Docket: 2006-3169(IT)I

BETWEEN:

MARIE ESTHER LOUISE CHEVALIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 29, 2007, at Montreal, Quebec.
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Scott L. Simser
Counsel for the Respondent:	Jade Boucher and Marie-Claude Boisvert, Student-at-Law

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the Partial Agreed Statement of Facts signed by the parties on July 19, 2007, and in which the Minister accepted medical expenses of $3,253.74. This results in a medical tax credit of $244 [($3,253 - 1,728) x 16%]; the interest shall be adjusted in consequence.

Signed at Ottawa, Canada, this 7th day of January, 2008.

"Paul Bédard"

Bédard J.

Citation: 2008TCC11
Date: 20080107
Docket: 2006-3169(IT)I

BETWEEN:

MARIE ESTHER LOUISE CHEVALIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

I. INTRODUCTION

[1] This is an appeal under the informal procedure for the 2002 taxation year. The Appellant, Marie Esther Louise Chevalier claimed the medical expense tax credit for the cost of organic products and foods as well as for services provided by a naturopath and an osteopath. The Minister of National Revenue ("Minister") disallowed the medical expenses so claimed on the ground that they did not fall within the scope of subsection 118.2(2) of the *Income Tax Act* ("*Act*").[1] Consequently, the Appellant is challenging the constitutional validity of subsection 118.2(2) of the *Act* on the basis that it infringes subsection 15(1) of the *Canadian Charter of Rights and Freedoms (*"Charter"*)*[2].

[1] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).
[2] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

II. FACTS

[2] The Appellant is 56 years of age and resides in Saint-Charles-Borromée in the province of Quebec. She served in the Canadian Forces ("Forces") from 1973 until 1989 as an aerospace engineer.

[3] The Appellant testified that she started experiencing severe health problems in 1978. With the deterioration of her health, she was forced to leave the Forces in 1989. Consequently, she went through a period of financial hardship until 2000, when the Forces finally recognized the precarious state of her health and granted her a pension on a retroactive basis.

[4] The Appellant consulted a number of doctors and was diagnosed as suffering from chronic fatigue syndrome. Furthermore, she testified that she has severe sensitivities to food, drinks and even to clothing. She testified that she reacts severely to chemicals in food as well as to natural foods such as meat, conventional bread, potatoes and beets. In addition, she testified that she is intolerant to gluten and lactose. These sensitivities confine her diet to organic foods and she can only wear clothing made from 100% natural fibres, such as wool, cotton or silk. Furthermore, she must use a purifier for her water, both for drinking and for cooking. She also indicated at trial that she was sensitive to everyday household cleaning products and therefore uses natural substances such as borax and citric acid to clean her house.

[5] The Appellant testified that she reacts strongly to pharmaceutical products and consequently turned to natural remedies. Moreover, in an attempt to relax her muscles, she uses the services of a naturopath and an osteopath.

[6] The Appellant testified that due to her illness she is easily fatigued by performing any minor task, such as cooking, cleaning or simply writing a cheque. Furthermore, she testified that if she did not follow a strict natural diet her brain would become severely irritated, which would then incapacitate her physically and mentally. Although the Respondent accepted the fact that the Appellant suffers from chronic fatigue syndrome, no expert evidence was presented at trial as to the symptoms of that illness.

[7] The parties have partially agreed on certain facts. Among other things, they have agreed that, for the purpose of computing her medical expense tax credit for the taxation year at issue, the Appellant claimed medical expenses in the amount of $18,252.79. This includes expenses of $3,253.74 conceded to be medical expenses by the Minister. As indicated by the parties in the Partial Agreed Statement of Facts, the following items remain at issue:

Item	Total expenses claimed by the Appellant ($)	Less medical expenses ($)	Less insurance reimbursement ($) 118.2(3) ITA	Less expenses conceded by the Appellant ($)	Total in issue ($)
Therapists, water purification unit	5,380.66	3,253.74	461.08	6.34	1,659.50
Organic products and food	11,995.39	0	0	5,665.28	6,330.11
Products for personal and house hygiene	1,653.63	0	0	0	1,653.63
Natural supplements	799.19	0	0	0	799.19
TOTAL					**10,442.43**

The parties further explained the nature of the amounts claimed by the Appellant, and the expenses left to be decided by this Court are as follows:

(i) $990.00 in expenses paid for osteopathic treatments;
(ii) $375.00 in expenses paid for naturopathic treatments;
(iii) $294.50 in expenses paid for organic herbal products bought from a herbalist and naturopath.
(iv) $6,330.11 representing expenses paid with respect to the “incremental cost” of acquiring organic products and foods;
(v) $1,653.63 in expenses for personal and household hygiene products, and;
(vi) $799.19 in expenses for natural supplements.

III. ISSUES TO BE DECIDED

[8] The following questions have been raised by the parties and need to be answered by this Court:

1. Are the products and services costs claimed by the Appellant medical expenses under subsection 118.2(2) of the *Act*?

2. Does subsection 118.2(2) of the *Act* violate section 15 of the *Charter* by discriminating against the Appellant?

3. If subsection 118.2(2) of the *Act* violates section 15 of the *Charter*, is that subsection saved by section 1 of the *Charter* as demonstrably justifiable in a free and democratic society?

4. Does the Tax Court of Canada have jurisdiction to issue declarations and grant, under section 52 of the *Constitution Act, 1982*, remedies consisting in reading up, reading down or severing invalid legislation, specifically the impugned provision of the *Act*?

ISSUE 1

[9] Are the products and services costs claimed by the Appellant medical expenses under subsection 118.2(2) of the *Act*?

[10] Although the Appellant bases her argument on a *Charter* violation, it is nonetheless important to examine first whether or not any of the expenses at issue fall within the scope of subsection 118.2(2) as it read in 2002. If such proves to be the case, a *Charter* analysis will become futile. Furthermore, this issue was brought forward by the Respondent in her written arguments. In order to answer this first question, it is necessary to differentiate between the expenses incurred for medical services and those incurred for medication products. The latter will be examined next.

[11] Paragraph 118.2(2)(*n*) of the *Act* provides as follows:

> **(2) Medical expenses** - For the purposes of subsection (1), a medical expense of an individual is an amount paid
>
> **(*n*) [drugs]** - for drugs, medicaments or other preparations or substances (other than those described in paragraph (*k*)) manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist;[3] [Emphasis added]

[12] This statutory provision enumerates three specific requirements to be met in order for medication or other therapeutic substances to qualify as medical expenses. Under these requirements the said products must:

(i) be manufactured, sold or represented for use either

a. in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state or the symptoms thereof, or

b. in restoring, correcting or modifying an organic function;

(ii) be prescribed by a medical practitioner;

(iii) be recorded by a pharmacist.

[13] This is not the first time that this Court has had to determine whether alternative medical products qualify as medical expenses under subsection 118.2(2) of the *Act*. On the contrary, the case law is quite extensive and dictates a clear and concise approach to the interpretation of this provision[4]. In the case at bar, the issue revolves around the third requirement of the test, namely whether the product was "recorded by a pharmacist". In *Ray v. R.*[5], the Federal Court of Appeal unanimously clarified the meaning of the words "recorded by a pharmacist" by stating:

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[3] *Supra* note 1 at s. 118.2(2)(*n*).
[4] *The leading case is Ray v. R.*, [2004] 2 C.T.C. 40 (F.C.A.). Prior to Ray the same approach was taken in *William v. R.*, [1998] 1 C.T.C. 2813; *Banman v. R.*, [2001] 2 C.T.C. 2111; *Pagnotta v. R.*, [2001] 4 C.T.C. 2613; *Melnychuk v. R.*, [2002] 2 C.T.C. 2389; *Lundrigan v. R.*, [2002] 2 C.T.C. 2928; *Lajeunesse-Lebel v. R.*, [2003] 4 C.T.C. 2765; more recently Ray was followed in *Lewis v. R.*, [2004] 2 C.T.C. 3067; in *Herzig v. R.*, [2004] 3 C.T.C. 2496, and also in *Bekker v. R.*, [2004] 3 C.T.C 183 (F.C.A.).
[5] [2004] 2 C.T.C. 40 (F.C.A.).

