Docket: 2004-2973(IT)I

BETWEEN:

CLEMENTINA C. CASTELA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 28, 2005 at Vancouver, British Columbia

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Amy Francis

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2002 taxation year is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 11th day of May 2005.

"J.E. Hershfield"

Hershfield J.

Citation: 2005TCC109
Date: 20050511
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BETWEEN:

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Appellant,

And

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Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] The Appellant, a resource teacher, appeals the Minister of National Revenue's disallowance of the education tax credit amount claimed in her 2002 taxation year pursuant to section 118.6 of the *Income Tax Act*, (the *Act*) in respect of a Masters Degree program taken by her. That section allows a tax credit for a full-time student enrolled in a qualifying educational program at a designated educational institution. The Minister's disallowance is based on the position that the program of study completed by the Appellant was connected with her teaching job and thereby not a "qualifying educational program" as defined in subsection 118.6(1).

[2] It is not necessary to set out all the requirements for eligibility for the education tax credit or even the whole definition in the *Act* of a "qualifying educational program" since it is only this one narrow aspect of this definition (that the program of study not be connected with employment) that has been put in issue. The portion of the definition in subsection 118.6(1) that addresses this issue is found in subparagraph (*b*)(ii). Under that provision an educational program is not a "qualifying educational program" if it is taken by the student during a period in which she received income from an office or employment, and the program is taken:

> (ii) in connection with, or as part of the duties of, that office or employment.

[3] If the program taken by the Appellant falls within this broad exclusionary provision then it will not be a qualifying educational program and she will not be entitled to the credit claimed.

[4] The subject program which extended over an 11-month period in the 2002 calendar year (January – July and September – December) allowed the Appellant to earn her Master of Arts in Education/Curriculum and Instruction. She attended the program on a full-time basis at the Vancouver campus of the University of Phoenix while continuing to work full-time as a resource teacher at a Burnaby District elementary school. As a teacher she earned employment income for teaching during the school year (January – July and September – December).[1] The issue then in this appeal is whether the Masters program she took was "in connection" with *that* employment. To make a finding of fact on this question requires a review of the evidence as to the nature and duties of the Appellant's employment and the nature, content, purpose and application of her program of study. The Appellant gave evidence at the hearing as to these matters as did a second witness, called by the Appellant, a teacher who had been enrolled in the same program at the same time as the Appellant.

[5] The Appellant has a Bachelor of General Studies Degree from Simon Fraser University where she majored in psychology and sociology. As well she has her professional teachers' certificate earned some 22 years ago. She has taught at several schools since qualifying as a professional teacher and has been engaged at her current work place for some seven years. As a resource teacher she deals with special needs students and ESL students. She teaches out of a separate resource room to which students from other classes come to her in small groups. In this setting I would think it fair to say that she works according to the needs of the child in the context of the program in which the child is enrolled.

[6] Nothing more need be said about the nature and duties of her employment which takes me to consider the nature, content, purpose and application of her program of study.

[7] The Appellant testified that the Masters program was unrelated to her job and that there was no direct application of program studies to her teaching job. This testimony was corroborated by the testimony of the second witness and is

[1] She did not work or earn income during July and August 2002. The Respondent conceded that the education credit for July should be allowed as the Appellant was not employed during that time.

borne out by a review of the courses taken by them. As well, the program or at least the courses offered in the program were inter-disciplinary. There were a number of courses taken that were participated in by a variety of persons including nurses and business students. Many of the courses were research oriented.[2] They are an essential part of graduate studies in general and of particular importance in formulating research proposals and carrying out the research that forms the basis for a graduate research paper.

[8] Many other courses, non-research courses, were of inter-disciplinary interest and value as well and were not necessarily related and certainly not directly related to the Appellant's teaching position. For example, the three-credit course "Lifespan Development and Learning" was taken by nurses doing post-graduate studies as well as by teachers. Such courses, which make up a great number of the credit hours required to complete the program, might be said to be related to the respective careers of the students but it would be stretching it considerably in my view to say that such courses could be said to have been taken by different professionals "in connection" with their respective jobs unless there was evidence of such connection. In the case at bar the Appellant and the second witness deny such connection and an objective analysis does not contradict their testimony.

