Docket: 2006-1072(IT)I

BETWEEN:

ANNETTE MALECEK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 20, 2007, at Vancouver, British Columbia, by
The Honourable Justice C.H. McArthur

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Pavanjit Mahil

JUDGMENT

The appeals from assessments of tax made under the *Income Tax Act* for the 2002 and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 16th day of May, 2007.

"C.H. McArthur"

McArthur J.

Citation: 2007TCC271
Date: 20070516
Docket: 2006-1072(IT)I

BETWEEN:

ANNETTE MALECEK,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] These appeals for the 2002 and 2003 taxation years are from assessments by the Minister of National Revenue (the Minister) reducing Annette Malecek's (the Appellant) claimed deductions for child tax expenses in 2002 from $7,901 to $2,161 and in 2003 from $7,904 to $924. The issue boils down to the interpretation of subsections 63(1) and (3) as they apply to the facts as I find them.

[2] During the relevant years, the Appellant was married to a professional; and in 2002 her three boys were 10, 8 and 6 years old. Apart from being a busy mother, she had full-time employment outside the home. Her annual income was approximately $35,000. She is an articulate and intelligent lady who is devoted to the upbringing of her three boys. Her work was demanding although her employer gave her flexibility to come and go from the office as needed provided that her office workload was completed in a timely manner. This required her at times to return to the office on weekends.

[3] The Appellant was the only witness. She testified that her husband's work took him out of town frequently, obliging them to find suitable care for their

children. In her application for an extension of time to institute an appeal, she stated:

> … I work five days a week, my husband and I coach three hockey teams and manage one team. I have been general contracting a 2000 square foot addition to my residence since the beginning of last August; now we have taken on all remaining aspects of the construction to completion and spend all extra time building. As well I have recently been involved in a small claims matter which has required seven court dates and many hours of work. Currently I co-coach a little league majors baseball team as well. So.. it has been perhaps a simple case of overlooking dates due to schedule.[1]

[4] In computing her income, the Minister refused the deduction of the following expenses:

2002 Taxation Year

Activity	Claimed by Appellant	Allowed by MNR	Denied by MNR
NSMH (Hockey)	$1,684		$1,684
RRS (Consent)	275		275
B.C. Boys Choir	225		225
L.V. Little League	264		264
David Borys	980	980	
Allegro School of Music	1,290		1,290
NV Recreation Commision	318	318	
Ice Sports North Shore	182		182
22nd Seymour Scouts	412		412
Andrea Milner	735	735	
Marna Leiren	1,140		1,140
Extreme Sports Club	396		396
In-Line Hockey Camp[2]		128	
TOTAL	7,901	2,161	5,868

2003 Taxation Year

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[1] This was not entered in evidence and when there was a conflict in evidence, I accepted her direct testimony.

[2] The activities are identified on the penultimate page of the Reply to the Notice of Appeal as Schedule A.

Activity	Claimed by Appellant	Allowed by MNR	Denied by MNR
BC Orff Chapter	$25		$25
Ross Road School	156		156
WV Yacht Club	320		320
Allegro School of Music	2,280		2,280
NS Winter Club	477		477
LV Little League	170		170
NV Minor Hockey League	1,484.86		1,484.86
Gymnastic BC	97		97
Andrea Milner	128	128	
David Borys	701	546	155
22nd Seymour Scouts	575		575
Canian Ice Sports	1,120.80		1,120.80
After School Arts with Shannon Brown	250	250	
Katrina Jones[3]	120		120
TOTAL	7,904.66	924	6,980.66

[5] These activities occupied the children for periods of one hour (Allegro School of Music) to occasionally, entire weekends, (22nd Seymour Scouts). Most activities were seasonal and only a few accommodated all three children at the same time. They normally took place after school and on weekends. The Appellant considers that they all have an educational value and were not simply the warehousing of their children.[4]

[6] The Appellant's primary submission is that all the claimed costs were "child care expenses" as defined by paragraph 63(3)*(a)* because they provided care for her children and enabled her "to perform the duties of an office or employment". The Minister's position included that (i) the expenses in excess of those allowed by the Minister were not incurred or were for activities that were recreational in nature; and (ii) expenses in excess of those allowed by the Minister were not paid in respect of services provided to enable the Appellant to earn income.