> In my view, it is reasonable to infer that the recording requirement in paragraph 118.2(2)(*n*) is intended to ensure that tax relief is not available for the cost of medications purchased off the shelf. There are laws throughout Canada that govern the practice of pharmacy. Although the laws are not identical for each province and territory, they have common features. Generally, they prohibit a pharmacist from dispensing certain medications without a medical prescription, and they describe the records that a pharmacist is required to keep for medications dispensed by prescription, including information that identifies the prescribing person and the patient. There is no evidence that pharmacists anywhere in Canada are required to keep such records for the substances in issue in this case.
>
> I cannot accept the suggestion that, in the case of a medication that is prescribed by a physician but is purchased at a pharmacy off the shelf, a sales slip or invoice from the pharmacist would be a sufficient "recording" to meet the statutory requirement. A record in that form cannot meet the apparent function of the recording requirement. There must be a record kept by the pharmacist in his or her capacity as pharmacist. That necessarily excludes substances, however useful or beneficial, that are purchased off the shelf.[6] [Emphasis added]

[14] As indicated by Associate Chief Justice Bowman (as he then was) in *Herzig v. R.*,[7] this requirement leads to the conclusion that only prescription medicines qualify. *Herzig* is a similar case to this one insofar as the taxpayer resorted to alternative medicines and products for valid health reasons. However, in light of the *Ray* decision, the Tax Court judge had no other choice than to dismiss the appeal. In addition, *Ray* was followed by the Federal Court of Appeal in a subsequent decision, *Bekker v. R.*[8]

[15] At trial, the Appellant acknowledged that the organic products and foods were not purchased at a pharmacy and were not recorded by a pharmacist. She testified that she bought them either directly from a farm or from a health food store. It is evident that the amount of $6,330.11 claimed as medical expenses for organic products and foods fails to meet the statutory requirements of subsection 118.2(2) of the *Act*. Furthermore, the expenses in the amount of $1,653.63 claimed for personal and household hygiene products are also disqualified. Some of these products were bought from a specialized store and not from a pharmacy. Although others were bought in a pharmacy, they were not recorded by a pharmacist as they were products that are available off the shelf and without a prescription. In addition, the Appellant testified that all of the natural supplements, for which she claimed $799.19, were

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[6] *Ibid.* at paras. 12-13.
[7] [2004] 3 C.T.C. 2496, at para. 9.
[8] [2004] 3 C.T.C. 183.

bought at a health food store and not a pharmacy. As a result, these expenses cannot be claimed as medical expenses in accordance with subsection 118.2(2) of the *Act*. The same applies to the organic herbal products bought from a herbalist and naturopath, for which the Appellant claims $294.50. In summary, none of the expenses claimed by the Appellant for medical products meet the requirements set out in paragraph 118.2(2)(*n*) of the *Act.*

[16] I will now examine the amounts claimed for medical services, in particular, the expenses of $990.00 and $375.00 paid for osteopathic and naturopathic treatments respectively. Paragraph 118.2(2)(*a*) of the *Act* reads as follows:

> **(2) Medical expenses** - For the purposes of subsection (1), a medical expense of an individual is an amount paid
>
> **(*a*) [medical and dental services]** - to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to a person (in this subsection referred to as the "patient") who is the individual, the individual's spouse or common-law partner or a dependant of the individual (within the meaning assigned by subsection 118(6)) in the taxation year in which the expense was incurred.[9]

[17] Furthermore, subsection 118.4(2) defines a "medical practitioner" as:

> **(2) Reference to medical practitioners, etc.** - For the purposes of sections 63, 118.2, 118.3 and 118.6, a reference to an audiologist, dentist, medical doctor, medical practitioner, nurse, occupational therapist, optometrist, pharmacist, psychologist, or speech-language pathologist is a reference to a person authorized to practise as such,
>
> **(*a*)** where the reference is used in respect of a service rendered to a taxpayer, pursuant to the laws of the jurisdiction in which the service is rendered. . .[10]

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[9] *Supra* note 1 at s. 118.2(2)(*a*).
[10] *Ibid.* at s. 118.4(2).

[18] These provisions require the Appellant to show that the cost of the medical services has been paid to a medical practitioner authorized to practise his or her profession pursuant to the laws of Quebec. Under Quebec legislation, naturopaths and osteopaths are not recognized medical practitioners.[11] The Appellant testified that there was no discernible distinction between the osteopathic and physiotherapy treatments, which were provided by the same therapist, namely, Ms. Marie-France Roy Gaudet. Thus, the Appellant argues that since physiotherapists are recognized medical practitioners in the province of Quebec, the $990.00 paid to Ms. Roy Gaudet for osteopathic treatments should be allowed. I disagree with this reasoning. The receipts for the $990.00 show that they were issued specifically for osteopathic treatments. As a result, the medical expenses claimed by the Appellant for osteopathic treatments provided by Marie-France Roy Gaudet fail to comply with the statutory provisions of the *Act* and must be disallowed. This is in accordance with previous decisions of this Court. For example, in *Davar v. R.*[12] the Appellant suffered from severe allergies and sought alternative treatments, including the services from a naturopath. Justice Miller disallowed the appeal on the basis that the services did not meet the requirements of paragraph 118.4(2)(*a*) of the *Act*. He further commented regarding the medical expense tax credit provision:

> . . . While this Court has interpreted these laws liberally and compassionately, the Court cannot turn a blind eye to the real and exact meaning of the law, no matter how unfair the taxpayer believes it to be. . .
>
> Sometimes the law leads society in a certain direction, but often times societal behaviour leads the law. In the case of medical expenses, it is a matter of the law eventually catching up to society's behaviour and I am hopeful the legislators will do that. . . .[13]

[19] Unfortunately, the law has not yet caught up to societal behaviour. Nevertheless, I too cannot turn a blind eye to the real meaning of the law. Since the Appellant's expenses were not paid to a medical practitioner, they cannot be medical expenses. Thus, none of the expenses claimed – neither those for medical services nor medical products – qualify as medical expenses pursuant to subsection 118.2(2) of the *Act.* I will therefore move on to the second issue.

ISSUE 2

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[11] Medical Act, R.S.Q., c. M-9, at ss. 1 & 31.
[12] [2006] 1 C.T.C. 2155.
[13] *Ibid*. at paras. 6 & 8.

[20] Does subsection 118.2(2) of the *Act* violate section 15 of the *Charter* by discriminating against the Appellant?

[21] This is the crux of the Appellant's argument and constitutes the main issue to be determined in the present appeal. The Appellant submits that subsection 118.2(2) of the *Act*, considered in its entirety, violates section 15 of the *Charter*. Section 15 of the *Charter* guarantees the Appellant's right to equality and reads as follows:

> **15. (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> **(2)** Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[14]

[22] Section 19.2 of the *Tax Court of Canada Act*[15] requires the claimant to serve notice on the Attorney General of Canada and the attorney general of each province at least ten days before the constitutional question is to be debated. This procedural requirement has been fulfilled by the Appellant and the constitutional question can therefore be examined by this Court.[16]

[23] The Appellant argues that subsection 118.2(2) of the *Act* was drafted in order to assist all persons with disabilities. Furthermore, she submits that, as presently drafted, subsection 118.2(2) fails to take into consideration her needs for a special diet, while reducing the tax burden of virtually all other disabled persons. In other words, she claims that she is being excluded from the medical expense tax credit scheme on the basis of her disability. Section 118.2 of the *Act* is reproduced in an appendix hereto along with section 5700 of the *Income Tax Regulations*, which pertains to certain devices and equipment qualifying under paragraph 118.2(2)(*m*).

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[14] *Supra* note 2 at s. 15.
[15] *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.
[16] *Bekker*, *supra* note 8.

[24] In *Law v. Canada (Minister of Employment and Immigration)*,[17] the Supreme Court of Canada established a three-part test to be used in a determination regarding a section 15 *Charter* violation. That Court stated:

> . . . Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[18]

[25] It is important to keep in mind that the above test is to be seen only as a guideline for analysis. It goes without saying that the test should not be mechanically applied but, as indicated by the Supreme Court of Canada, the analysis must be purposive and contextual.[19] This was further emphasized by the Supreme Court of Canada in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,[20] a case in which that Court had to determine if the government of British Columbia had infringed subsection 15(1) of the *Charter* by failing to fund specific treatment for autistic children. It concluded that the benefit claimed – funding for all medically required treatment – is not provided by law and there exists no obligation for the provincial government to fund all medically required treatments. As a result, a violation of subsection 15(1) could not be found to exist. The analytical framework used in *Auton* can be of assistance in the case at bar. Accordingly, the first question to be determined is as follows:

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[17] [1999] 1 S.C.R. 497.
[18] *Ibid.* at para. 88.
[19] *Ibid.* at para. 6.
[20] [2004] 3 S.C.R. 657.

Is the claim for a benefit provided by law?

[26] The Supreme Court in *Auton* explained, at paragraph 27:

> In order to succeed, the claimants must show unequal treatment under the law — more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens "of the law". Combatting discrimination and ameliorating the position of members of disadvantaged groups is a formidable task and demands a multi-pronged response. Section 15(1) is part of that response. Section 15(2)'s exemption for affirmative action programs is another prong of the response. Beyond these lie a host of initiatives that governments, organizations and individuals can undertake to ameliorate the position of members of disadvantaged groups.[21] [Emphasis added]

[27] Before answering the question whether or not there is a benefit provided by law, it is necessary to establish what benefits the Appellant is claiming. The Appellant asks that the following medical products and services qualify for the medical tax credit:

> *. . . on behalf of the patient who has fibromyaglia [sic], chronic fatigue syndrome, or multiple chemical sensitivities,*
>
> **VII.** *vitamins and natural supplements,*
>
> **VIII.** *specialty personal hygiene, household cleaning, and skin care products that are free of synthetic chemicals,*
>
> **IX.** *homeopathic products,*
>
> **X.** *bottled and chemical-free water,*
>
> **XI.** *naturopathic services, and*

[21] *Ibid*. at para. 27.

> **XII.** *the incremental cost of acquiring organic food products as compared to the cost of comparable non-organic food products,*
>
> *if the patient has been certified in writing by a medical practitioner to be a person who, because of that disease, requires such items.*[22]

[28] The Appellant submits that the benefit provided by law is established by the application of subsection 118.2(2) of the *Act*. The Appellant argues that subsection 118.2(2) is designed to cover all persons with disabilities. More precisely, the Appellant contends that the medical tax credit is "*intended to alleviate the tax burden of an individual who incurs high medical expenses and otherwise incurs sufficient tax payable in order to benefit from the medical expense tax credit. Thus, there is a definite benefit provided to the individual since it lowers one's tax payable, and can be a significant tax saving.*"[23] In other words, the Appellant claims that all individuals who incur high medical expenses benefit from the tax credit, if their income is high enough. According to the Appellant, the unequal treatment lies in allowing the medical expense tax credit for individuals incurring high medical expenses, while denying it to individuals who suffer from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities and who incur expenses for vitamins, osteopathy, organic food, specialty creams and soaps, supplements, and sanitary products.