[9] For the sake of completeness I note that there were courses taken by the Appellant that appeared more geared to her profession. Such courses included: "Cooperative Learning", "Diversity in Education", "Integrating Technology in the Classroom" and "Critical Issues in Canadian Education". While neither witness was able to give much detail on the content of these courses it can readily be said that they are related to the Appellant's chosen field of endeavour but that is not to say, and it is hard to imagine, that the academic studies associated with these courses could in any practical sense be said to be "in connection with" her job as a resource teacher at a Burnaby elementary school. The Appellant admitted the potentiality of applying theory learned in these courses but her uncontradicted testimony corroborated by the second witness was that there was nothing in these courses or in the program as a whole that would have direct application in the classroom.

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[2] Seven of fifteen courses listed on the Enrolment Agreement were research oriented courses all of which were taken by the Appellant. Their credit value was 12 of 36 credits including a research proposal and research presentation for one credit each. Of the remaining eight courses listed (having 24 credit hours), three had been substituted with courses that were not identified at the hearing.

[10] One aspect of the program however that arguably was "connected" to the Appellant's employment was the research proposal and paper required to be completed. Her Action Research Proposal and Action Research Presentation dealt with cooperative learning techniques in teaching children. While this clearly relates to her profession as an educator it arguably, in spite of her denial, might have had a direct connection to her job as an elementary school resource teacher. However, there are two reasons to suggest that that would not be determinative of whether the program as a whole was connected to her employment.

[11] Firstly, the enrolment for the degree was governed by a written contract (the Enrolment Agreement) which simply required 36 credit hours of which only two credit hours were given to the research proposal and presentation. This is such a small part of the program that it should not be regarded as having significant weight. Secondly, and importantly, I accept that even if the paper was a more relevant component of the program than reflected in the Enrolment Agreement, as an academic work geared to employing and demonstrating research skills it should be given more weight or emphasis in relation to her professional development than in relation to her job *per se*. As an academic work it reflects skills suitable to a variety to potential pursuits that require post-graduate research skills. On this point I also note that there was a letter, tendered in evidence, from the Appellant's employer confirming that the program taken by the Appellant was not related to her employment.[3] The university also wrote that the program was not a "one time job-related course". Such correspondence recognizes that programs such as this Masters Degree from an institution of higher learning is not generally offered or regarded in the market place as related to a specific job. While Respondent's counsel did not object to the introduction of these two letters as evidence they are, of course, hearsay, the authors of which were not available for cross-examination. While I would not give such correspondence determinative weight, such evidence need not be totally ignored particularly in an informal proceeding case such as this.[4]

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[3] As well I note that the Reply admits that employer had no connection to the program. The employer did not sponsor, pay for or reimburse the Appellant for the program.

[4] In informal procedure cases practical concerns over the cost to the parties of adhering to strict rules of evidence such as calling every witness who may contribute a relevant fact in order to have more reliable evidence must be weighed against the threat of not having reliable evidence when not given in accord with such strict rules. Where in any given case non-adherence does not on a balance of probability threaten the likely reliability of the evidence, such evidence can be given weight in informal procedure cases. Here the unchallenged letters are almost generic in content and to that extent seem reliable enough in the context of this case. A Masters Degree is surely not seen as "one job" specific in most circumstances by either Universities or employers.

[12] A further possible connection between the Appellant's job and the subject program is that the Appellant's salary in part is based on her education level so that she received an automatic raise on completion of the Masters Degree. The Respondent relies heavily on this connection and argues that on a proper construction of the subject provision I should not limit my analysis to determining whether there is an applied connection between the program content and the duties of the job which she argues is what the foregoing analysis does. She wants me to find that the exclusionary net cast by the subject provision is sufficiently wide to exclude the tax credit, not only where there is an incidental connection such as a salary increment, but also where there is no new career path being pursued by the student.

[13] As to the raise in salary, it is not clear on the evidence whether the recognition of the degree was dependent in this case on the degree being an "Education" degree. The Reply to the Notice of Appeal makes no such assumption yet the Respondent's position effectively is that I must presume such connection. I am not persuaded that I should make such an assumption on behalf of the Crown where it is neither pleaded nor proven. If the degree were a Masters in Space Science would the school board's pay structure still bump the Appellant's pay scale? Even if it did, would that *consequence* of having the degree mean necessarily that the program was taken in connection with her employment at the school? I think not. While her employer's recognition of a credential for compensation purposes is a result of having taken the program, that employer denies a relationship between the program and the employment which underlines the distinction. Further, the Appellant denied, and I accept her testimony, taking the program for the raise in salary that it afforded. She stated she took the program as a way of breaking away from her routines as a mother and improving her knowledge base, her education, while continuing to work, which is to underline the purely incidental and consequential nature of the salary increase. The language of the subject provision requires that the program be "taken by the student -- in connection with" her employment. While a purely subjective analysis (from the perspective of either employer or student) may not be warranted, the provision does not, nonetheless, suggest that the consequences of having taken the program are relevant as a connecting factor.

