Personal Tax Planning

Co-Editors: Pearl E. Schusheim* and Gena Katz**

TUITION EXPENSES AND TUTORING FEES AS MEDICAL EXPENSES

*Jamie Golombek, Debbie Pearl-Weinberg, and Tess Francis****

Parents raising a child with a disability, who are sometimes faced with challenges in finding appropriate schooling that accommodates the child's unique needs, often turn to the private school system. The result is that tuition fees and private tutoring can cost thousands of dollars. Fortunately, Canadian tax policy recognizes the financial burden faced by these parents and provides some relief for the cost of schooling and tutoring by means of the medical expense tax credit. In practice, however, it is often difficult to claim this credit. The authors review the criteria, as determined by case law and the Canada Revenue Agency's published technical interpretations, for claiming tuition fees and the cost of tutoring as a valid medical expense. They also review two other planning solutions that could provide relief: using the preferred beneficiary election to allocate trust income to a beneficiary with a disability and using a prescribed rate loan to split investment income with minor children.

KEYWORDS: DISABILITY TAX CREDIT ■ MEDICAL EXPENSES ■ TUTORING ■ TUITION FEES ■ PRESCRIBED RATE LOAN ■ PREFERRED BENEFICIARY ELECTION

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* Of Couzin Taylor LLP (allied with Ernst & Young LLP), Toronto.

** Of Ernst & Young LLP, Toronto.

*** Of CIBC Wealth Advisory Services, Toronto.

MEDICAL EXPENSE TAX CREDIT

Most Canadians have the majority of their health care expenses paid for by provincial health-care programs. The Income Tax Act[1] provides some relief in the form of a non-refundable tax credit for expenses that are not fully covered. Introduced in 1942 as a deduction from income, the credit in its current form has existed since 1988.[2] The provinces and territories provide additional relief through provincial credits.

While most medical doctor visits, hospital services, and medically prescribed tests are fully covered by the various provincial health care programs, typically the cost of dental services, prescription medications, eyeglasses, and various other medical services and devices are not covered under these programs for the majority of Canadians.

The federal non-refundable tax credit is calculated as 15 percent of the individual's medical expenses over an annual threshold, which is the lesser of $2,208 for 2015 or 3 percent of net income.[3] The provinces and territories each offer a comparable credit that brings the total combined federal and provincial/territorial relief for medical expenses to between 19 percent (Nunavut) and 32 percent (Quebec).[4]

An individual may pool his or her medical expenses with the medical expenses of his or her spouse or common-law partner and children under age 18 before deducting the 3 percent net income (or $2,208) threshold. It is very common, therefore, for only one spouse, partner, or parent to claim the entire family's medical expenses on a single tax return.

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

2 David G. Duff, "Disability and the Income Tax" (2000) 45:4 *McGill Law Journal* 797-889, at 813-14.

3 Subsection 118.2(1).

4 Quebec uses family income for the 3 percent limitation test with no annual threshold, effectively preventing many high-income Quebec families from claiming any provincial relief for medical expenses.

Medical expenses for any 12-month period that ends in the taxation year can be claimed.[5] An individual can also claim an unlimited[6] amount of medical expenses paid for a dependent relative (other than a spouse, partner, or minor child) that exceeds that relative's income threshold.

In addition to the medical expense tax credit, a refundable federal medical expense tax credit[7] is available for low-income earners who report employment or business income in the year.[8] For 2015, the credit is worth a maximum of $1,172, and the individual must have minimum earnings of $3,421.[9]

Eligible Medical Expenses

The Income Tax Act provides an extremely detailed list[10] of medical expenses that qualify for the tax credit. The list includes medical and dental services,[11] expenses for nursing home care,[12] prescription drugs,[13] guide dogs,[14] gluten-free food,[15] and even medical marijuana.[16] This list of eligible medical expenses also includes tuition fees[17] and tutoring expenses.[18]

TUITION FEES

The Act provides that a patient must have a physical or mental handicap that requires special equipment, facilities, or personnel to be provided by a school in order for tuition fees to qualify for the credit. Paragraph 118.2(2)(e) states that a medical expense includes an amount paid

5 Paragraph 118.2(1)B(d).

6 Subsection 118.2(1)D. Before 2011, the limitation was $10,000, but this limitation was removed by the 2011 federal budget.

7 Subsection 122.51(1).

8 For 2015, this credit cannot be claimed if the total net income of an individual and his or her spouse or partner less any universal child care benefit and registered disability savings plan income is $49,379 or more.

9 A discussion of the refundable medical expense tax credit is beyond the scope of this article, but see Arthur B.C. Drache, "Medical Expense Supplement Credit" (2002) 24:22 *Canadian Taxpayer* 172-73.