[29] This raises the question of whether the legislative scheme created by the medical expense tax credit provision in fact allows an alleviation of the tax burden for all individuals who incur high medical expenses and otherwise incur sufficient tax payable. An examination of the scheme shows that it does not.

[30] The predecessor of the medical expense tax credit was first introduced in 1942 as a deduction in computing income for a limited number of medical expenses.[24] The purpose of the credit is to recognize the effect of above-average medical and disability-related expenses on an individual's ability to pay tax.[25] In 1988, it became a deduction in computing tax payable.[26] At its inception, the claimable medical expenses were subject to a maximum amount. This cap was removed in 1961.[27] Furthermore, a taxpayer's claim for the deduction has always been subject to a

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[22] *Appellant's memorandum of fact and law*, at paras. 44 & 56.
[23] *Ibid*. at para. 22.
[24] *An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 5(6)(*n*), and *Ali v. The Queen*, 2006 TCC 287 (appealed to F.C.A.).
[25] *Canada, House of Commons, Debates*, at p. 3580 (23 June 1942) (Minister of Finance Isley), and *The Budget Plan 2005*, Canada, Department of Finances, at p. 386, and also *Ali, supra*, at paras. 56 & 61.
[26] *Ali, supra* note 24 at para. 56.
[27] David Duff, *"Disability and the Income Tax Act"* (2000), 45 McGill L.J. 797 at pp. 813-14.

minimum threshold; in the 2002 taxation year, this threshold was the lesser of $1,728 and 3% of the individual's income for the year.[28]

[31] The list of expenses that qualify for the tax credit is regularly reviewed and updated and, as a result, it has become a very lengthy and precise list. As indicated by the Department of Finance of Canada in *The Budget Plan 2005*:

> The list of expenses eligible for the credit is regularly reviewed and updated in light of new technologies and other disability-specific or medically related developments.[29]

[32] The Appellant submits that this very lengthy list of allowable medical expenses "*arguably shows the purpose of such legislation is to accommodate <u>every disability</u>*" or at the very least "*that the effect is that prima facie <u>every disability is</u> . . . <u>accommodated</u>*"[30] (Emphasis added) by virtue of the medical expense tax credit provision. I do not agree that the legislative scheme of the medical expense tax credit is that broad. Although its purpose is to recognize the effect of above-average medical and disability-related expenses on an individual's ability to pay tax, it is not meant to cover every health-related expense. On the contrary, the legislative scheme clearly demonstrates Parliament's intention to limit the scope of subsection 118.2(2) of the *Act* in an attempt to address specific needs and expenses. This is in line with the decision rendered by this Court in *Ali v. The Queen*.[31], in which Justice Woods, after analyzing the purpose of subsection 118.2(2) of the *Act*, stated:

> On the other hand, the decision to list specific qualifying expenses in s. 118.2(2) rather than making all medical expenses eligible has the result that some taxpayers will incur reasonable medical expenses that do not qualify. I think that this result is intended. Parliament has decided that it is not appropriate to allow tax relief for all medical expenses incurred either at the discretion of the taxpayer or even on the advice of a medical practitioner.[32]

[33] It should be noted that *Ali* is being appealed to the Federal Court of Appeal. Nonetheless, I agree with the analysis of Justice Woods. Thus, the benefit claimed by the Appellant – that every disability be accommodated by the medical tax credit – is not one that the *Act* confers on anyone else. Parliament intentionally limited the scope of subsection 118.2(2) of the *Act*; it was never intended to accommodate every disability.

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[28] *Supra* note 1 at s. 118.2(1).
[29] *The Budget Plan 2005*, at p. 387.
[30] Appellant's memo, *supra* at para. 18.
[31] [2006] T.C.C. 287 (presently under appeal to the F.C.A.)
[32] *Ibid*. at para. 113.

[34] The case law shows that individuals who suffer from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities are not the only taxpayers who need to buy vitamins, organic food, specialty creams and soaps, supplements, and sanitary products or who require osteopathic services for justifiable medical reasons. For example, in *Herzig*[33] described as a *"most deserving case"* by Associate Chief Justice Bowman (as he then was), the appellant's spouse was suffering from breast cancer that proved to be fatal. The appellant was denied the medical expense tax credit for the cost of homeopathic medicine and nutrients and herbal supplements prescribed by the appellant's wife's medical doctors, because these did not fall within the scope of subsection 118.2(2).[34] It becomes quite evident that the benefit sought by the Appellant in the present case – i.e., the alleviation of the tax burden for all individuals suffering from a disability and who incur high medical expenses and otherwise incur sufficient tax payable - is not a benefit that is provided by law.

[35] As indicated by the Supreme Court of Canada in *Auton*, the analysis does not end here. That Court explained:

> . . . Courts should look to the reality of the situation to see whether the claimants have been denied benefits of the legislative scheme other than those they have raised. This brings up the broader issue of whether the legislative scheme is discriminatory, since it provides non-core services to some groups while denying funding for ABA/IBI therapy to autistic children. The allegation is that the scheme is itself discriminatory, by funding some non-core therapies while denying equally necessary ABA/IBI therapy.
>
> This argument moves beyond the legislative definition of "benefit". As pointed out in *Hodge*, *supra*, at para. 25:
>
> > . . . the legislative definition, being the subject matter of the equality rights challenge, is not the last word. Otherwise, a survivor's pension restricted to white protestant males could be defended on the ground that all surviving white protestant males were being treated equally.
>
> We must look behind the words and ask whether the statutory definition is itself a means of perpetrating inequality rather than alleviating it. Section 15(1) requires not merely formal equality, but substantive equality: *Andrews*, *supra*, at p. 166.[35]

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[33] *Supra* note 7.
[34] *Ibid*. at para. 2.
[35] *Supra* note 20 at paras. 39-40.

[36] In other words, while Parliament is free to target the social programs it wishes to fund as a matter of public policy, it cannot enact a law whose policy objectives and provisions are discriminatory.[36] In *Auton* the Supreme Court of Canada further indicates that:

> A statutory scheme may discriminate either directly, by adopting a discriminatory policy or purpose, or indirectly, by effect. Direct discrimination on the face of a statute or in its policy is readily identifiable and poses little difficulty. Discrimination by effect is more difficult to identify. Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.[37] [Emphasis added]

[37] As already mentioned, the legislative scheme in the case at bar does not imply that all medical expenses are to be accommodated by the medical expense tax credit. Furthermore, the medical expense tax credit benefit does not exclude individuals who suffer from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities. The Appellant was allowed to claim medical expenses that fell within the scope of subsection 118.2(2) of the *Act*. In addition, a cancer patient who might benefit from osteopathic treatments and organic foods will not be allowed to claim such expenses for the purpose of the medical expense tax credit. In short, medical expenses qualify for the medical expense tax credit on the basis of the product or service purchased and not on the basis of the type of disability from which the taxpayer suffers. This is reiterated by Justice Woods in *Ali* where she emphasizes that *"The line that Parliament has chosen to draw is between types of therapeutic substances and not physical characteristics of people"*.[38]

[38] Accordingly, I conclude that the benefit claimed by the Appellant — accommodation under subsection 118.2(2) of the *Act* for all disabilities — is not a

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[36] *Ibid*. at paras. 41 & 42.
[37] *Ibid*. at para. 42.
[38] *Supra* note 31 at para. 6.

benefit provided by law. Thus, since the first branch of the equality test has not been met, subsection 118.2(2) of the *Act* does not infringe on the Appellant's rights under subsection 15(1) of the *Charter*. However, since this case raises important issues, it is appropriate to consider whether the Appellant would have succeeded had she established that a credit for medical expenses for alternative medicine products and services for patients suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities is a benefit provided by law. The next element in this section 15 analysis consists in this Court's determining whether the relevant benefit was denied to the claimant while being granted to a comparator group alike. Thus, I will now turn to the second branch of the *Law* test.

Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

[39] Disability is one of the enumerated grounds of discrimination in subsection 15(1) of the *Charter*. The Appellant alleges that she was denied the medical expense tax credit for the cost of medical products and services and thus she has been discriminated against on the basis of disability. This allegation requires the identification of the appropriate comparator group, with which the Appellant can then be compared in terms of benefits available under subsection 118.2(2) of the *Act*.

[40] The first step in this enquiry is to determine whether the group with which the claimant compares herself is the appropriate comparator group. This step is a crucial one, and the Supreme Court of Canada established guidelines in *Hodge v. Canada (Minister of Human Resources Development)*,[39] which were later summarized in *Auton*, where, that Court stated:

> The law pertaining to the choice of comparators is extensively discussed in *Hodge*, *supra*, and need not be repeated here. That discussion establishes the following propositions.
>
> First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis": *Hodge*, *supra*, at para. 18.
>
> Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: *Hodge*, *supra*, at para. 20.

[39] [2004] 3 S.C.R. 357.

> Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination: *Hodge, supra*, at para. 23. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: *Hodge*, at paras. 25 and 31.
>
> Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity: *Hodge*, *supra*, at paras. 28 and 32. Examples of the former include the differential treatment of those suffering mental disability from those suffering physical disability in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, and the differential treatment of those suffering chronic pain from those suffering other workplace injuries in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. An example of the latter is the treatment of persons with temporary disabilities compared with those suffering permanent disabilities in *Granovsky, supra*.[40]

[41] The comparator group chosen by the Appellant is "*all taxpayers who have other disabilities, yet are able to claim the medical expense tax credit in respect of their specific disabilities. Such persons have hearing, mobility, vision, and mental disabilities.*"[41] The Appellant further suggests that no other class of disabilities requires organic food, natural supplements, personal and household hygiene products that are free of synthetic chemicals, and bottled water for valid health reasons.[42] Moreover, the Appellant argues:

> . . . Different disabilities require different expenses. Hearing aids are required by the deaf and hard of hearing but not by many persons who are blind or low vision. Chemotherapy is required for cancer patients but not for many people with mobility impairments. It would be absurd for the Court to choose a comparator group that desires to claim organic food, natural supplements, personal and household hygienic products that are free of synthetic chemicals, and bottled water, since that would not be a "benefit" to persons with other disabilities in the medical sense.[43] [Emphasis added]

[42] I disagree with the Appellant for the following reasons. First, no evidence has been presented with regard to the statement made by the Appellant that only

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[40] *Supra* note 20 at paras. 50-54.
[41] Appellant's memo, *Supra* at para. 24.
[42] Appellant's Reply to the Respondent's written submissions, at para. 14.
[43] *Ibid*. at para. 14.

individuals suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities require the use of alternative medicine, such as natural products and services. Second, the case law indicates otherwise: there are several instances of very deserving cases, ones in which taxpayers with other disabilities requested the credit for similar health-related expenses and were denied.[44] The suggestion by the Appellant that a cancer patient, as in *Herzig*, cannot, medically speaking, "benefit" from alternative medicine is open to medical debate. Be that as it may on reading that case, one can conclude that Ms. Herzig was benefiting just as much from the natural treatment she received as the Appellant currently is from hers. Alternative medicine is not as narrow in terms of those whom it may benefit as the Appellant claims it to be; it cannot be compared with a hearing aid, which will, of course, serve its purpose only for individuals with a hearing impairment.

[43] When selecting the appropriate comparator group, the Court has to find the group that shares with the claimant all the characteristics that qualify for the benefit, other than a personal characteristic that is among, or analogous to, those listed in section 15 of the *Charter*. In the case at bar, the appropriate comparator group for the Appellant is persons who have a disability other than fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities and who seek the medical expense tax credit for organic food, natural supplements, and personal and household hygiene products that are free of synthetic chemicals. Such a comparator group meets the requirements set out by the Supreme Court of Canada in *Hodge*, since the members of that comparator group are identical to the claimant in all ways except for the characteristics relating to the alleged ground of discrimination, namely, that they do not suffer from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities.

[44] Taking as a basis the appropriate comparator group, I will now compare the treatment given by law to the Appellant with the treatment given to the comparator group and determine if the claimant has been denied a benefit made available to the comparator group. It is important to keep in mind that differential treatment in comparison with the comparator group can be either direct or indirect. The former is established by showing an explicit distinction, and the latter, by showing that the effect of government actions amounts to singling out the claimant for less advantageous treatment on the basis of the alleged grounds of discrimination.[45]

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[44] *Herzig*, *supra* note 7.
[45] *Auton*, *supra* note 20 at para. 57.

[45] The Appellant alleges that she is being treated differently because she is not being allowed the medical expense tax credit for products and services that she requires in order to survive and maintain her health. As mentioned previously, these products and services include osteopathic treatments, organic food, natural supplements, and personal and household hygienic products that are free of synthetic chemicals. In short, the question is whether subsection 118.2(2) of the *Act* denies people suffering from chronic fatigue syndrome benefits it accords others in the same situation, except that they do not have this specific physical disability. The Appellant argues forcefully that the line Parliament has chosen to draw is the physical disability of taxpayers, and not medical products and services. I disagree; the legislation does not make a distinction between individuals suffering from chronic fatigue syndrome and individuals who suffer from a different disability. No one is allowed tax relief for organic foods and dietary supplements, and this is so regardless of the disability involved. In addition, no evidence was put forward by the Appellant that would suggest that individuals suffering from chronic fatigue syndrome have a greater need for natural products and/or alternative medicine. Justice Woods made a statement that applies perfectly in this case when she said in *Ali*: "*The appellants must do more than establish that they are harshly affected by the legislation. They must establish that they are affected differently based on a personal characteristic.*"[46]

[46] As already mentioned, there are cases that clearly demonstrate that individuals suffering from a different disability had just as great a need for organic products as the Appellant, but were not able to claim any tax credit for these products. I agree with the Respondent that, as regards to those products, the credit was denied on the basis of the product purchased and not the disability of the taxpayer.

[47] In support of her argument, the Appellant refers to paragraph 118.2(2)(*r*) of the *Act*, which allows individuals suffering from celiac disease to claim the incremental cost of acquiring gluten-free food products as compared to the cost of comparable non-gluten-free food products, if the patient has a written certificate from a medical practitioner. The said paragraph has been in effect since 2003 and reads as follows:

> (*r*) **[gluten-free food] -** on behalf of the patient who has celiac disease, the incremental cost of acquiring gluten-free food products as compared to the cost of comparable non-gluten-free food products, if the patient has been certified in writing by a medical practitioner to be a person who, because of that disease, requires a gluten-free diet;[47] [Emphasize added]

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[46] *Supra* note 31 at para. 104.
[47] *Supra* note 1 at s. 118.2(2)(*r*).

[48] The Appellant uses paragraph 118.2(2)(*r*) of the *Act* as a justification for allowing persons with chronic fatigue syndrome and multiple chemical sensitivities to claim the medical expense tax credit for organic foods and products. While the Appellant testified that she is intolerant of gluten, she does not imply that paragraph 118.2(2)(*r*) violates the *Charter* but rather argues that the entire medical expense tax credit provision is under-inclusive and in breach of her *Charter* rights. The Appellant has not established that the organic products she bought were gluten-free nor has she presented any medical evidence showing that she requires gluten-free products. It seems to me that by referring to paragraph 118.2(2)(*r*), the Appellant is attempting to underline her position that the qualifying process under the medical expense tax credit provision is based on disability rather than on medical products or services. I disagree with any such inference for the following reasons.

[49] First and foremost, the Appellant cannot rely on a provision that was non-existent for the year at issue. Paragraph 118.2(2)(*r*) of the *Act* only came into force for the 2003 taxation year and thus has to be ignored for the purpose of this appeal. This being said, even if the gluten-free provision had been applicable in 2002, that would not change the outcome of this appeal. I will examine this point next.

[50] The question to ask is whether paragraph 118.2(2)(*r*) of the *Act* indicates a shift towards a disability-based approach in regard to the medical expense tax credit. It seems clear that the said provision makes a differentiation based on disability; it restricts the benefit strictly to persons who suffer from celiac disease. Before this provision was adopted, it was examined by the *Standing Committee on Human Resources Development and the Status of Persons with Disabilities.* The following dialogue took place:

> **Ms. Diane St-Jacques:** You spoke about medical expenses for people with gluten problems. There is no reference to those with severe allergies. There is a case in my riding of parents with two children who were allergic to nearly everything, probably even gluten, but maybe not. In any case, the parents had to appeal because the problem was not recognized. The children could not eat any food bought at a grocery store.
>
> Could you expand on the amendments made to...?
>
> **Mr. Serge Nadeau:** The list of medical expenses eligible for the tax credit has been extended so that sufferers of celiac disease could claim the difference in cost for gluten-free products.
>
> **Ms. Diane St-Jacques:** But that applies only to people with that problem?
>
> **Mr. Serge Nadeau:** Yes.

> **Ms. Diane St-Jacques:** So other very severe allergies are not included in that?
>
> **Mr. Serge Nadeau:** No.
>
> **Ms. Diane St-Jacques:** Is that something else the interim committee can...?
>
> **Mr. Serge Nadeau:** It is something else the committee could also review.
>
> **Ms. Diane St-Jacques:** Those are all my questions, Mr. Chairman.[48] [Emphasize added]

The Bill being discussed was later adopted by Parliament with the specific "celiac disease" requirement. This requirement seems to have been thought through and perhaps the legislator meant to avoid the financial impact of a larger and more inclusive provision. The nature of the tax credit scheme involves a certain degree of flexibility and requires Parliament to make certain policy decisions. This was supported by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board v. Martin)*[49], where Justice Gonthier indicated:

> Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers' compensation scheme under consideration.[50]

[51] By adding paragraph 118.2(2)(*r*), Parliament expanded and updated the list of specific allowable expenses in light of new technologies and other disability-specific or medically related developments. While it is true that paragraph 118.2(2)(*r*) of the *Act* specifically refers to a disability, namely, celiac disease, I do not think that this can be seen as a general shift in policy. The gluten-free food provision is an exception to the overall objective of the medical expense tax credit scheme rather than the norm. When determining the underlying objective of the medical expense tax credit provision, one has to look at the provision in its entirety. With the exception of paragraph 118.2(2)(*r*), the legislator has been consistent in avoiding limiting the scope of the medical expense tax credit provision on the basis of specific personal disabilities. Such an approach is in line with the objective of making a distinction based on medical products and services. Therefore, as long as Parliament refrains from adding further provisions that differentiate on the basis of disabilities, the general structure of the medical expense tax credit remains unchanged: the

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[48] 37th Parliament, 2nd Session, *Standing Committee on Human Resources Development and the Status of Persons with Disabilities*, Evidence, February 27, 2003.
[49] [2003] 2 S.C.R. 504.
[50] *Ibid*. at para. 82.

distinction is based on types of medical products and services and not on personal characteristics of taxpayers.

