

Docket: 2008-805(IT)I

BETWEEN:

RENE CORBETT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on August 29, 2008, at Halifax, Nova Scotia

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Toks Omisade

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**JUDGMENT**

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed.

Signed at Ottawa, Canada, this 11th day of September 2008.

“V.A. Miller”

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V.A. Miller, J.

Citation: 2008TCC499

Date: 20080911

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RENE CORBETT,

Appellant,

and

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### **REASONS FOR JUDGMENT**

V.A. Miller, J.

[1] This is an appeal from an assessment made under the *Income Tax Act* (“the Act”) for the 2005 taxation year wherein the *Minister of National Revenue* (the “Minister”) did not allow the Appellant the credit for mental or physical impairment. In his Notice of Appeal the Appellant also asked that he be considered for the credit for mental or physical impairment for the 2000, 2001, 2002, 2003 and 2004 taxation years.

[2] Cathy Rissanen, Litigation Officer, for the Canada Revenue Agency (“CRA”) testified that the Appellant was last reassessed for his 2000 taxation year on March 21, 2002; for his 2001 taxation year on September 15, 2003; for his 2002 taxation year on September 15, 2003; for his 2003 taxation year on July 15, 2004; and, for his 2004 taxation year on December 28, 2005. The Appellant did not file Notices of Objection for the 2000, 2001, 2002, 2003 and 2004 taxation years. As well, the Appellant has never filed applications for extension of time to file Notices of Objection for these years. Consequently, the 2000, 2001, 2002, 2003 and 2004 taxation years cannot be considered by this court.

[3] In his Notice of Appeal the Appellant asked that he be considered eligible to receive the credit for mental or physical impairment on the basis that he receives life-sustaining therapy.

[4] The Appellant represented himself. He stated that he is sixty-four and he is living with human immunodeficiency virus (“HIV”) and acquired immune deficiency syndrome (“AIDS”). He contracted HIV through a blood transfusion in 1980 and he was diagnosed in December 1995 to have AIDS. He explained that his condition has deteriorated significantly since that time. In 2005 the Appellant’s medical treatment included monthly blood tests. He stated that in 2005 he also took 29 different medications twice a day. The medications were pills and creams and it took him about 1 hour daily to self-administer the medications. His evidence was that his medications changed on an annual basis because they became ineffective. He stated that the medications control the virus but damage his body.

[5] The Appellant testified that he has to perform a regimen of exercises that was given to him by a physiotherapist. These exercises help him to stay mobile and to function. He explained that without these exercises he would be unable to move on his own. At the hearing the Appellant estimated that he spent more than 4 hours a day doing exercises whereas in his Notice of Appeal he stated that he spent 2 hours every day doing exercises. It was the Appellant’s position in his Notice of Appeal and at the hearing that his medication and exercise regimen constituted life-sustaining therapy.

[6] Dr. Howard Conter, the Appellant’s family physician, explained in a letter that aside from AIDS the Appellant also has ischemic heart disease for which he had an angioplasty in 2006 with a placement of stents. Dr. Conter did not appear as a witness at the hearing.

[7] On cross examination the Appellant was questioned about his ability to perform the basic activities of daily living as that phrase is defined in the *Income Tax Act* (the “Act”). The Appellant said that in 2005 he was incontinent of both bladder and bowel functions. There were occasions when he could not leave his home because he suffered from diarrhea. He started to wear incontinence pads in 2005 and he wears them today. The medications caused him to have dementia and in 2004 and 2005 he attended psychotherapy to get his mind to function. The Appellant developed cataracts as a result of the virus and the medications. In 2005 he had the cataracts removed.

[8] The Disability Tax Credit Certificate (the “Certificate”) that was filed with the Minister was completed by Dr. Conter. In Part B of the Certificate he indicated that the Appellant was not markedly restricted in any of the basic activities of daily living. He did indicate that the Appellant met the conditions for life-sustaining therapy as he has HIV-AIDS and must take a “cocktail of anti-HIV drugs plus followup”. Dr. Conter certified that the Appellant has at least one impairment in physical or mental functions that has lasted for a continuous period of at least 12 months; that with appropriate therapy, medication, and devices, the impairment has resulted in a significant restriction that is not quite a marked restriction in two or more basic activities of daily living; that these restrictions exist all or substantially all of the time; and that, the cumulative effect of these significant restrictions is equivalent to a marked restriction in a single basic activity of daily living. However, he was required to indicate which basic activities of daily living were significantly restricted. This he failed to do. Instead, he wrote “Life sustaining therapy” on the form.

[9] The relevant statutory provisions are as follows:

Credit for mental or physical impairment

**118.3** (1) Where

(a) an individual has one or more severe and prolonged impairments in physical or mental functions,

(a.1) the effects of the impairment or impairments are such that the individual’s ability to perform more than one basic activity of daily living is significantly restricted where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living or are such that the individual’s ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy that

(i) is essential to sustain a vital function of the individual,

(ii) is required to be administered at least three times each week for a total duration averaging not less than 14 hours a week, and

(iii) cannot reasonably be expected to be of significant benefit to persons who are not so impaired,

(a.2) in the case of an impairment in physical or mental functions the effects of which are such that the individual’s ability to perform a single basic activity of daily living is markedly restricted or would be so restricted but for therapy

referred to in paragraph (a.1), a medical practitioner has certified in prescribed form that the impairment is a severe and prolonged impairment in physical or mental functions the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted, but for therapy referred to in paragraph (a.1), where the medical practitioner is a medical doctor or, in the case of