[7] Subsection 63(3) states:

> 63(3) In this section,

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[3] These activities are identified on the last page of the Reply to the Notice of Appeal as Schedule B.

[4] Warehousing of their children was the term used by the Appellant to describe a non-educational child care service.

> "child care expense" means an expense incurred in a taxation year for the purpose of providing in Canada, for an eligible child of a taxpayer, child care services including baby sitting services, day nursery services or services provided at a boarding school or camp if the services were provided
>
> *(a)* to enable the taxpayer, or the supporting person of the child for the year, who resided with the child at the time the expense was incurred,
>
> (i) to perform the duties of an office or employment
>
> …
>
> except that
>
> *(c)* any such expenses paid in the year for a child's attendance at a boarding school or camp to the extent that the total of those expenses exceeds the product obtained when the periodic child care expense amount in respect of the child for the year is multiplied by the number of weeks in the year during which the child attended the school or camp, and
>
> *(d)* for greater certainty, any expenses described in subsection 118.2(2) and any other expenses that are paid for medical or hospital care, clothing, transportation or education or for board and lodging, except as otherwise expressly provided in this definition,
>
> are not child care expenses;

[8] The Minister's counsel fairly presented case law that appears to present two separate schools of thought. The first of these arises in *Levine v. Canada*,[5] where Justice Archambault found that expenses for ballet lessons, swimming, visual arts, tennis, skiing, skating and gymnastics were not incurred for the purpose of watching over children to protect them. He found that they were incurred to develop the physical, social and artistic abilities of the children and were not "child care expenses" within the meaning of paragraph 63(3)*(a)*.

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5 [1995] TCJ No. 1487.

[9] The reasoning in *Levine* was followed in *Keefer v. Canada*,[6] where Rowe J. supported this approach stating:

> There is no doubt that it makes very good sense to be able to do two things at once: your kids there so you can do this. But, it is the limiting wording of the Act here, first of all care, child care, babysitting, day nursery services, services provided, boarding school, camp. Even without going back to the technical notes or the debates in Parliament and so on, what leaps out at you is the guardianship, the protection aspect of it. Then, when you look further, as Judge Archambault did in the Levine case, it is clear the intent of Parliament was that the recreational expenses, if that is the overwhelming component, would not, in fact, be included in Section 63. And when one, then, looks at the intention of Parliament, it is clear that it never intended for the type of expenses incurred by Ms. Keefer here to be deductible or it would, in fact, have said so.
>
> …
>
> Certainly, the language of the section might initially permit the interpretation placed on it by the Appellant but an examination of the decision of Judge Archambault, albeit not specifically binding upon me, clearly indicates that is the conclusion I would have come to, in somewhat lesser examination than Judge Archambault, but what is required and desired by Parliament is that the expenses be expenses, under carefully controlled terms, relating to the overwhelming component of guardianship, protection and child care. Had Parliament meant it to be broadened to include the type of expense claimed here by the Appellant, Parliament would have said so.

[10] In *Keefer*, the expense claimed was for children's riding lessons. Rowe J. reiterated his opinion in *Sykes v. Canada*[7] stating:

> I concur with the comments of Judge Archambault and there are other decisions also on point. In my view it is regrettable that the particular provision of the *Act* is so restrictive that I can see no other way of interpreting it as it is currently written. The overarching purpose is to permit the parent to generate income while someone else is looking after the child. However, for that to occur for the type of activities carried out here, in my view, there is going to have to be an amendment to the *Act*.

[11] In *Bell v. Canada*,[8] Campbell J. agreed with the decisions in *Levine* and *Keefer*. At page 3 she stated:

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6 [1999] TCJ No. 939.

7 [2000] TCJ No. 935.

8 [2000] TCJ No. 844.

> I agree with the conclusions reached in both Keefer and Levine that Parliament never intended for the type of expenses as presented in this case to be eligible for deduction as child care expenses. The activities here are related very clearly to developing the physical, social and artistic abilities of the children.