[52] Having concluded that the distinction made by subsection 118.2(2) of the *Act* is based on types of therapeutic substances and not physical characteristics of people, it follows that the claimant has not shown that differential treatment exists. She was not denied a benefit granted to a comparator group alike in all ways relevant to the benefit, except for the personal characteristic associated with an enumerated or analogous ground. If the Appellant had been able to show that differential treatment exists, the third criterion of the *Law* test would become relevant, and I will look at it next.

Has discrimination been effected?

[53] Since there is no finding of differential treatment, for all practical purposes this question becomes moot. However, as it raises some important issues of law, I will nonetheless proceed by analyzing the third branch of the *Law* test as though it had been found that subsection 118.2(2) of the *Act* differentiates the Appellant on the basis of disability. As stated by the Supreme Court of Canada in *Law*, the third question that the Court has to answer is as follows:

> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[51]

[54] Furthermore, it is well established that whether there is an infringement on human dignity is to be determined by examining four contextual factors: (1) pre-existing disadvantage; (2) correspondence between the grounds upon which the differential treatment is based and the claimant's actual needs, capacities and circumstances; (3) ameliorative purpose or effects; and (4) the nature and scope of the interest affected by the impugned law.[52] These four factors are not exhaustive and should not be applied mechanically.[53] Furthermore, the appropriate perspective to be

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[51] *Supra* note 17 at para. 88.
[52] *Ibid.* at para. 62 and *Martin*, *supra* note 49 at para. 85.
[53] *Lavoie v. Canada*, [2002] 1 S.C.R. 769, at paras. 38 & 46.

used in this analysis is a subjective-objective one.[54] In *Law*, the Supreme Court of Canada emphasized that:

> . . . Equality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1).[55]

[55] The Appellant argues that the differential treatment discriminates against her by withholding a benefit, namely, the medical expense tax credit, in a manner reflective of the stereotypical application of presumed group or personal characteristics. The Appellant adds that the differential treatment has the effect of promoting the view that she is less capable or worthy of being valued as a human being or as a member of Canadian society deserving concern, consideration and respect. To answer the Appellant's allegation of discrimination and to follow the guidelines set out by the *Law* test, I have to examine whether individuals suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities experience pre-existing disadvantages.

(a) Pre-existing disadvantage

[56] The Respondent recognizes that individuals with disabilities have experienced disadvantages. In *Martin*, the Supreme Court of Canada examined the pre-existing disadvantage of individuals suffering from chronic pain. While the Court found it unnecessary to make a finding on that issue, it noted that "*many elements*" seemed to indicate that chronic pain sufferers have historically been subject to disadvantages or stereotypes.[56] In the case at bar, some elements certainly point in the same direction. The Appellant testified that she was not recognized as qualifying for an Armed Forces pension until 11 years after she had left. None of the medical doctors seemed to believe she was in fact suffering from a serious illness. She further indicated that she was not taken seriously and was told by some medical doctors that it was "all in her head". For these reasons, I accept that individuals suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities are subject to a pre-existing disadvantage. However, this does not automatically result in discrimination.

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[54] *Law*, *supra* at para 61.
[55] *Ibid*. at para 61.
[56] *Supra*, note 49 at para. 90.

It will depend on the circumstances of each case and the other contextual factors involved. This leads me to examine the second factor.

(b) Correspondence between the grounds upon which the differential treatment is based and the claimant's actual needs, capacities and circumstances

[57] With respect to this factor, I will consider the relationship between the ground of distinction and the actual needs, capacities and circumstances of individuals who suffer from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities.[57] I have to ask the following question: does subsection 118.2(2) of the *Act* take into account the needs, capacities or circumstances of taxpayers suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities in a manner that respects their value as human beings and as members of Canadian society?

[58] The Appellant claims that she is left out from the benefits provided by subsection 118.2(2) of the *Act*. More specifically, the Appellant argues that the said provision is under-inclusive in that that it recognizes *"a great multitude of disabled persons in its listing of dozens of products and services, but has practically nothing for her as a person with the disability of chronic fatigue syndrome and multiple chemical sensitivities."*[58] The Appellant further argues that a reasonable person would sympathize with her situation or her circumstances. In other words, the Appellant claims that the government acts as if chronic fatigue syndrome were not a real medical condition and fails to treat her with the respect and consideration she deserves.

[59] First, one should note that the medical expense tax credit in the *Act* is a large-scale benefit program that is available to all taxpayers. In *Martin*, the Supreme Court of Canada recognized that, with such large-scale social benefit programs, general solutions, such as classification and standardization, are in many cases necessary.[59] This is certainly the case with the medical expense tax credit under the *Act*. It is impossible for the government to personalize the medical expense tax credit in accordance with the individual medical needs of each taxpayer. In *Law*, the Supreme Court of Canada described human dignity as follows:

> . . . Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and

[57] *Ibid.* at para. 92
[58] Appellant's memo, *supra* at para. 35.
[59] *Supra*, note 49 at para. 93.

> empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.[60]

[60] As mentioned previously, the medical expense tax credit, being a large-scale benefit program, cannot take into account every taxpayer's needs. Furthermore, there is no legal requirement that it do so.[61] I agree that subsection 118.2(2) of the *Act* does not allow the Appellant to deduct all medical expenses that relate to her individual needs. However, this was never the intended purpose of subsection 118.2(2) of the *Act*. Also, the said provision does not exclude the Appellant on the basis of personal traits or circumstances; it is not arbitrary, but, rather, it applies equally to all taxpayers. Many taxpayers suffering from various types of illnesses seek alternative medical treatment, thus it cannot be said that the legislation draws a line based on physical characteristics. The government simply had to define the scope of subsection 118.2(2); it did so on the basis of the type of medical services and products. Consequently, the needs of the Appellant have been taken into account by the government, since she qualifies for some tax relief under that subsection.

(c) Ameliorative purpose or effects

[61] In regard to this contextual factor, the Supreme Court of Canada explained in *Law*:

> Another possibly important factor will be the ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society. As stated by Sopinka J. in *Eaton*, *supra*, at para. 66: "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is

[60] *Supra*, note 17 at para. 53.
[61] *Auton*, *supra* note 20 at paras. 32–35.

> more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination: see *Vriend*, *supra*, at paras. 94-104, *per* Cory J.[62] [Emphasize added]

[62] The Respondent asserts that some taxpayers who benefit from subsection 118.2(2) might be in a position of greater disadvantage than the Appellant. This may very well be true, but the reverse might also be true. I do not think that the measuring of relative disadvantages as between the Appellant and other disabled individuals is the key point here. I have determined that the Appellant does belong to a historically disadvantaged group and, as indicated by the Supreme Court of Canada in *Law*, in such cases the threshold to escape the charge of discrimination becomes high.[63] Nevertheless, the impugned provision in this case is a large-scale benefit program and its purpose is not to provide unlimited tax relief for all medical expenses. It is not under-inclusive since it does provide individuals suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities with partial tax relief. This distinguishes the present case from *Martin*, where the claimants were totally excluded under the Nova Scotia *Workers' Compensation Act*[64] on the basis of their disabilities. Such is not the case here, and for the above reasons, I conclude that the overall ameliorative purpose of subsection 118.2(2) of the *Act* does not conflict with the values enshrined in subsection 15(1) of the *Charter*.

(d) The nature and scope of the interest affected by the impugned law

[63] The last contextual factor to be taken into account requires me to consider the nature and scope of the interest affected by the impugned law. In *Law* the Supreme Court of Canada explained this factor as follows:

> A further contextual factor which may be relevant in appropriate cases in determining whether the claimant's dignity has been violated will be the nature and scope of the interest affected by the legislation. This point was well explained by L'Heureux-Dubé J. in *Egan*, *supra*, at paras. 63-64. As she noted, at para. 63, "[i]f all other things are equal, the more severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*". L'Heureux-Dubé J. explained, at para. 64, that the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by

[62] *Supra*, note 17 at para. 72.
[63] *Ibid*. at para. 72.
[64] *Worker's Compensation Act*, S.N.S. 1994-95, c. 10.

> the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group".[65]

[64] Accordingly, it is necessary to examine whether the Appellant was denied access to a fundamental social institution or was not recognized as being a full member of Canadian society. The Respondent argues that the Appellant's interests at stake here are only financial. This question was examined in *Martin*, where the Supreme Court of Canada stated:

> . . . While a s. 15(1) claim relating to an economic interest should generally be accompanied by an explanation as to how the dignity of the person is engaged, claimants need not rebut a presumption that economic disadvantage is unrelated to human dignity. In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely held negative attitudes towards the claimants and thus reinforce the assault on their dignity.[66]

[65] While it is true that the benefits of the medical expense tax credit are monetary, in light of the *Martin* decision, deprivation of such monetary benefits may in some circumstances lead to a loss of dignity. Therefore, it is not surprising that the Appellant compares herself with the claimants in *Martin*. However, in the case at bar, the situation is quite different. First, the Appellant is not excluded from the scope of subsection 118.2(2) of the *Act*, since for some medical expenses she did qualify for the credit. Second, the medical expense tax credit only applies to taxpayers with an income high enough to actually qualify for the credit. Many individuals suffering from the same illness as the Appellant will not gain any benefit from the Appellant's proposed amendment to the medical expense tax credit provision of the *Act*. This suggests that the medical expense tax credit is a financial benefit of which only certain people can avail themselves. Therefore, if a medical expense does not qualify under the *Act*, that is not by itself a denial of access to some fundamental social institution, nor has the government failed to recognize the claimant as being a full member of Canadian society.

