

Docket: 2009-2427(IT)I

BETWEEN:

EDWARD MURPHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 13, 2010, at Ottawa, Ontario

Before: The Honourable Justice C.H. McArthur

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Antoine Lamarre

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is allowed, with costs, if any, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to claim the additional amount of \$2,002 as medical expenses incurred for his spouse, for the cost of acupuncture treatments.

Signed at Ottawa, Canada, this 20th day of August, 2010.

“C.H. McArthur”

McArthur J.

Citation: 2010 TCC 434
Date: 20100820
Docket: 2009-2427(IT)I

BETWEEN:

EDWARD MURPHY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] This appeal is from an assessment by the Minister of National Revenue (Minister) denying the Appellant's claim for acupuncture medical expenses of approximately \$2,000.00 for his 2007 taxation year.

[2] The Minister determined that the fees paid for his wife's (Cathy MacKechnie) acupuncture treatment were not made to an individual or organization registered as a medical practitioner in the province of Ontario within the meaning of paragraphs 118.2(2)(a) and 118.4(2)(a) of the *Income Tax Act (Act)*¹.

Facts

¹ Reply to the Notice of Appeal.

[3] The Appellant made the following undisputed statement in paragraph 2 of his Notice of Appeal:

2. My wife underwent acupuncture as part of extensive fertility treatments. Thankfully, these treatments eventually resulted in the birth of our daughter. Introduction of acupuncture into the treatment process was (at least in our view) the determining factor that transformed months of failure into success (pregnancy). The treatment was provided by the acupuncturist affiliated with the Ottawa Fertility Centre, Steve Ryu. Mr. Ryu is a licensed acupuncturist (N.Y.), and is a member of the Canadian Society of Chinese Medicine and Acupuncture.

[4] The outcome of this appeal rests with whether an acupuncturist in Ontario is a "medical practitioner" within the meaning of the *Act*. The evidence was not in dispute. Comprehensive arguments were presented by the Appellant who is a lawyer and Antoine Lamarre, counsel for the Minister. A summary of the parties' submissions follows.

Appellant's Position

[5] The issue is whether a "medical practitioner" as described in the *Act* includes an acupuncturist practicing in Ontario in 2007. Two criteria are required. First, the expenses claimed must be made in respect of medical services rendered by a medical practitioner authorized to practise in Ontario. The second requirement is whether the Ontario law recognizes acupuncture.

[6] The Appellant submitted that subsection 27(1) of the *Regulated Health Professions Act, 1991 (RHPA)*² states "nobody shall perform a controlled act...", but

² S.O. 1991, c. 18.

27(1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,

(a) the person is a member authorized by a health profession Act to perform the controlled act; or

...

27(2) A "controlled act" is any one of the following done with respect to an individual:

...

section 8 of the *Controlled Acts*, Ontario Regulation 107/96 (Regulation) explicitly exempts acupuncture from this restriction. In 2007, acupuncturists were legally permitted to work in Ontario (*Traditional Chinese Medicine Act*). In *Couture v. Her Majesty the Queen*,³ Boyle J., of this Court found that this was a regulatory step to authorize acupuncture, giving it formal recognition as a discipline under Ontario law.⁴ The Federal Court of Appeal (FCA)⁵ reversed this finding, concluding that an exemption from a prohibition does not amount to formal recognition or authorization.

[7] The present situation can be distinguished in that the FCA appeal considered the 2003 and 2004 taxation years. The present appeal relates to the 2007 taxation year and in 2006 the *Traditional Chinese Medicine Act, 2006 (TCMA)*⁶ was passed in Ontario.⁷ The Appellant quotes from Hansard to the effect that acupuncture medical treatment is an important part of our health care system.⁸

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2. Performing a procedure on tissue below the dermis, below the surface of a mucous membrane, in or below the surface of the cornea, or in or below the surfaces of the teeth, including the scaling of teeth.

³ 2008 TCC 171.