The facts in *Bell* are not unlike those in the present case. Both Mr. and Mrs. Bell worked. Mr. Bell sought to deduct expenses for programs that included soccer, swimming, baseball and science club on the basis that he and his wife were able to work while their children participated in these activities. Campbell J. concluded these recreational activities did not qualify as child care expenses as they did not have the primary goal of providing care for the children. Bell's use of his time when the children were engaged in the activities was not a factor in deciding the characterization of the activities.

[12] The second school of thought or interpretation of subsection 63(3) is found in *Jones v. Canada*.[9] Upon agreeing with the purpose and interpretation of the legislation set out in *Bailey v. R*,[10] Woods J. found that the main purpose in *Jones* was to provide child care after school gym classes to permit Ms. Jones to perform her employment duties and the expense for the school gym classes was allowed. I believe the decisions in *Levine* and *Jones* are diametrically opposed. I accept the reasoning in *Levine* as followed in *Keefer*, *Sykes* and *Bell*. The conclusion in *Levine* is that recreational activities do not qualify under paragraph 63(3)*(a)* because they did not provide as their primary purpose "child care services including baby sitting services, day nursery services or services provided at a boarding school or camp". Woods J. found that the key words in paragraph 63(3)*(a)* were "… to enable the taxpayer … to perform the duties of an office or employment".

[13] She found support for this position in *Bailey*, where the Minister argued that the services provided by a private school were educational and were excluded in the definition of "child care expense". At page 675, Rip J. defined the intent of paragraph 63(3):

> 13 The legislative intent in enacting this provision was to assist parents who work by subsidizing child care expenses in the form of a deduction. Given that goal, it is difficult to accept the Minister's conclusion that any expense related to

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9 [2006] TCJ No. 385.

10 2005 DTC 673.

> looking after the child of a working parent should be denied solely because it included an educative element. Such an interpretation would clearly undermine the intent of the Parliament for it would likely exclude all types of child care expenses, especially those in respect of a young child; for to a young child almost all positive interaction serves as education -- be it through discipline, television shows, stories or games.

[14] The main thrust of the *Bailey* decision is that the relevant question is what was the taxpayer's primary reason for enrolling the child in the educational institution? Rip J. found as a fact that Mrs. Bailey had the option between a previous daycare ($5,000) which clearly was deductible under paragraph 63(3)*(a)* or an academy ($4,000). He concluded that her primary reason was for reasonably priced child care services and any education received was an incidental benefit. I agree with this finding which deals with child care services in an educational institution. In the present case, the children were enrolled in activities that were not educational institutions and I am not in any way satisfied that she enrolled her children for child care services to enable her to perform the duties of employment. The activities were not primarily educational and most were sport or music related;[11] and they were held outside of regular school hours. The Appellant and her husband often coached or assisted in supervision of the children's activities. The Appellant had three boys of different ages. Rarely did the three participate in the same activity at the same time. There was no specific evidence that all three boys were occupied by these activities at the same time permitting her to work. They all attended school on a full-time basis. It is not the school expense that is in question, as in *Bailey*. Even if I were satisfied as in *Bailey* that these activities were a child care service, I am unable to conclude that the activities were provided to enable the Appellant to perform her office duties. Her evidence in this regard was general in nature and uncorroborated.

[15] Upon review of *Levine*, *Keefer*, *Sykes*, *Bell*, *Bailey* and *Jones*, I accept the reasoning and decision in *Bailey* as it is limited to its particular facts. I agree with those decisions that concluded that it is stretching the legislation too far to include predominantly recreational activity expenses.

[16] Certainly there is an educational element and a child care element in all the activities for which the Appellant seeks a deduction but from reading the plain ordinary words of the legislation it is clear that the type of expenses incurred here are not deductible under subsection 63(3) or the legislature would have said so. I

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[11] They include hockey, choir, baseball, music, recreation, ice sports, scouts, extreme sports, in-line hockey and sailing.

must be guided by the actual interpretation of the statute as it is written and not as I think it should be written, which is up to Parliament.

[17] The appeals are dismissed.

Signed at Ottawa, Canada, this 16th day of May, 2007.

"C.H. McArthur"

McArthur J.

CITATION:	2007TCC271
COURT FILE NO.:	2006-1072(IT)I
STYLE OF CAUSE:	Annette Malecek and Her Majesty the Queen
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REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
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APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Pavanjit Mahil

COUNSEL OF RECORD:

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