Thus, I conclude that, if under subsection 118.2(2) of the *Act*, there is differential treatment of taxpayers suffering from fibromyalgia, chronic fatigue syndrome or multiple chemical sensitivities, that differential treatment does not discriminate against the Appellant. As shown above, subsection 118.2(2) does not promote the

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[65] *Supra*, note 17 at para. 74.
[66] *Supra* note 49 at para. 103.

view that the Appellant is less capable or less worthy of recognition as a human being. The impugned law simply provides for a financial benefit to qualifying taxpayers on the basis of qualifying services and products. Consequently, there is no discrimination and subsection 118.2(2) of the *Act* does not violate human dignity.

ISSUE 3

[66] If subsection 118.2(2) of the *Act* violates section 15 of the *Charter*, is that subsection saved by section 1 of the *Charter* as demonstrably justifiable in a free and democratic society?

[67] If I were to assume that subsection 118.2(2) of the *Act* violates subsection 15(1) of the *Charter*, the Respondent could then demonstrate that such a violation is justified under section 1 of the *Charter*. Section 1 reads as follows:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[67]

[68] The test applicable for a section 1 analysis was established by the Supreme Court of Canada in *R. v. Oakes*.[68] It is a two-part test; first, in order to limit a constitutional guarantee, the objective of the legislation must be pressing and substantial. Second, the court has to determine if the limit is proportional to that objective in that it is rationally connected to the legislative aims, it minimally impairs the claimant's rights to equality, and finally, its positive objectives and effects outweigh the effects of the abridgement of those rights. Furthermore, the standard of proof is the preponderance of probabilities and the onus in that regard is on the Respondent.[69]

(a) Pressing and substantial objective

[69] At this stage, it is necessary to determine whether the objective of the impugned law is pressing and substantial such that it justifies a restriction of an equality right. It goes without saying that the legislator cannot legislate contrary to the principles enshrined in section 15 of the *Charter*. To determine whether such has been done, it is essential to find the legislator's true objective. In other words, what

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[67] *Supra*, note 2 at s. 1.
[68] [1986] 1 S.C.R. 103.
[69] *Ibid.* at paras. 69–71.

did Parliament intend to achieve when first enacting the medical expense tax credit? It should be noted that the original intention might have changed over time, and this will have to be taken into consideration.

[70] The purpose of the medical expense tax credit provision of the *Act* has already been examined, and I will refrain from repeating myself. In short, the purpose of the medical expense tax credit is to alleviate the tax burden of taxpayers who incur high medical expenses, within certain limits. These limits have been intentionally drawn by the legislator, and subsection 118.2(2) was never intended to accommodate every disability. The Appellant argues that this case is different from *Ali* since it does not specifically question the validity of the "recorded by a pharmacist" requirement set out in paragraph 118.2(2)(*n*) of the *Act*. She stresses that "*it is time for this Honourable Court to take a fresh new approach*"[70]. Furthermore, the Appellant argues that subsection 118.2(2) is not about the safety and efficacy of medical products and services. I disagree; the legislator limited the application of the medical expense tax credit provision in order to avoid abuse and ensure that the provision is in line with concerns for safety and efficacy. This is consistent with the decision rendered by Justice Woods in *Ali*, in which she stated:

> Assurance of safety and efficacy would not be met if the pharmacist-recording requirement were removed. The evidence as a whole suggests that the efficacy of natural health products is very controversial. In terms of the safety and efficacy of dietary supplements to treat FMS and CFS, Health Canada generally has not required clinical trials for these products and the FMS Report and CFS Report suggest that there is no general acceptance that NHPs generally are efficacious to treat these conditions.[71]

[71] While I agree with the Appellant that the question in the *Ali* case was more specifically directed towards paragraph 118.2(2)(*n*), the overall purpose and objective of the medical expense tax credit provision remains identical. It is quite evident that controlling the safety and efficacy of medication is a pressing and substantive objective. It is important that the benefits provided by the application of subsection 118.2(2) of the *Act* be geared towards ensuring safe and efficacious medications. I do not suggest that alternative medicine is unsafe or inefficacious; I wish rather to emphasize that by restricting the application of subsection 118.2(2) Parliament seeks to ensure that the tax relief is beneficial to taxpayers and is within the monetary means of the government. Furthermore, the Appellant argues that alternative medicine, such as herbal medicine, homeopathic preparation, vitamins and

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[70] Appellant's memo, *supra* at para. 41.
[71] *Supra*, note 31 at para. 133.

mineral supplements are safe and "*certainly much more safe that [sic] pharmaceuticals*".[72] The Appellant further argues that natural products will have a natural product number by the end of 2010 and that this could serve to ensure safety. The Appellant also suggests that this Court "*may mandate inclusion in the medical expense tax credit of natural health products that have a government approved Natural Product Number*."[73] Again, whether alternative medicines, such as natural medicaments, are safe is not for this Court to determine, but is for Parliament to debate. What matters at this stage of the analysis is that the safety and efficacy of medical products and services was taken into consideration by the legislator when determining the scope of subsection 118.2(2) of the *Act*. These considerations are pressing and substantial objectives.

[72] The Respondent also raises the issue of the government's ability to control costs by limiting the scope of the medical expense tax credit provision. As mentioned previously, the medical expense tax credit is not an all-inclusive medical health plan, but rather a limited and specific benefit available to taxpayers. In summary, the objective of the impugned law, namely, to ensure that the benefit provides tax relief with respect to safe and efficacious medical products and services as well as to limit abuse and control costs in order to maintain the credit's financial sustainability, is a pressing and substantial objective. I will now examine whether the limit imposed on the equality right is proportional to the objective of subsection 118.2(2) of the *Act*. This question is answered by evaluation of the three following elements.

(b) Proportionality

(i) Rational connection

[73] In *Oakes*, the Supreme Court of Canada indicated that the law must be "*carefully designed to achieve the objective in question*"; it should not be "*arbitrary unfair, or based on irrational considerations.*"[74] In the case at bar, the question is whether subsection 118.2(2) of the *Act* logically supports the underlying objective of the legislator. In *Rodriguez v. British Columbia (Attorney General)*[75], the Supreme Court of Canada makes it clear that a rule of law is arbitrary if there is no rational connection with its objective. Subsection 118.2(2) of the *Act* has as its purpose tax relief for specific health-related expenses. This reduction in taxes is only for specific

[72] Appellant's Reply, *supra* at para. 5.
[73] *Ibid* at para 5.
[74] *Supra*, note 68 at para 70.
[75] [1993] 3 S.C.R. 519.

products and services that have been listed and defined by Parliament. There is a clear connection between: (1) the goal of limiting tax relief for safe and efficacious services and products and ensuring that the program is financially sustainable and (2) the limitative scope of the services and products that are allowed to be claimed under subsection 118.2(2) of the *Act*.

(ii) Minimal impairment

[74] Does the impugned law unnecessarily impair the Appellant's rights? Her case is a very deserving one and there is no doubt that the Appellant would benefit from a medical expense tax credit that would include alternative medicine and medicaments. However, unlike the situation in the *Martin* case, the Appellant presently benefits from the tax credit; she is not excluded entirely from the scheme. Furthermore, the only way for the government to control a large-scale tax benefit is to narrow its scope and specify what is included and what is not. As already mentioned, this process is carried out not arbitrarily, but in the light of new medical technology. It is, moreover, not up to this Court to rewrite policies in this regard. As indicated by the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*[76]:

> In past cases, the Court has discussed a number of situations in which courts must show deference, namely situations in which the government is required to mediate between competing interests and to choose between a number of legislative priorities (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 993-94). It is also possible to imagine situations in which a government might lack time to implement programs or amend legislation following the emergence of new social, economic or political conditions. The same is true of an ongoing situation in which the government makes strategic choices with future consequences that a court is not in a position to evaluate.
>
> In short, a court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests. Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state.[77] *[Emphasis added]*

[75] Considering its limitative purpose, I conclude that subsection 118.2(2) does not unnecessarily impair the Appellant's rights under the *Charter*.

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[76] [2005] 1 S.C.R. 791.
[77] *Ibid.* at paras. 94 & 95.

(iii) Do the positive objectives and effects outweigh the effects of the abridgement of the Appellant's rights?

[76] Peter W. Hogg notes that what this test requires is "*a balancing of the objective sought by the law against the infringement of the Charter. It asks whether the Charter infringement is too high a price to pay for the benefit of the law*"[78].

[77] Here the objective of the law outweighs the negative consequences; the fact that many taxpayers who incur high medical expenses benefit from the medical expense tax credit outweighs the fact that not all medical services and products can be claimed. The more the effects of a given provision are negative for the claimant the more difficult it becomes to justify its necessity. However, in the case at bar, the detrimental effects on some taxpayers, who do not qualify for the credit with respect to some of the expenses they incur for medical products or services, is outweighed by the general purpose of the provision, that is, to provide partial tax relief for specific medical expenses.

[78] Therefore, even if subsection 118.2(2) of the *Act* infringes subsection 15(1) of the *Charter*, such infringement can be justified under section 1 of the *Charter*.