10 Subsection 118.2(2).

11 Paragraph 118.2(2)(a).

12 Paragraph 118.2(2)(b).

13 Paragraph 118.2(2)(n).

14 Paragraph 118.2(2)(l).

15 Paragraph 118.2(2)(r).

16 Paragraph 118.2(2)(u).

17 Paragraph 118.2(2)(e).

18 Paragraph 118.2(2)(l.91).

for the care, or the care and training, at a school, an institution or another place of the patient, who has been certified in writing 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.

Collins

The courts have considered the conditions for a medical expense tax credit in the context of school tuition in a number of cases.[19] Perhaps the leading school tuition case is *Collins*.[20]

The child at issue displayed emotional and behavioural difficulties from a very young age. At four, he was assessed by a child psychologist, who advised that attention deficit hyperactivity disorder (ADHD) was suspected; when he was six, his parent became aware of a school that might be able to assist him. This school had small classes and staff who were specialized in dealing with various issues, including ADHD. Before his admission, the child was seen by another psychologist who, although he did not prepare a written report, confirmed that the child was gifted and recommended that he attend the school. On examination, this psychologist later confirmed that the school was recommended because it could accommodate both the child's high intellectual capacity and his emotional, social, and behavioural problems. Rowe J of the Tax Court of Canada set out the following four tests that must be satisfied to claim the medical expense tax credit in respect of tuition fees:

1. The taxpayer must pay an amount for the care or care and training at a school, institution or other place.
2. The patient must suffer from a mental handicap.[21]
3. The school, institution or other place must specially provide to the patient suffering from the handicap, equipment, facilities or personnel for the care or the care and training of other persons suffering from the same handicap.
4. An appropriately qualified person must certify the mental or physical handicap is the reason the patient requires that the school specially provide the equipment,

19 There have been rare instances in which a court has held that a particular school, institution, or other place specifically met the requirements of paragraph 118.2(2)(e). In his notes to paragraph 118.2(2)(e) of the *Practitioner's Income Tax Act*, 46th ed. (Toronto: Carswell, 2014), David Sherman states that the Tax Court of Canada has disallowed claims for fees paid to Crestwood Preparatory College, Glenlyon Norfolk School, Laureate Academy, Robert Land Academy, Rothesay Collegiate School, and Rumble College Academy but has allowed claims for fees paid to Calgary Academy, Foothills Academy, Robert Land Academy, and TALC Academy.

20 *Collins v. R*, [1998] 3 CTC 2980 (TCC).

21 Although Rowe J did not include "physical" handicaps in this criterion, paragraph 118.2(2)(e) refers to both mental and physical handicaps. Both such handicaps were referred to in the subsequent court decisions discussed below.

> facilities or personnel for the care or the care and training of individuals suffering from the same handicap.[22]

These tests were later modified somewhat by the court in *Lang*,[23] which involved private school tuition fees for triplets. Because of the parents' concern with the children's performance in elementary school, they were assessed by a psychologist before entering high school. The psychologist found that each child had a learning disability. The children then attended a high school whose marketing material indicated a focus on children with learning disabilities.

Miller J found that the test would be better set out as follows:

1. The taxpayer must pay an amount for the care or care and training at a school, institution or other place; and
2. The taxpayer must provide a certificate of an appropriately qualified person certifying that:
   (i) the person has a mental or physical handicap; and
   (ii) by reason of which the person requires equipment, facilities or personnel specially provided by that school for care or care and training of people suffering from the same handicap.[24]

The one change of substance in this modified test is the specific requirement that certification confirm a mental or physical handicap, rather than the mere requirement that a mental handicap exist. As explained below, this requirement takes the decision whether a mental or physical handicap exists away from the court and puts it into the hands of a professional.

We will now examine each of the criteria in *Collins* as well as the *Lang* modifications.

An Amount Must Be Paid for the Care or Care and Training at a School, Institution, or Other Place

An Amount Must Be Paid

Receipts issued for the purposes of claiming tuition should separate the cost of care or care and training from other costs.[25] If an individual suffers from a physical or mental handicap, fees paid to a place that has equipment, facilities, or personnel trained specifically for the care of individuals with that particular handicap may

22 *Collins*, supra note 20, at paragraph 20.

23 *Lang v. The Queen*, 2009 TCC 182.