[14] Respondent's counsel argues that such narrow construction of the subject provision is not warranted. Indeed, as stated, she argues that the exclusionary provision be applied as having such wide scope as to deny the education tax credit wherever there is no new career path being pursued by the student. In arguing for

such a wide construction, Respondent's counsel relies on two points of statutory construction: one relating to narrowing the importance of connecting job "duties" with program content and the other relating to an amendment to the subject provision which is said to support a wide application of the exclusionary provision. The Appellant argues in effect that only a direct substantive connection between taking the program and the particular job (such as a direct connection with one's duties or an employer requirement to take the program) would suffice to deprive a person of the subject education tax credit and relies on the recent case of *Reiner v. The Queen*, 2004-2727(IT)I (February 10, 2005)[5].

[15] Respondent's counsel argues that the relevant provision on a plain reading makes it clear that there are two exclusionary provisions in the subparagraph cited above. One (the general exclusion) is where there is a connection between the program and the job (as opposed to a connection between the course content and the duties of employment) and the other (the specific exclusion) is where the program is taken as part of the duties of the job. She argues that a connection between course content and job requirements (duties) should not be read in as a requirement in the general exclusion (particularly since "duties" are referred to in the specific exclusion but not in the general exclusion). In the general exclusion any connection, in the broadest sense, should suffice. She relies on an oft cited passage from *Nowegijick v. The Queen*[6] where it was found that the "words in respect of" import such meanings as "in relation to", "with reference to" or "in connection with" and is probably the widest of any expression intended to convey some connection between two related subjects. Aside from that passage suggesting that "in connection with" is itself not the widest of expressions, that passage does not deal with any contextual implications of the use of the expression such as might have to be considered where the context is one subject matter being "taken -- in connection with" another potentially related subject matter. The only real connection here between the program in the case at bar and the job is the potential for the Appellant to bring to bare to her work in the classroom a more learned mind. The subject provision of the *Act* does not speak of such potential connections. It speaks rather, in my view, of an actual connection. Many academic programs have potential utility in a variety of job settings. That potentiality does not establish a connection between the taking of such program and a particular job – even a job engaged in concurrently with the taking of the program. Where taking

[5] Respondent's counsel provided this case to the Court and the Appellant in a submission made after the hearing of the appeal.

[6] 83 DTC 5041 at p. 5045 (SCC).

the program "connects" principally with something other than the job *per se* without direct and material application to the duties of employment, the connection required to deny the tax credit does not, in my view, exist.

[16] Without belabouring the point further, there is nothing, in my view, in the employment of the expression "in connection with" in the subject provision that supports a finding that the widest of connecting factors be considered as sufficient to deny an education tax credit to a student advancing his/her professional education even while employed in that profession. As simply put in *Reiner* by Justice Beaubier at paragraph 11 in virtually indistinguishable circumstances: "-- the program was not part of her duties of her employment. Nor was it in connection with her duties of employment. Rather, it was in connection with her profession." In that case as in the present case, the connection was between the program and the profession of the student, not between the program and the particular employment of the student in that profession. The indirect or incidental connection between the employment and the program (including a consequential pay raise) was not found relevant or sufficient and I agree with that conclusion. On the other hand, I would add to the principles contained in *Reiner* that where the program or program content has direct and material application to the student's employment duties, a finding that the taking of it is connected to that employment may be warranted even if the program is "profession" connected.

[17] Respondent's counsel argues that I should distinguish *Reiner* or not apply it. Respondent's counsel argues that unlike *Reiner*, there is evidence in the case at bar that program content was connected to the Appellant's job. That I have seemingly scrutinized program content more rigorously than done in *Reiner* does not change the fact that my findings, in light of such scrutiny, are that in the case at bar the program was taken for personal and professional development and that the program content was primarily related or connected to that and not materially related to her job. Accordingly, the cases should not be distinguished on the basis of program content.