⁴ 2008 FCA 412, paragraph 7, Ryer J. of the FCA summarized the conclusions of Boyle J. as follows:

[7] . . . the Tax Court Judge found that the Crown had not shown, and he was unable to find, anything in the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, that prohibited the practice of traditional Chinese medicine or acupuncture in Ontario in 2003 and 2004. He further stated that he did not see anything in that legislation that suggested that Professor Cheung was not authorized to practice traditional Chinese medicine and acupuncture in 2003 and 2004. Finally, the Tax Court Judge found that the removal of a prohibition against acupuncture, as a controlled act under subsection 27(1) of the *Regulated Health Profession Act, 1991*, by virtue of section 8 of the *Controlled Acts*, O. Reg. 107/96 (the "Controlled Acts Regulations."), meant that in the relevant years, anyone was allowed to perform acupuncture in Ontario.

⁵ 2008 FCA 412.

⁶ S.O. 2006, c. 27.

⁷ Tab 4 of Appellant's Book of Documents.

⁸ Tab 5, page 6419 of Appellant's Book of Documents.

[8] The Appellant adds that there are substantive provisions in *TCMA* that are not yet operative, which would control how to regulate the profession and operate a governing college yet the FCA stated in *Couture*⁹ that the question is whether acupuncture has been formally recognized as a discipline under provincial law, namely by the *TCMA*. Formal recognition under provincial law has occurred because Ontario established a legislative framework. At paragraph 13 of *Couture*, Ryer J. indicates that "authorize" means to give formal approval to or to formally approve. By contrast, if substantive regulation was a prerequisite, the FCA would have said so. The legislature established a foundation for a college, such that the goal of formal recognition is achieved.

Respondent's Submissions

[9] In 2007, a medical practitioner in Ontario was a person authorized to practise as such, pursuant to the laws of the jurisdiction in which the service is rendered.

[10] The Respondent submitted that paragraphs 13 and 14 of the FCA's decision in *Couture* require that there must be some formal approval of acupuncture that goes beyond the section 8 Regulation exemption to the subsection 27(1) *RHPA* prohibition on practising acupuncture. To be authorized to practise, the acupuncturist must be a member of the College of Traditional Chinese Medicine Practitioners and Acupuncturist of Ontario (College), pursuant to sections 4 and 8 of the *TCMA* contained a provision that revokes the section 8 Regulation exemption to the subsection 27(1) *RHPA* prohibition on practising acupuncture. That section was also not in force during 2007, so during that year the exemption to the prohibition was in operation and not the *TCMA* authorization to practise.

Analysis

Hon. George Smitherman (Deputy Premier, Minister of Health and Long-Term Care):

Thank you, we are here today –the Legislature of Ontario is here —and we are joining together to acknowledge that traditional Chinese medicine and acupuncture are an important part of our health care system. We do so in response to the reality that is well know; that is, many of our constituents are gaining benefit from these services.

⁹ Tabs 1 and 2 of Respondent's Book of Authorities.

[11] The crux of the Appellant's position is that after the *Couture* FCA decision, things have changed. The *TCMA* was enacted to legally recognize acupuncture as a discipline. Although the substantive portions are not yet operative, all that was required was the legislature to pass the *TCMA*, which it did with Royal Assent in December 2009.

[12] The core of the Respondent's position is that not all provisions of *TCMA* are in force, and only when they are will the prohibition and its corresponding exemption disappear to be replaced by an authorization of acupuncture.

[13] Both parties emphasized reliance on the FCA *Couture* decision. I am indebted to both Boyle J. of the Tax Court and Ryer J. of the FCA, respectively, for their analyses. Boyle J. whose conclusion was overturned by Ryer J., considered the same issue as the present one, but for the 2003 and 2004 taxation years.