- (i) a sight impairment, an optometrist,
- (ii) a speech impairment, a speech-language pathologist,
- (iii) a hearing impairment, an audiologist,
- (iv) an impairment with respect to an individual's ability in feeding or dressing themselves, an occupational therapist,
- (v) an impairment with respect to an individual's ability in walking, an occupational therapist, or after February 22, 2005, a physiotherapist, and
- (vi) an impairment with respect to an individual's ability in mental functions necessary for everyday life, a psychologist,

(a.3) in the case of one or more impairments in physical or mental functions the effects of which are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted, a medical practitioner has certified in prescribed form that the impairment or impairments are severe and prolonged impairments in physical or mental functions the effects of which are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted and that the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a single basic activity of daily living, where the medical practitioner is, in the case of

- (i) an impairment with respect to the individual's ability in feeding or dressing themselves, or in walking, a medical doctor or an occupational therapist, and
- (ii) in the case of any other impairment, a medical doctor,

has certified in prescribed form that the impairment is a severe and prolonged mental or physical impairment the effects of which are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy referred to in paragraph (a.1),

(b) the individual has filed for a taxation year with the Minister the certificate described in paragraph (a.2) or (a.3)

...

### Time spent on therapy

(1.1) For the purpose of paragraph 118.3(1)(a.1), in determining whether therapy is required to be administered at least three times each week for a total duration averaging not less than an average of 14 hours a week, the time spent on administering therapy

(a) includes only time spent on activities that require the individual to take time away from normal everyday activities in order to receive the therapy;

(b) in the case of therapy that requires a regular dosage of medication that is required to be adjusted on a daily basis, includes (subject to paragraph (d)) time spent on activities that are directly related to the determination of the dosage of the medication;

(c) in the case of a child who is unable to perform the activities related to the administration of the therapy as a result of the child's age, includes the time, if any, spent by the child's primary caregivers performing or supervising those activities for the child; and

(d) does not include time spent on activities related to dietary or exercise restrictions or regimes (even if those restrictions or regimes are a factor in determining the daily dosage of medication), travel time, medical appointments, shopping for medication or recuperation after therapy.

...

### Nature of impairment

**118.4** (1) For the purposes of subsection 6(16), sections 118.2 and 118.3 and this subsection,

(a) an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months;

(b) an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living;

(b.1) an individual is considered to have the equivalent of a marked restriction in a basic activity of daily living only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual's ability to perform more than one basic activity of daily living (including for this purpose, the ability to see) is significantly restricted, and the cumulative effect of those restrictions is tantamount to the individual's ability to perform a basic activity of daily living being markedly restricted;

(c) a basic activity of daily living in relation to an individual means

- (i) mental functions necessary for everyday life,
- (ii) feeding oneself or dressing oneself,
- (iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,
- (iv) hearing so as to understand, in a quiet setting, another person familiar with the individual,
- (v) eliminating (bowel or bladder functions), or
- (vi) walking;

(c.1) mental functions necessary for everyday life include

- (i) memory,
- (ii) problem solving, goal-setting and judgement (taken together), and
- (iii) adaptive functioning;

(d) for greater certainty, no other activity, including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living; and

(e) feeding oneself does not include

- (i) any of the activities of identifying, finding, shopping for or otherwise procuring food, or
- (ii) the activity of preparing food to the extent that the time associated with the activity would not have been necessary in the absence of a dietary restriction or regime; and

(f) dressing oneself does not include any of the activities of identifying, finding, shopping for or otherwise procuring clothing

[10] The Federal Court of Appeal in *MacIsaac v. Canada*<sup>i</sup> emphasized that not only must the prescribed certificate be filed but that the certificate must satisfy the language of the legislation. In paragraph 5 Justice Sexton stated:

5 While we sympathize with both Respondents and with the position taken by the Tax Court Judge we cannot agree with him on this question. Section 118.3(1)(a.2) of the *Income Tax Act* is not merely directory. It is mandatory. Simply put, there must be a certificate by the doctor that the individual suffers impairments in the language of these subsections. This Court held to the same effect in *Partanen v. R.* (1999), 99 D.T.C. 5436 (Fed. C.A.) and we feel bound by this decision.

[11] The Certificate filed with the Minister must specify the activity or activities of daily living which are impaired and which result in a significant restriction. This Dr. Conter failed to do.

[12] In addition, based on the evidence presented, the Appellant does not meet the requirements of paragraph 118.3(1)(a.1) of the *Act*. Although Dr. Conter has certified that the medications which the Appellant took are a life-sustaining therapy, the Appellant's evidence establishes that they were not administered for a total duration averaging not less than 14 hours a week. The time spent by the Appellant in performing his exercises is not included in the calculation of the time spent in administering therapy in accordance with paragraph 118.3(1.1)(d) of the *Act*. It was the Appellant's evidence that it took him 7 hours a week to administer his medications.

[13] The appeal is dismissed.

Signed at Ottawa, Canada, this 11th day of September 2008.

“V.A. Miller”

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V.A. Miller, J.

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<sup>i</sup> [2000] 1 C.T.C. 307 (FCA)

CITATION:	2008TCC499
COURT FILE NO.:	2008-805(IT)I
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PLACE OF HEARING: Halifax, Nova Scotia  
DATE OF HEARING: August 29, 2008  
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller  
DATE OF JUDGMENT: September 8, 2008

APPEARANCES:

For the Appellant: The Appellant himself  
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COUNSEL OF RECORD:

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Firm:

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