24 Ibid., at paragraph 7.

25 See CRA document no. 2005-0113121E5, May 5, 2005, which indicates that for an individual with Alzheimer's disease who resided in a personal care home, the fees for care that related to the Alzheimer's disease needed to be distinguished from other fees that were paid to the home.

qualify as a medical expense. The receipt provider should ensure that it has the necessary equipment, facilities, and personnel before issuing a receipt.[26]

School, Institution, or Other Place

What constitutes a "school, institution or other place" is a question that has been posed to the Canada Revenue Agency (CRA) on several occasions. The CRA's view is that there is no requirement that the school, institution, or other place be located in Canada.[27] It has suggested that the following information would assist in determining whether a particular facility can be considered to be a school, institution, or other place that offers specialized personnel, equipment, or facilities for learning-disabled individuals:

- documentation that shows that the particular facility is recognized as a place offering specialized care,
- the number of staff members and their educational qualifications,
- the number of individuals that can be accommodated at the facility,
- the curriculum followed by the individuals who attend the facility, and
- a full description of the facility and any specialized equipment that it offers.[28]

The words "school" and "institution" have been interpreted to mean facilities of a public character that offer services to individuals who are not related to the facility owner or operator.[29] The private home of a tutor was found not to qualify, although the CRA did indicate that a tutor's home would in all likelihood have satisfied this condition if the tutor had operated in a manner similar to a school or institution and had staff, facilities, or equipment specially provided to treat a handicap.[30] Similarly, the home or office of a music therapist was found not to be a school, institution, or other place. In coming to this conclusion, the CRA stated that the term "other place" should be interpreted to be substantially the same as a school or institution.[31] While an "other place" may include an outpatient clinic,[32] the CRA noted this "was not intended to broaden the interpretation of the words 'other place,' but to recognize that the care and training . . . can be provided on an outpatient basis, as well as in an institutional setting."[33]

26 Ibid.

27 CRA document no. 9709637, August 5, 1997, stated, "the fact that such a school is in a foreign country does not preclude a claim under paragraph 118.2(2)(e) of the Act."

28 See CRA document no. 9507937, August 10, 1995.

29 See CRA document no. 2007-0253621E5, February 5, 2008.

30 See CRA document no. 9507937, August 10, 1995.

31 Ibid.

32 *Interpretation Bulletin* IT-519R2, "Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction," April 6, 1998, at paragraph 30, cancelled and replaced by *Income Tax Folio* S1-F1-C1, "Medical Expense Tax Credit."

33 CRA document no. 9720296, October 3, 1997.

The Patient Must Suffer from a Physical or Mental Handicap

A "mental handicap" is "a condition in which the intellectual capacity of a person is permanently lowered or underdeveloped to a degree that prevents normal function in society."[34] There is, however, no definition of the term "physical or mental handicap" in the Act. Accordingly, the meaning of this term has been explored a number of times. The CRA has stated that "[w]hether or not a particular individual has a physical or mental handicap requires a medical judgment which we are not in a position to make," and added, "our mandate is to be satisfied that a mental handicap indeed exists and that the handicap is such that it requires the special treatment."[35]

Taxpayers have attempted to claim tuition paid to private schools for the gifted as a medical expense on the basis that giftedness is a mental handicap; however, children who are gifted are not considered to have a mental handicap in the opinion of the CRA.[36] A private school argued that the credit is intended to provide tax relief for extraordinary medical expenses and that narrowly interpreting the term "mental handicap" defeats this purpose, particularly since there is a trend toward expanding the medical expense provisions. The school further contended that the ordinary meaning of "giftedness" encompasses negative side effects and that the dictionary definition of "handicap" is broad enough to include giftedness.[37] The CRA disagreed: "It is our opinion that the search for the ordinary meaning of a word may start with the dictionary definition but it does not necessarily end there. Ultimately, the ordinary meaning assigned to a word must reflect what the public generally understands it to be."[38]

The courts have also considered whether a gifted child can be viewed as having a mental handicap. The consistent result is that giftedness alone, without an additional condition, is not a mental handicap. The court in *Collins* concluded that the criteria for handicapped status were not as strict as those necessary to claim the disability tax credit. The *Congo*[39] case acknowledged that ADHD was a handicap but nonetheless resulted in an unsuccessful claim for the disability tax credit. The test for mental handicap was satisfied in *Collins* not only on the basis of professional evidence that the child had ADHD but also on the basis of the evidence of a psychiatrist who was of the opinion that ADHD was a "mental disorder and a mental handicap."[40] The court did not rely on the fact that the child was gifted to come to this conclusion.

34 *Oxford English Dictionary*, 2d ed.

35 CRA document no. 9623375, July 30, 1996.

36 CRA document no. 9608706, April 10, 1996.

37 Ibid.

38 Ibid.

39 *Congo v. R*, [1996] 3 CTC 2189(D) (TCC).

40 *Collins*, supra note 20, at paragraph 27.

Rowe J presided over three other cases dealing with children who attended the same private school that the child in *Collins* attended: Choice School in Richmond, British Columbia (Choice), and the decisions in these cases were handed down in quick succession. The first case was *Giroday*.[41] Using the same reasoning as the court in *Collins*, the court determined that a child who was diagnosed as gifted and recommended to attend Choice neither had a mental handicap nor had been certified as having one. The child was attending a public school where the program was not designed for gifted children. The view of the psychologist who examined the child was that the child would benefit from a more challenging program. Choice was specifically recommended because of its small classes, individualized academic program, and large number of enrichment activities. Rowe J found that "it cannot be said that [the child] is suffering from a mental handicap merely because of his superior intellectual ability."[42]

Again, in *Robinson*[43] children who were diagnosed as gifted and recommended to attend Choice were found not to have a mental handicap and not to have been certified as having one. One of the children was so frustrated by the public school program he was enrolled in that he exhibited very dangerous behaviour. Rowe J clearly sympathized with the taxpayer but did not feel that he could rule in her favour: "I cannot find on the evidence that [the child] suffered from a mental handicap although it is recognized his behaviour . . . was highly disconcerting to the appellant and her husband and, most importantly, to [the child]."[44]

Rowe J also felt compelled to deny the tax credit in *Burns*,[45] although the child, who was diagnosed by a psychologist as being gifted, also exhibited a disparity between his pronounced verbal skills and his unremarkable other skills, which could cause problems. The psychologist, who recommended that he attend Choice, stated that the child "had a physical, mental or emotional condition that interfered with his normal functioning."[46] She admitted that the recommendation of Choice "had a strong prophylactic component to it and that gifted children, who are merely bored in school, may attain a level of frustration so extreme . . . at which point the behaviour becomes diagnosable."[47] The judge again expressed sympathy toward the taxpayer, and added that since giftedness does not qualify as a mental handicap, there is no relief provided for private school tuition, unless a mental handicap results from ignoring the child's exasperation.[48]

41 *Giroday v. R*, [1998] 3 CTC 2756 (TCC).

42 Ibid., at paragraph 6.

43 *Robinson v. R*, [1998] 3 CTC 2948 (TCC).

44 Ibid., at paragraph 35.

45 *Burns v. R*, [1998] 4 CTC 2149 (TCC).

46 Ibid., at paragraph 14.

47 Ibid., at paragraph 15.

48 Ibid., at paragraph 34.

In other situations, the CRA has stated its opinion that there is no known mental or physical handicap associated with multiple severe food allergies that are anaphylactic;[49] however, expenses may be eligible in circumstances involving an addiction to tobacco,[50] drugs, or alcohol;[51] an eating disorder;[52] obesity;[53] attention deficit disorder (ADD);[54] ADHD;[55] learning disabilities in general (including dyslexia);[56] and some behavioural problems.[57]

Provision of Equipment, Facilities, and Personnel by a School, Institution, or Other Place for the Care or Care and Training of Other Persons Suffering from the Same Handicap

The CRA's general position is that a school need not limit its enrolment to persons who require specialized care and training.[58] In addition, the care does not need to be provided on a full-time basis.[59]

Before the decision in *Collins*, the court in *Anka*[60] clarified that care or training must be received and that the receipt of care or training is to be distinguished from tuition paid for education, even if the education is tailored to a child's special needs. "It must be remembered that the words 'care or care and training' are used in the context of a definition of a medical expense and they take colour from that context."[61] On this basis, the costs of nursery school and ballet and swimming lessons for a child who was diagnosed as having severe expressive speech and language problems were found not to be eligible for the credit.

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49 See CRA document no. 2013-0507021E5, January 29, 2014.

50 See S1-F1-C1, supra note 32. A stop-smoking program qualifies only if it is required because of serious health deterioration and the program is both prescribed and monitored by a medical practitioner.

51 See CRA document no. 2012-0436431E5, February 20, 2012.

52 Ibid.

53 See CRA document no. 2001-0093005, September 19, 2001. A weight-loss program qualifies only if it is required because of serious health deterioration and the program is both prescribed and monitored by a medical practitioner.

54 See CRA document no. 2004-0055761E5, February 27, 2004.

55 See CRA document no. 2002-0124487, May 14, 2002.

56 In CRA document no. 9623375, July 30, 1996, the CRA stated, "Over the years, we have come to recognize that learning disabilities, generally, and some behavioural problems are properly characterized as a form of mental handicap."

57 Ibid.

58 See CRA document no. 2004-0055761E5, February 27, 2004.

59 See S1-F1-C1, supra note 32.

60 *Anka v. R*, [1996] 1 CTC 2674(D) (TCC); aff'd. [1997] 3 CTC 48 (FCA).

61 Ibid. (TCC).

It is imperative that "care" be provided to the taxpayer, either with or without training. If training is the only service provided, the basic requirement for claiming tuition fees as a medical expense is not met.[62]

In situations involving private schools, the CRA has taken the view that special equipment, facilities, or the services of specially trained personnel must not be available to a student in the public school system.[63] For example, one doctor recommended the use of one-to-one tutoring that could not always be provided within a public school.[64]

Although the CRA's view is that a facility tailored to a specific disability may be more likely to be viewed as providing specialized equipment, facilities, or personnel, the legislation does not require that care be provided exclusively for individuals with a mental or physical handicap.[65]

However, small class sizes, individual tutoring, and individualized learning programs are not determinative factors for the CRA in deciding whether a school provides special equipment, facilities, or personnel.[66] This approach was illustrated in two situations involving autistic children. In one situation, a child attended a school whose approach focused on a low student-to-teacher ratio, beneficial social effects, and a stimulating atmosphere.[67] In the other situation, a child attended a day-care centre that offered an integrated setting and individualized attention that was focused on social skill development.[68] In both situations, these attributes were found to be beneficial to children in general and were not determinative in deciding whether the school provided special equipment, facilities, or personnel for the care of an individual with an autistic disorder.

The CRA came to a different conclusion when a special-needs school for learning-disabled students furnished a letter saying that teachers were required to undergo training in special methods; the school also provided specific language development instruction to aid students in overcoming weaknesses associated with disabilities such as ADHD.[69] The CRA concluded that it was likely that the school would be considered to have equipment, facilities, or personnel for the care or care and training of individuals suffering from ADHD.

Finally, in a situation in which a child was placed in a private school because of severe food allergies that could not be safely managed in public school, it was found that although the private school had taken measures to ensure an allergen-free

62 CRA document no. 9925417, November 4, 1999.

63 See CRA document no. 9610485, June 13, 1996.

64 See CRA document no. 9233187, December 21, 1992.

65 See CRA document no. 9603255, January 30, 1996.

66 See CRA document nos. 9704755, September 16, 1997; and 2002-0124487, May 14, 2002.

67 See CRA document no. 2010-0403181E5, May 27, 2011.

68 See CRA document no. 2004-0065621E5, May 06, 2004.

69 See CRA document no. 9824915, October 27, 1998.

environment, the school did not provide specialized equipment, facilities, or personnel.[70]

The courts have further interpreted and developed this test. In *Collins*, the court relied on the decision in *Zack*[71] to conclude that a school need not exclusively provide care for children with the same mental handicap, but merely be capable of satisfying this requirement. The court found that this requirement was satisfied because the school provided small classes, an open environment, and specially trained staff to deal with students with learning disabilities. The court referred to the fact that the staff was capable of addressing the needs of the child and others suffering from ADHD or a similar handicap. Similarly, in *Murdoch*[72] the court held that the requisite care and training was provided when public schools could not meet the needs of the child, and the private school that the child attended had a low student-teacher ratio and teachers with training to meet the needs of learning-disabled students.

In *Marshall*,[73] children had been diagnosed with ADD. An expert testified that the school attended by these children provided staff trained to deal with children with ADD and equipment to assist slow learners in processing information; in addition, treatment was a consistent consequence if a behaviour code was not met. The court held that these attributes satisfied the condition.

These three cases should be contrasted with *Flower*,[74] in which all students attending the school had been diagnosed with a learning disability. Tuition was in question for two children of the appellant, one who had benefited from remedial instruction, and the other who had benefited from accommodation in learning. In denying the tax credit for the tuition paid, the court relied on *Anka*,[75] in which it was held that the expense must be analyzed from a medical context. While the court conceded that special assistance was provided to the children at the school, this was insufficient when analyzing the school from a medical context. In the words of the judge, "While I have no doubt the boys needed the assistance that they received and profited from it, there is no legislation in the Act which permits a credit or deduction in respect of such assistance."[76] It is somewhat difficult to reconcile the decision in *Flower* with previous decisions in which the credit was permitted.

In *Scott*,[77] the Federal Court of Appeal refined this test. The court relied on the earlier decision in *Lister*,[78] which held that expenses for a seniors' residence were

70 See CRA document no. 2013-0507021E5, January 29, 2014.

71 *Zack v. R*, [1998] 1 CTC 2734 (TCC).

72 *Murdoch v. R*, [2002] 3 CTC 2451 (TCC).

73 *Marshall v. The Queen*, 2003 TCC 356.

74 *Flower v. The Queen*, 2005 TCC 268.

75 *Anka*, supra note 60.

76 *Flower*, supra note 74, at paragraph 15.

77 *Canada v. Scott*, 2008 FCA 286.

78 *Lister v. Canada*, 2006 FCA 331.

ineligible for the credit where the medical services provided were incidental to the accommodation services provided. The court found that this holding implied that the test was one of purpose. It found that there must be a specific need, and that the tuition expense "must be inextricably tied to this specific need resulting from his disability."[79] The school must be able to address the needs of children with similar disabilities. Thus, where a child attending a private school had ADD, an auditory processing disorder, and obsessive compulsive disorder, it was held that the tax credit was not permitted when some of the services offered to all students at the school benefited those with special needs. This school did not specialize in students with learning disorders, although its programs assisted with those issues. Although the teachers were not required to have specialized learning-disabilities training, they did in fact receive some training. The school offered small classes, and staff monitored the students' progress in connection with trial medication through contact with an external physician. In residence, homework coaches were provided.

In *Vita-Finzi*, the court noted that there is no express legislative requirement that a school have a particular focus but merely that "facilities and personnel be provided for the care and training required by the person suffering the mental handicap."[80] The court, however, found that the Federal Court of Appeal had previously held that eligibility for the tax credit required that the school provide medical services as a main focus. In other words, "care and training [must be] provided because of a handicap suffered by a patient."[81] The tuition fees at issue were paid to a school in which only 35 of 250 students required special attention. There were no special classrooms, and only one teacher was trained in special education. The court could not materially distinguish these facts from the facts in *Scott* and therefore felt bound by this decision. It was held that the special education was incidental to the regular academic program. No tax credit was available, although there was no ambiguity that the child had a learning disability arising from a developmental handicap, and that the school had supplied facilities and staff to address this disability. This reasoning was relied on by the court in *Piper* to conclude that tuition paid to a school that did not have "the education of handicapped children, or children with learning disabilities, as a dominant purpose,"[82] but was only a school that could accommodate children with learning disabilities, did not satisfy the requisite purpose test.

This decision can be contrasted with the decision in *Lang*, which recognized the "fine line between education and training."[83] The court held that the tuition paid for children with learning disabilities did encompass care and training because the

79 *Scott*, supra note 77, at paragraph 11.

80 *Vita-Finzi v. The Queen*, 2008 TCC 565, at paragraph 8.

81 Ibid., at paragraph 9.

82 *Piper v. The Queen*, 2010 TCC 492, at paragraph 9.

83 *Lang*, supra note 23, at paragraph 14.

school provided "specific skill instruction, accommodations, compensatory strategies and self-advocacy skills."[84]

The courts and the CRA have provided some guidelines in interpreting this requirement. For example, although the care need not be full-time, and enrolment need not be limited to children with a particular handicap, special education should be a dominant purpose of the particular school. It should not be incidental to the regular academic program, where handicaps are merely accommodated and the services provided assist students both with and without handicaps. The tuition should be paid to address a specific need. It appears that small classes and individual tutoring are insufficient on their own; rather, staff should have special training in dealing with students with a particular handicap, and similar care should not be available in the public school system.

Certification by an Appropriately Qualified Person That the Mental or Physical Handicap Is the Reason the Patient Requires That the School Specially Provide the Equipment, Facilities, or Personnel for the Care or the Care and Training of Individuals Suffering from the Same Handicap

An Appropriately Qualified Person

Certification does not need to be carried out by a medical practitioner.[85] Although the CRA had previously defined an "appropriately qualified person" to include a medical practitioner, as well as "any other person who has been given the required certification powers under provincial or federal law,"[86] there is no such definition in the income tax folio that replaced the former CRA interpretation bulletin that discusses this tax credit.[87]

In *Attas*,[88] the mother of a child with a learning disability heard from a friend about a doctor who could provide care and training for her child. The court found that the mother was a "qualified person" to make a certification for the purposes of paragraph 118.2(2)(e) because she was a professional teacher engaged in teaching students with learning disabilities.

Form of Certification

As was noted by the court in *Collins*, there is no special form to be used for a certification, and it need not be communicated to the CRA. In *Collins*, a psychologist had stated on examination that, after assessing the child before his admittance to Choice,

84 Ibid.

85 See CRA document no. 2012-0444341E5, April 23, 2012.

86 IT-519R2, supra note 32, at paragraph 30.

87 S1-F1-C1, supra note 32.

88 *Attas v. R*, [2000] 3 CTC 2773 (TCC).

she recommended Choice because it could accommodate both the child's high intellectual capacity and the child's emotional, social, and behavioural problems. At age nine, the child was seen by a psychiatrist, who provided a report concluding that the child "had a superior intelligence with high level of creativity, severe ADHD, and Oppositional Defiant Disorder."[89] It was also her opinion that a school such as the one attended by the child was the only place where the child could be maintained, even when medication (Ritalin) was prescribed. The court found that the certification had been provided in these circumstances, likely on the basis of the conclusions of the psychologist who met with the child before admission (although this was not stated explicitly).

Timing

In *Flower*, the children's family physician provided a letter two years after the tuition was paid. Its contents were based not only on the physician's ongoing assessment of the children over the years that she treated them but also on earlier assessments by psychologists and a hospital behavioural development clinic. The letter stated that the children suffer from "a learning disability" and "require the structure and specialized teaching offered by their current school."[90] It was held that the letter was issued too late to meet the requirement.

In *Macduff*,[91] the taxpayer could not provide any supporting documents because they had been destroyed. The court therefore reviewed copies of documents that the CRA had obtained during the notice of objection stage. A letter written after the child had benefited from the resources provided by a school was also held to be insufficient. It is not clear if this ruling was based solely on the timing of the letter. In addition, a letter from the school stating that a CRA official had concluded years earlier that "the tuition paid to [the school] will qualify as a medical expense"[92] was insufficient to meet this requirement.

In *Scott*, one of the reasons that a certification was ruled to be invalid was that it was made years after the period of enrolment. The court in *Karn*,[93] however, interpreted this decision as holding that the certification must be obtained before the time that a taxpayer files a tax return in which the credit is claimed, rather than before the fee payment is made. Subsequently, the court in *Greenaway*,[94] a case not dealing with the medical expense tax credit but with the timing of a certification in another section of the Act, disagreed with one counsel's submission that *Scott* stood for the proposition that the medical certification must be filed with the taxpayer's

89 *Collins*, supra note 20, at paragraph 15.

90 *Flower v. The Queen*, 2003 TCC 216, at paragraph 5.

91 *Macduff v. The Queen*, 2009 TCC 179.

92 Ibid., at paragraph 8.

93 *Karn v. The Queen*, 2013 TCC 78.

94 *Greenaway v. The Queen*, 2010 TCC 42.

tax return. Rather, the court held that it was sufficient that the certification was provided at trial. The court's view was that if a form were required to be filed with a tax return, the legislation would specifically state that this was the case. Despite this decision, it is usually advisable to obtain a certificate before a child attends a facility.[95]

Content

The certificate should specify that an individual requires the equipment, facilities, or personnel specially provided by a particular place to deal with the individual's particular handicap.[96] A statement that an individual "may benefit" from special equipment, facilities, or personnel provided by a particular place is not sufficient.[97] Further, the certification must specify the school, institution, or other place that provides the specialized equipment, facilities, or personnel.[98] In *Flower*, one additional factor influencing the finding that a certification was insufficient was the fact that "it fails to clearly state that the boys require the facilities and personnel specially provided by [the school] for their care and training."[99]

In *Scott*, the court referred to *Title Estate*, an earlier decision,[100] as support for the conclusion that "there must be true certification: one which specifies the mental or physical handicap from which the patient suffers, and the equipment, facilities or personnel that the patient requires in order to obtain the care or training needed to deal with that handicap."[101] The Federal Court of Appeal found no certification where there was merely a recommendation that the child attend the school.[102] This finding was relied on in *Bauskin*,[103] in which a child diagnosed with ADHD attended a school that provided a special program until the end of grade 8; however, in high school the child attended the mainstream program at the school and was provided with extra assistance, such as extra time for testing and assistance with work. The court held that the required certification was not provided for the years after

95 See CRA document no. 9731625, April 27, 1998. The CRA concluded that when the care provided by a particular place is restricted to individuals with a particular handicap, it is generally inferred that the individual was placed in the facility because of the particular handicap, and a certificate issued after the individual's placement in the facility may be accepted.

96 See CRA document no. 2002-0124487, May 14, 2002.

97 Ibid.

98 See S1-F1-C1, supra note 32. In the past, the certificate could instead have been specific to the type of equipment, facilities, or personnel that were needed to provide care and training of a person with that type of physical or mental impairment. See IT-519R2, supra note 32.

99 *Flower*, supra note 90, at paragraph 6.

100 *Canada v. Title Estate*, 2001 FCA 106.

101 *Scott*, supra note 77, at paragraph 23.

102 As stated above, the timing of the certification was another factor that influenced the decision.

103 *Bauskin v. The Queen*, 2013 TCC 64.

grade 8 because the physician's letter did not address the mainstream program's equipment, facilities, or personnel.