[14] At the outset, reference should be made to section 27 of the *Ontario's Regulated Health Professions Act, 1991*¹⁰, and the relevant portion reads:

Controlled Acts Restricted

27(1) No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless,

(a) the person is a member authorized by a health profession Act to perform the controlled act; or

27(2) A "controlled act" is...

Performing a procedure on tissue below the dermis...

[15] Section 27 effectively prohibited the practise of acupuncture, but section 8 of the *Controlled Acts*, exempts acupuncture from the operation of section 27. The question is whether this exemption is sufficient to conclude that an acupuncturist was authorized in 2007 to practise acupuncture in Ontario, meeting the requirements of paragraph 118.4(2)(a) of the *Act* which reads:

118.4(2) For the purposes of sections 63, 64, 118.2, 118.3 and 118.6, a reference to an audiologist, dentist, medical doctor, medical practitioner, nurse, occupational therapist, optometrist, pharmacist, physiotherapist, psychologist or speech-language pathologist is a reference to a person authorized to practise as such,

¹⁰ S.O. 1991, Chapter 18.

- (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;
- (b) ...

[16] On appeal of Boyle J.'s decision in *Couture*,¹¹ Ryer J. from the FCA held that an exemption from a prohibition on practising acupuncture in Ontario is not synonymous with being authorized to practise acupuncture in Ontario, as required by paragraph 118.4(2)(a) of the *Act*.

[17] At paragraph 13 , 15 and 16, he stated:¹²

[13] Each of these definitions states that "authorize" can be taken to mean "to give formal approval to" or "to formally approve". In my view, those meanings are appropriate with respect to the interpretation to the phrase "authorized to practise" in subsection 118.4(2). Thus, some formality or formal recognition of acupuncture as a discipline that is legally countenanced under Ontario law must be shown.

[15] The Crown argues that specific legislative approval and regulation of a particular area of practise or profession, in this case acupuncture, is required to demonstrate that such practise had been authorized by the applicable law. In support of that contention, the Crown refers to a passage from *Noddin*, in which Bowie J. states, at paragraph 8:

Clearly the policy objective is that the credit is to be available only where there is some legislated assurance of competence of the person administering the service.

[16] In my view, the level of legislative approval put forward by the Crown would be clearly sufficient to demonstrate the requisite legislative authorization. However, I would not rule out the possibility that something else might be sufficient in the circumstances. In the present circumstance the only legislative reference to acupuncture was its inclusion in the Controlled Act Regulations as something that is no longer prohibited as a controlled act. As previously stated, I am of the view that this level of legislative reference is insufficient to establish that the practise of acupuncture was formally approved by Ontario law in 2003 and 2004.

(Emphasis added)

¹¹ 2008 FCA 412.

¹² *Ibid.*

[18] The law relating to the practise of acupuncture in Ontario changed after 2004 with the passing of the *TCMA*. The requirement of a formal legal recognition of acupuncture as a medical discipline has now been countenanced.

[19] The Ontario Legislature's intention was expressed by the Minister of Health and Long-Term Care, who said:¹³

Accordingly, it is appropriate today in this Legislature of Ontario that we move forward as the second jurisdiction in Canada, and one of decidedly few, to say that we will create the circumstances to allow a College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario to come to life, giving it the formal acknowledgement in law that the people of Ontario, by the droves, have send a signal that they respect. (Emphasis added)¹⁴

[20] I agree that some provisions of the *TCMA* were not in force during the 2007 taxation year including sections 4, 5, 6, 8 and 19. Section 4 authorizes College members to practise acupuncture. Section 5 establishes the College. Section 8 prohibits non-members from practising acupuncture. Considering these provisions not being in force, the Respondent submitted that in 2007, no College had been established, so no members existed, and since one must be a member to practise acupuncture, nobody was authorized to practise acupuncture in Ontario during that year. The Respondent concludes that an acupuncturist was not "authorized" to practise in Ontario within the meaning of the term "authorized" found in paragraph 118.4(2)(a) of the *Act*. I do not accept this premise and conclusion as it defies reality at the present time. I take judicial notice to the effect that acceptance of acupuncture by the Ontario public is a growing phenomena. Considering the common usage of the terms, an acupuncturist is a medical practitioner but, of course, not a medical doctor, physician or surgeon.