[18] Respondent's counsel also argues that any professional, such as a teacher, could assert that an educational program is for professional advancement or development and thereby effectively render the general exclusionary provision meaningless or selectively applicable to non-professionals. She argues some effect must be given to the subject provision and that it cannot be construed so as to be meaningless. Clearly, there are connecting factors or circumstances that can be identified to give the general exclusionary provision meaning – a meaning that is consistent with the language of the provision and its apparent purpose as gleaned

from that language. One such circumstance is where the program content has direct and material application to one's employment duties whether the student is a professional or not.[7] That was apparently not the case in *Reiner* and is not the case in the present appeal. In any event, the provision as written has meaning without trying to expand it by finding general, loose, incidental, indirect, or potential connections between a program and one's job so as to deny the benefit of the education tax credit to persons like the Appellant who have sought, while working, to improve their standing in life by pursuing a new or revived interest in a post-graduate education.

[19] I also note that *Reiner* does not consider Respondent counsel's second argument made to support the position that the general exclusionary provision be applied on a broad basis so as to deny the education tax credit wherever there is any connection between the program and the employment (incidental or otherwise) or wherever there is no new career path being pursued by the student. That argument relates to an amendment to the subject provision introduced in March 2004.

[20] The amendment relied on by Respondent's counsel was contained in the 2004 Federal Budget which included the following resolution:

> That, for the 2004 and subsequent taxation years, a qualifying educational program for the purpose of the education tax credit include an otherwise eligible program that an individual takes in connection with, or as part of, the duties of an office or employment.

[21] The Supplementary Information distributed with the Federal Budget materials on March 23, 2004 contained the following comment:

> The education tax credit cannot currently be claimed by students who pursue post-secondary education that is related to their current employment [due to 118.6(1) "qualifying educational program" (b) — ed.]. In order to facilitate the pursuit of job-related lifelong learning, the Budget proposes to remove this restriction provided that no part of the costs of education is reimbursed by the employer.

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[7] I note here the distinction between the general and specific exclusionary provisions. An employer might offer, or require an employee to take, an educational program or credit work time for program hours. These connecting factors may be caught by the specific exclusionary provision as in such cases taking the program could well be "part of" the student's duties of employment. But finding a special value, usefulness or application of program content to one's employment duties, does not fit the specific exclusion provision. However, finding a material special value, usefulness or application of program content to one's employment duties may be very relevant to the application of the general exclusionary provision.

[22] The resolution is suggested by counsel for the Respondent as effecting a change in policy effective in 2004 and subsequent taxation years and should, taken with the Supplementary Information commentary, underline that in prior years the legislative intent was restrictive and narrowed the availability of the education tax credit by precluding "job-related lifelong learning programs". If the Supplementary Information commentary had legislative effect, Respondent's counsel would be correct but it does not and I do not embrace the position that it be applied as determinative or even persuasive of the legislative purpose of the exclusionary provision being considered in this appeal. More importantly, resort to such external aids to interpretation should only be made where there is an ambiguity in the legislation and counsel for the Respondent has not argued that the subject provision was ambiguous. Indeed she asserted that the provision was not ambiguous[8] and I concur with that view. Importantly as well I note that the *Interpretation Act* of Canada at section 45 states that an amendment of an enactment shall not be deemed to be or to involve any declaration as to the previous state of the law. The amendment is far reaching and will eliminate the need to draw the distinctions drawn in this analysis. Employer required programs and programs with content materially connected to a job will no longer be denied the education tax credit provided the cost of the program is not borne by the employer. The new provision is reflective of a parliamentary attitude consistent with the narrow construction of the former exclusionary provision dictated by the express and unambiguous language of the former provision and if there is any uncertainty or ambiguity as to that, the benefit of the uncertainty goes to the taxpayer.[9]

[23] Accordingly and for all these reasons the appeal is allowed with costs.

Signed at Ottawa, Canada, this 11th day of May 2005.

"J.E. Hershfield"

[8] Paragraph 12 of Respondent's Supplementary Written Argument.

[9] See *Johns-Manville Canada Inc. v. The Queen*, 85 DTC 5373 (S.C.C.) and *Corporation Notre-Dame de Bon-Secours v. Communauté Urbaine de Québec and City of Québec et al.*, (1994) 3 S.C.R. 3.

Hershfield J.

CITATION:	2005TCC109
COURT FILE NO.:	2004-2973(IT)I
STYLE OF CAUSE:	Clementina C. Castela and Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 28, 2005
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF JUDGMENT:	May 11, 2005

APPEARANCES:

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