ISSUE 4

[79] Does the Tax Court of Canada have jurisdiction to issue declarations and grant, under section 52 of the *Constitution Act, 1982*, remedies consisting in reading up, reading down or severing invalid legislation, specifically the impugned provision of the *Act*?

[80] Since I have concluded that there is no *Charter* violation, I find it unnecessary to entertain this question.

CONCLUSION

[78] Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Thomson Carswell, 2007) vol. II, at p. 38.13.

[81] While her case is a very deserving one, what the Appellant is really seeking is a legislative change and not judicial review. That lies beyond the power of the judiciary.

[82] With regard to the medical expense tax credit, Parliament has to make certain policy choices. In this particular case, the result might seem harsh for the Appellant. One can only hope that current reality and the progress of alternative medicine will be taken into consideration by Parliament and that the *Act* will ultimately be amended.

[83] Therefore, I conclude that the Appellant shall only be allowed to claim the amount of $3,253.74 as medical expenses, as agreed by the parties in their Partial Agreed Statement of Facts. Consequently, the Appellant's 2002 medical tax credit is $244 [($3,253 - $1,728) x 16%]. For the reasons provided in this judgment, the remaining portion of the medical expenses claimed, amounting to a total of $10,442.43, ought to be ignored in the calculation of the Appellant's medical tax credit.

Signed at Ottawa, Canada, this 7th day of January 2008.

"Paul Bédard"

Bédard J.

Appendix

Relevant Statutory Provisions as they read in 2002.

118.2. Medical expense credit

(1) Medical expense credit - For the purpose of computing the tax payable under this Part by an individual for a taxation year, there may be deducted an amount determined by the formula

A(B - C) - D

where

A is the appropriate percentage for the year;

B is the total of the individual's medical expenses that are proven by filing receipts therefor with the Minister, that were not included in determining an amount under this subsection or subsection 122.51(2) for a preceding taxation year and that were paid by either the individual or the individual's legal representative,

(*a*) where the individual died in the year, within any period of 24 months that includes the day of death, and

(*b*) in any other case, within any period of 12 months ending in the year;

C is the lesser of $1,500 and 3% of the individual's income for the year; and

D is 68% of the total of all amounts each of which is the amount, if any, by which

(*a*) the income for the year of a person (other than the individual and the individual's spouse or common-law partner) in respect of whom an amount is included in computing the individual's deduction under this section for the year

exceeds

(*b*) the amount used under paragraph (*c*) of the description of B in subsection 118(1) for the year.

(2) Medical expenses - For the purposes of subsection (1), a medical expense of an individual is an amount paid

(*a*) **[medical and dental services] -** to a medical practitioner, dentist or nurse or a public or licensed private hospital in respect of medical or dental services provided to a person (in this subsection referred to as the “patient”) who is the individual, the individual's spouse or common-law partner or a dependant of the individual (within the meaning assigned by subsection 118(6)) in the taxation year in which the expense was incurred;

(*b*) **[attendant or nursing home care] -** as remuneration for one full-time attendant (other than a person who, at the time the remuneration is paid, is the individual's spouse or common-law partner or

is under 18 years of age) on, or for the full-time care in a nursing home of, the patient in respect of whom an amount would, but for paragraph 118.3(1)(c), be deductible under section 118.3 in computing a taxpayer's tax payable under this Part for the taxation year in which the expense was incurred;

(*b*.1) **[attendant] -** as remuneration for attendant care provided in Canada to the patient if

> (i) the patient is a person in respect of whom an amount may be deducted under section 118.3 in computing a taxpayer's tax payable under this Part for the taxation year in which the expense was incurred,
>
> (ii) no part of the remuneration is included in computing a deduction claimed in respect of the patient under section paragraph 63 or 64 or (b), (b.2), (c), (d) or (e) for any taxation year,
>
> (iii) at the time the remuneration is paid, the attendant is neither the individual's spouse or common-law partner nor under 18 years of age, and
>
> (iv) each receipt filed with the Minister to prove payment of the remuneration was issued by the payee and contains, where the payee is an individual, that individual's Social Insurance Number,

to the extent that the total of amounts so paid does not exceed $10,000 (or $20,000 if the individual dies in the year);

(*b*.2) **[group home care] -** as remuneration for the patient's care or supervision provided in a group home in Canada maintained and operated exclusively for the benefit of individuals who have a severe and prolonged impairment, if

> (i) because of the patient's impairment, the patient is a person in respect of whom an amount may be deducted under section 118.3 in computing a taxpayer's tax payable under this Part for the taxation year in which the expense is incurred,
>
> (ii) no part of the remuneration is included in computing a deduction claimed in respect of the patient under section paragraph 63 or 64 or (b), (b.1), (c), (d) or (e) for any taxation year, and
>
> (iii) each receipt filed with the Minister to prove payment of the remuneration was issued by the payee and contains, where the payee is an individual, that individual's Social Insurance Number;

(*c*) **[full-time attendant at home] -** as remuneration for one full-time attendant upon the patient in a self-contained domestic establishment in which the patient lives, if

> (i) the patient is, and has been certified by a medical practitioner to be, a person who, by reason of mental or physical infirmity, is and is likely to be for a long-continued period of indefinite duration dependent on others for the patient's personal needs and care and who, as a result thereof, requires a full-time attendant,

(ii) at the time the remuneration is paid, the attendant is neither the individual's spouse or common-law partner nor under 18 years of age, and

(iii) each receipt filed with the Minister to prove payment of the remuneration was issued by the payee and contains, where the payee is an individual, that individual's Social Insurance Number;

(*d*) **[nursing home care] -** for the full-time care in a nursing home of the patient, who has been certified by a medical practitioner to be a person who, by reason of lack of normal mental capacity, is and in the foreseeable future will continue to be dependent on others for the patient's personal needs and care;

(*e*) **[school, institution, etc.] -** 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;

(*f*) **[ambulance fees] -** for transportation by ambulance to or from a public or licensed private hospital for the patient;

(*g*) **[transportation] -** to a person engaged in the business of providing transportation services, to the extent that the payment is made for the transportation of

(i) the patient, and

(ii) one individual who accompanied the patient, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant

from the locality where the patient dwells to a place, not less than 40 kilometres from that locality, where medical services are normally provided, or from that place to that locality, if

(iii) substantially equivalent medical services are not available in that locality,

(iv) the route travelled by the patient is, having regard to the circumstances, a reasonably direct route, and

(v) the patient travels to that place to obtain medical services for himself or herself and it is reasonable, having regard to the circumstances, for the patient to travel to that place to obtain those services;

(*h*) **[travel expenses] -** for reasonable travel expenses (other than expenses described in paragraph (*g*)) incurred in respect of the patient and, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant, in respect of one individual who accompanied the patient, to obtain medical services in a place that is not less than 80 kilometres from the locality where the patient dwells if the circumstances described in subparagraphs (g)(iii), (iv) and (v) apply;

(*i*) **[devices] -** for or in respect of an artificial limb, iron lung, rocking bed for poliomyelitis victims, wheel chair, crutches, spinal brace, brace for a limb, iliostomy or colostomy pad, truss for hernia, artificial eye, laryngeal speaking aid, aid to hearing or artificial kidney machine, for the patient;

(*i*.1) **[devices for incontinence] -** for or in respect of diapers, disposable briefs, catheters, catheter trays, tubing or other products required by the patient by reason of incontinence caused by illness, injury or affliction;

(*j*) **[eyeglasses] -** for eye glasses or other devices for the treatment or correction of a defect of vision of the patient as prescribed by a medical practitioner or optometrist;

(*k*) **[various] -** for an oxygen tent or other equipment necessary to administer oxygen or for insulin, oxygen, liver extract injectible for pernicious anaemia or vitamin B12 for pernicious anaemia, for use by the patient as prescribed by a medical practitioner;

(*l*) **[guide dogs, etc.] -** on behalf of the patient who is blind or profoundly deaf or has a severe and prolonged impairment that markedly restricts the use of the patient's arms or legs,

> (i) for an animal specially trained to assist the patient in coping with the impairment and provided by a person or organization one of whose main purposes is such training of animals,
>
> (ii) for the care and maintenance of such an animal, including food and veterinary care,
>
> (iii) for reasonable travel expenses of the patient incurred for the purpose of attending a school, institution or other facility that trains, in the handling of such animals, individuals who are so impaired, and
>
> (iv) for reasonable board and lodging expenses of the patient incurred for the purpose of the patient's full-time attendance at a school, institution or other facility referred to in subparagraph (iii);

(*l*.1) **[transplant costs] -** on behalf of the patient who requires a bone marrow or organ transplant,

> (i) for reasonable expenses (other than expenses described in subparagraph (ii)), including legal fees and insurance premiums, to locate a compatible donor and to arrange for the transplant, and
>
> (ii) for reasonable travel, board and lodging expenses (other than expenses described in paragraphs (g) and (h)) of the donor (and one other person who accompanies the donor) and the patient (and one other person who accompanies the patient) incurred in respect of the transplant;

(*l*.2) **[alterations to home] -** for reasonable expenses relating to renovations or alterations to a dwelling of the patient who lacks normal physical development or has a severe and prolonged mobility impairment, to enable the patient to gain access to, or to be mobile or functional within, the dwelling;

(*l*.21) **[home construction costs] -** for reasonable expenses, relating to the construction of the principal place of residence of the patient who lacks normal physical development or has a severe and prolonged mobility impairment, that can reasonably be considered to be incremental costs

incurred to enable the patient to gain access to, or to be mobile or functional within, the patient's principal place of residence;

(*l*.3) **[lip reading and sign language training] -** for reasonable expenses relating to rehabilitative therapy, including training in lip reading and sign language, incurred to adjust for the patient's hearing or speech loss;

(*l*.4) **[sign language services] -** on behalf of the patient who has a speech or hearing impairment, for sign language interpretation services, to the extent that the payment is made to a person engaged in the business of providing such services;

(*l*.5) **[moving expenses] -** for reasonable moving expenses (within the meaning of subsection 62(3), but not including any expense deducted under section 62 for any taxation year) of the patient, who lacks normal physical development or has a severe and prolonged mobility impairment, incurred for the purpose of the patient's move to a dwelling that is more accessible by the patient or in which the patient is more mobile or functional, if the total of the expenses claimed under this paragraph by all persons in respect of the move does not exceed $2,000;

(*l*.6) **[driveway alterations] -** for reasonable expenses relating to alterations to the driveway of the principal place of residence of the patient who has a severe and prolonged mobility impairment, to facilitate the patient's access to a bus;

(*l*.7) **[van for wheelchair] -** for a van that, at the time of its acquisition or within 6 months after that time, has been adapted for the transportation of the patient who requires the use of a wheelchair, to the extent of the lesser of $5,000 and 20% of the amount by which

(i) the amount paid for the acquisition of the van

exceeds

(ii) the portion, if any, of the amount referred to in subparagraph (i) that is included because of paragraph (m) in computing the individual's deduction under this section for any taxation year;

(*l*.8) **[caregiver training] -** for reasonable expenses (other than amounts paid to a person who was at the time of the payment the individual's spouse or common-law partner or a person under 18 years of age) to train the individual, or a person related to the individual, if the training relates to the mental or physical infirmity of a person who

(i) is related to the individual, and

(ii) is a member of the individual's household or is dependent on the individual for support;

(*l*.9) **[therapy] -** as remuneration for therapy provided to the patient because of the patient's severe and prolonged impairment, if

(i) because of the patient's impairment, an amount may be deducted under section 118.3 in computing a taxpayer's tax payable under this Part for the taxation year in which the remuneration is paid,

(ii) the therapy is prescribed by, and administered under the general supervision of,

(A) a medical doctor or a psychologist, in the case of mental impairment, and

(B) a medical doctor or an occupational therapist, in the case of a physical impairment,

(iii) at the time the remuneration is paid, the payee is neither the individual's spouse nor an individual who is under 18 years of age, and

(iv) each receipt filed with the Minister to prove payment of the remuneration was issued by the payee and contains, where the payee is an individual, that individual's Social Insurance Number;

(*l*.91) **[tutoring services] -** as remuneration for tutoring services that are rendered to, and are supplementary to the primary education of, the patient who

(i) has a learning disability or a mental impairment, and

(ii) has been certified in writing by a medical practitioner to be a person who, because of that disability or impairment, requires those services,

if the payment is made to a person ordinarily engaged in the business of providing such services to individuals who are not related to the payee.

(*m*) **[prescribed devices] -** for any device or equipment for use by the patient that

(i) is of a prescribed kind,

(ii) is prescribed by a medical practitioner,

(iii) is not described in any other paragraph of this subsection, and

(iv) meets such conditions as may be prescribed as to its use or the reason for its acquisition;

to the extent that the amount so paid does not exceed the amount, if any, prescribed in respect of the device or equipment;

(*n*) **[drugs] -** for drugs, medicaments or other preparations or substances (other than those described in paragraph (k)) manufactured, sold or represented for use in the diagnosis, treatment or prevention of a disease, disorder, abnormal physical state, or the symptoms thereof or in restoring, correcting or modifying an organic function, purchased for use by the patient as prescribed by a medical practitioner or dentist and as recorded by a pharmacist;

(*o*) **[lab test] -** for laboratory, radiological or other diagnostic procedures or services together with necessary interpretations, for maintaining health, preventing disease or assisting in the diagnosis or treatment of any injury, illness or disability, for the patient as prescribed by a medical practitioner or dentist;

(*p*) **[dentures] -** to a person authorized under the laws of a province to carry on the business of a dental mechanic, for the making or repairing of an upper or lower denture, or for the taking of impressions, bite registrations and insertions in respect of the making, producing, constructing and furnishing of an upper or lower denture, for the patient; or

(*q*) **[health plan premiums] -** as a premium, contribution or other consideration under a private health services plan in respect of one or more of the individual, the individual's spouse or common-law partner and any member of the individual's household with whom the individual is connected by blood relationship, marriage, common-law partnership or adoption, except to the extent that the premium, contribution or consideration is deducted under subsection 20.01(1) in computing an individual's income from a business for any taxation year.

(3) Deemed medical expense - For the purposes of subsection (1),

(*a*) any amount included in computing an individual's income for a taxation year from an office or employment in respect of a medical expense described in subsection (2) paid or provided by an employer at a particular time shall be deemed to be a medical expense paid by the individual at that time; and

(*b*) there shall not be included as a medical expense of an individual any expense to the extent that

(i) the individual,

(ii) the person referred to in subsection (2) as the patient,

(iii) any person related to a person referred to in subparagraph (i) or (ii), or

(iv) the legal representative of any person referred to in any of subparagraphs (i) to (iii)

is entitled to be reimbursed for the expense, except to the extent that the amount of the reimbursement is required to be included in computing income and is not deductible in computing taxable income.

(4) Deemed payment of medical expenses - Where, in circumstances in which a person engaged in the business of providing transportation services is not readily available, an individual makes use of a vehicle for a purpose described in paragraph (2)(g), the individual or the individual's legal representative shall be deemed to have paid to a person engaged in the business of providing transportation services, in respect of the operation of the vehicle, such amount as is reasonable in the circumstances.

Regulation, Part LVII — Medical Devices and Equipment [S. 5700]

5700. For the purposes of paragraph 118.2(2)(m) of the Act, a device or equipment is prescribed if it is a

(*a*) wig made to order for an individual who has suffered abnormal hair loss owing to disease, medical treatment or accident;

(*b*) needle or syringe designed to be used for the purpose of giving an injection;

(*c*) device or equipment, including a replacement part, designed exclusively for use by an individual suffering from a severe chronic respiratory ailment or a severe chronic immune system disregulation, but not including an air conditioner, humidifier, dehumidifier, heat pump or heat or air exchanger;

(*c*.1) air or water filter or purifier for use by an individual who is suffering from a severe chronic respiratory ailment or a severe chronic immune system disregulation to cope with or overcome that ailment or disregulation;

(*c*.2) electric or sealed combustion furnace acquired to replace a furnace that is neither an electric furnace nor a sealed combustion furnace, where the replacement is necessary solely because of a severe chronic respiratory ailment or a severe chronic immune system disregulation;

(*c*.3) air conditioner acquired for use by an individual to cope with the individual's severe chronic ailment, disease or disorder, to the extent of the lesser of $1,000 and 50% of the amount paid for the air conditioner;

(*d*) device or equipment designed to pace or monitor the heart of an individual who suffers from heart disease;

(*e*) orthopaedic shoe or boot or an insert for a shoe or boot made to order for an individual in accordance with a prescription to overcome a physical disability of the individual;

(*f*) power-operated guided chair installation, for an individual, that is designed to be used solely in a stairway;

(*g*) mechanical device or equipment designed to be used to assist an individual to enter or leave a bathtub or shower or to get on or off a toilet;

(*h*) hospital bed including such attachments thereto as may have been included in a prescription therefor;

(*i*) device that is designed to assist an individual in walking where the individual has a mobility impairment;

(*j*) external breast prosthesis that is required because of a mastectomy;

(*k*) teletypewriter or similar device, including a telephone ringing indicator, that enables a deaf or mute individual to make and receive telephone calls;

(*l*) optical scanner or similar device designed to be used by a blind individual to enable him to read print;

(*m*) power-operated lift or transportation equipment designed exclusively for use by, or for, a disabled individual to allow the individual access to different areas of a building or to assist the individual to gain access to a vehicle or to place the individual's wheelchair in or on a vehicle;

(*n*) device designed exclusively to enable an individual with a mobility impairment to operate a vehicle;

(*o*) device or equipment, including a synthetic speech system, braille printer and large print-on-screen device, designed exclusively to be used by a blind individual in the operation of a computer;

(*p*) electronic speech synthesizer that enables a mute individual to communicate by use of a portable keyboard;

(*q*) device to decode special television signals to permit the script of a program to be visually displayed;

(*q*.1) a visual or vibratory signalling device, including a visual fire alarm indicator, for an individual with a hearing impairment;

(*r*) device designed to be attached to infants diagnosed as being prone to sudden infant death syndrome in order to sound an alarm if the infant ceases to breathe;

(*s*) infusion pump, including diposable peripherals, used in the treatment of diabetes or a device designed to enable a diabetic to measure the diabetic's blood sugar level;

(*t*) electronic or computerized environmental control system designed exclusively for the use of an individual with a severe and prolonged mobility restriction;

(*u*) extremity pump or elastic support hose designed exclusively to relieve swelling caused by chronic lymphedema;

(*v*) inductive coupling osteogenesis stimulator for treating non-union of fractures or aiding in bone fusion; and

(*w*) talking textbook prescribed by a medical practitioner for use by an individual with a perceptual disability, in connection with the individual's enrolment at an educational institution in Canada.

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