[21] I note that section 13 of the *TCMA* was in force allowing for a transitional Council with broad powers to be formed.

Transition before certain provisions in force

13(1) The Lieutenant Governor in Council may appoint a transitional Council.

Registrar

¹³ Legislative Assembly of Ontario (Second Session, 38th Parliament) Official Report of Debates (Hansard), November 23, 2006, at page 6421.

- 13(2) The Lieutenant Governor in Council may appoint a Registrar who may do anything that the Registrar may do under the *Regulated Health Professions Act, 1991*.

Powers of transitional Council and Registrar

- 13(3) Before section 6 comes into force, the Registrar, the transitional Council and its employees and committees may do anything that is necessary or advisable for the implementation of this Act and anything that the Registrar, the Council, and its employees and committees could do under this Act.

[22] The Respondent submitted that subsection 19(1) of the *TCMA*¹⁵ (which revokes the section 8 *Regulation* exemption to the subsection 27(1) *RHPA* prohibition) was not in force in 2007, so the exemption to the prohibition was still in operation and not the *TCMA* authorization to practise. I do not accept this argument. An exemption to a prohibition, by operation of the *RHPA* and *Regulation*, and an authorization, by operation of the *TCMA*, can operate simultaneously in harmony. They do not conflict. Additionally, while subsection 19(1), if in force, would remove the exemption to the prohibition, subsection 19(2), which was also not in force at the time, would have re-added the exemption to the prohibition in a table in the *Regulation*. In short, section 19 has a zero-sum effect and if section 19 was in force, the exemption to the prohibition would remain alongside the *TCMA* authorization.

[23] Had the legislatures and the FCA required that further regulation of acupuncturists be in force, they would have stated so.

Conclusion

[24] I accept the Appellant's position. The FCA defined the term "authorize". "Authorize" requires formal recognition of acupuncture as a discipline that is legally countenanced under Ontario law. The formal recognition must go beyond a mere exemption from a prohibition but does not have to be as extensive as regulations. The Royal Assent of the *TCMA* and the statement in Hansard relating to the *TCMA* are sufficient formal recognition that acupuncture was a discipline legally accepted under Ontario law in 2007, satisfying the definition of "authorize" in paragraph 118.4(2)(a) of the *Act*. I make this finding notwithstanding that not all provisions of the *TCMA* were in force in 2007.

¹⁵ 19.(1) Paragraph 1 of section 8 of Ontario Regulation 107/96 (*Controlled Acts*) under the *Regulated Health Professions Act, 1991* is revoked.

[25] The FCA did not require the regulation of acupuncture in order for an acupuncturist to be "authorized". Ryer J. defined "authorize" in paragraph 12 as "to give formal approval to" or "to formally approve". "Regulate" has a much different meaning than "authorize" and requires more than formal approval. *The Oxford Paperback Dictionary*, New Expanded Edition 1998, provided to the Court by the Appellant, defines "regulate" as "to control or direct by means of rules and restrictions". If Parliament wanted the "medical practitioner" to be regulated in order to qualify for a medical expense credit, it would have used the term "regulate" in paragraph 118.4(2)(a) of the *Act* instead of "authorize".

[26] The appeal is allowed with costs.

Signed at Ottawa, Canada, this 20th day of August, 2010.

“C.H. McArthur”

McArthur J.

CITATION: 2010 TCC 434

COURT FILE NO.: 2009-2427(IT)I

STYLE OF CAUSE: Edward Murphy and Her Majesty the Queen

PLACE OF HEARING: Ottawa, Ontario

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REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: August 20, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Antoine Lamarre

COUNSEL OF RECORD:

For the Appellant:	n/a
Name:	
Firm:	
For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada