Second Issue**

[20] The issue is whether Dr. Zelman made a recommendation with respect to Rothesay that amounts to certification within the meaning of subsection 118.2(2)(*e*) of the Act.

[21] In her oral reasons, the judge states:

> Dr. Zelman had prior knowledge of Rothesay as a destination for individuals with learning and behavioural problems. His knowledge was gained at medical conferences and from discussions with other doctors and parents. It is clear from his evidence that he endorsed Rothesay as an appropriate learning centre with the capabilities to adequately address and assist with Matthew's problems and mental handicaps.
>
> He confirmed his diagnosis of attention deficit disorder and associated behavioural issues and according to his expert testimony he considered that Matthew could benefit from this type of structured setting. He stated that Rothesay had a reputation in the medical community for assisting and dealing with individuals with learning disabilities and on this basis he recommended it to the Appellant.
>
> In this vein, I believe he was certifying or representing this school to the Appellant or vouching that this school could benefit Mattew based on the school's track record in the medical community. Of course, I do not believe he could guarantee it as an absolute cure all to the Appellant any more than he could recommend another program at another school or medication that would guarantee a resolution to Matthew's issues. [Emphasis added]
> (Reasons, at page 14, lines 1-24)

…

> I accept the expert evidence of Dr. Zelman and conclude that his recommendation of Rothesay to the Appellant qualified as his certification of the school as a positive potential for assisting in, not curing, Matthew's disabilities to enable him to develop the social and academic skills to be, as Mr. Kitchen stated, the best he can be within those limitations. [Emphasis added] (Reasons, at page 15, lines 14-21)

[22] As stated by the judge at page 13 of her reasons, there is no requirement that certification be in a particular format.

[23] However there must be true certification: one which specifies the mental or physical handicap from which the patient suffers, and the equipment, facilities or personnel that the patient requires in order to obtain the care or training needed to deal with that handicap: *Title Estate v. Canada* [2001] F.C.J. No. 530 at paragraph 5.

[24] While the judge was in a unique and privileged position to weigh the evidence before her, based on a careful review of the transcript against the standard set out in *Title Estate* above, I find no evidentiary support for her conclusion on certification.

[25] The transcript reveals the following:

- For herself, the respondent testified to the effect that she heard of Rothesay through a mutual friend (transcript, page 26, lines 4-5) and that she discussed the school with Dr. Zelman before her initial visit to the school (transcript, page 30,

lines 4-5). Finally, after viewing the school and much discussion with Ms. Turnbull [admissions officer] it was decided to enrol her son (transcript, page 31, lines 6-7).

- As for Dr. Zelman, he diagnosed the respondent's son in 1996 with Attention Deficit Disorder and suggested at that time that the child be tested for other learning issues by the School Board, school consultant or the psychologist to the School Board (transcript, page 12, lines 12-16). This was done.

- The expert witness also stated that children like the respondent's son would have great difficulty in school and was familiar with schools in the Maritimes that would be beneficial for children like the respondent's son (transcript, page 14, lines 3-4 and lines 16-18).

- Dr. Zelman discussed Rothesay with the respondent as one of the learning possibilities in Atlantic Canada (transcript, page 15, lines 1-5). He was aware of the school from its reputation, websites, conferences and discussions with other paediatricians with particular focus on development, adding that Rothesay would be one of the schools that they "certainly talk about" (transcript, page 16, lines 9-15).

[26] Finally, it is worth noting the last question that the respondent asked Dr. Zelman in direct examination and the answer:

Q. In your professional opinion, would you recommend [Rothesay] as a suitable school setting for the treatment of [my son's] learning and behaviour disorders due to the teacher/student ratio, more accessibility to teacher assistance, improved organization and study habits through daily meetings with his advisor and his Grade 12 prefect.

A. Very much so.

[27] In my view, the affirmative answer to the question "Would you recommend" does not amount to certification. Furthermore, this recommendation of Dr. Zelman with respect to Rothesay appears to have been made *ex post facto* before the Tax Court.

[28] As the record stands, I notice that Dr. Zelman did not express a formal expert opinion to the respondent at any time before her filing of the income tax return for the given year in which she claimed the tuition fees as a medical expense deduction. For the purpose of paragraph 118.2(2)(*e*) of the Act, certification is clearly a pre-condition to qualifying for a disbursement as a medical expense.

[29] At the hearing in appeal, the respondent concedes that prior to her claim she never directly asked Dr. Zelman for certification although she believes that he would have provided it had he been asked. The fact is that certification was never obtained.

**Conclusion**

[30] Therefore, I find that the judge made a palpable and overriding error in concluding that the respondent met the third and fourth requirements set out in *Collins*, *supra*, in order to be able to claim the cost of tuition as a medical expense under paragraph 118.2(2)(*e*) of the Act.

[31] I would allow the appeal, set aside the judgment of the Tax Court, and render judgment on the basis that the notice of reassessment dated November 1st, 2004 was validly issued. Since this matter came before us pursuant to the informal procedure, and the appeal is that of the Crown, the respondent is entitled to her reasonable and proper costs in accordance with section 18.25 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

"Johanne Trudel"

J.A.

“I concur
Alice Desjardins J.A.”

“I concur
Marc Noël J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
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| **DOCKET:** | A-435-07 |
| **(APPEAL FROM A DECISION OF CAMPBELL J. (2007 TCC 610) OF THE TAX COURT OF CANADA, DATED JUNE 26, 2007)** | |
| **STYLE OF CAUSE:** | Her Majesty the Queen v. Debbie Scott |
| **PLACE OF HEARING:** | Fredericton, New Brunswick |
| **DATE OF HEARING:** | September 24th, 2008 |
| **REASONS FOR JUDGMENT BY:** | Trudel J.A. |
| **CONCURRED IN BY:** | Desjardins J.A.<br>Noël J.A. |
| **DATED:** | September 26, 2008 |

**APPEARANCES:**

| | |
|---|---|
| John P. Bodurtha | FOR THE APPELLANT |
| Debbie Scott | SELF-REPRESENTED RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
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| JOHN H. SIMS, Q.C.<br>Deputy Attorney General of Canada | FOR THE APPELLANT |