In *Vita-Finzi*, the court had already concluded that the tax credit was unavailable on the basis of the program provided; however, it reviewed whether a report provided by a psychologist could have satisfied the certification requirement, and stated (in obiter) that "[t]he less emphasis that the program [for which tuition was paid] puts on dealing with the special needs of handicapped persons, the more stringent the requirements for certifications to deal more expressly and exactingly with the express requirements of the Act."[104] In this context, the court indicated that, had tuition been paid to a school that "focused on teaching special needs children," it would likely have accepted the report that was submitted as a certification because the report specified a mental handicap and suggested program modifications and teaching strategies, notwithstanding that these modifications and suggestions were in a section of the report entitled "Recommendations."[105]

In *Lang*, the report provided by a psychologist did conclude that the children at issue suffered from learning disabilities. In its refinement of the *Collins* tests, the court held that it is not for a court to determine whether a mental handicap exists. Rather, the court is required to determine if there is a certification of a mental handicap, and if the certification identifies a school as specially providing services to those suffering a similar handicap.[106] The court held that the question articulated in *Lister*[107] (that it must be decided whether a handicap exists) would have a court make a determination beyond what the legislation requires. Miller J suggested that if a court doubts the professional evaluation of a handicap or an institution, it should deny the credit only "if the Court is satisfied the professional's certificate constitutes some type of abuse or avoidance."[108] Although the court recognized that a proper certification does not require the inclusion of the words "mental or physical handicap," the report should leave "no doubt in any reasonable reader's mind that it is the professional's view that the individual has a mental handicap."[109] The court did not accept the psychologist's report as a proper certification because it was unclear whether there was a mental handicap, despite the obvious learning difficulties.

Subsequent cases have focused on the certification requirement as expressed in *Lang*. In *Lucarelli*, the court interpreted Miller J's comments in *Lang* as requiring that a certification "specify the particular school that is at issue," on the reasoning that "Parliament expected an expert to provide this and not a judge."[110] In this case,

104 *Vita-Finzi*, supra note 80, at paragraph 19.

105 Ibid.

106 *Lang*, supra note 23, at paragraph 8.

107 *Lister*, supra note 78.

108 *Lang*, supra note 23, at paragraph 8.

109 Ibid., at paragraph 27.

110 *Lucarelli v. The Queen*, 2012 TCC 301, at paragraph 18.

the court held that certification was provided when information from professionals (an initial doctor's report followed by an assessment by a dyslexic resource centre) indicated the difficulties experienced by the child and recommended individualized training to bypass areas that were problematic. This finding was made even though no specific school was recommended in the reports because the court felt that it was established that the recommended training was provided by the school attended since the school specialized in providing this training to children who had the disability at issue.

In *Karn*, the court found that under the certification requirement as interpreted in *Lang*, a proper certification was provided and the dictionary definition of "mental handicap"[111] was satisfied, since one of the reports confirmed a learning disability and a "need for placement in a specialized school that provides specialized teacher training and very specific individual program plans, optimizes the teacher to student ratio and provides a high level of individualized support."[112] The court viewed the word "need" as interchangeable with the word "require."

Although the CRA has stated that it is "usually reluctant to challenge a medical certificate, issued by a medical practitioner,"[113] it has done so on several occasions, usually looking to the degree of a disorder to determine if an individual required special equipment, facilities, or personnel.[114] For example, in one situation a doctor had issued a certificate for an individual with a learning disorder. Although the certificate acknowledged a learning disorder, the CRA was of the view that it did not clearly establish that the learning disorder constituted a mental handicap that required special equipment, facilities, or personnel.[115]

In another instance,[116] a pediatrician strongly recommended that two boys be placed in a particular school as a result of their learning disabilities. Psychological assessments supported the recommendation. The CRA stated, "We would re-emphasize here that we are not in a position to judge the degree of a student's learning disability and reliance is therefore placed on the opinions of qualified persons in the field."[117] The CRA went on, however, to say that the existence of opinions from authorities within the educational system about the capability of the public school system in treating the disabilities brought into question whether the boys required placement in a special school. The CRA was unable to conclude with certainty that the criteria for claiming medical expenses had been met.[118]

111 *Oxford English Dictionary*, supra note 34.

112 *Karn*, supra note 93, at paragraph 22.

113 CRA document no. 9233187, December 21, 1992.

114 These technical interpretations preceded the decision in *Lang*, supra note 23.

115 See CRA document no. 9233187, December 21, 1992.

116 See CRA document no. 9623375, July 30, 1996.

117 Ibid.

118 Ibid.

TUTORING

When the requirements for claiming tuition as a medical expense under paragraph 118.2(2)(e) are not met, taxpayers should consider whether the medical expense tax credit can be claimed on the basis that fees have been paid for tutoring services.

Medical expense includes an amount paid

> 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.[119]

A "medical practitioner" is defined as "a person who is authorized to practise as such . . . pursuant to the laws of the jurisdiction in which the service is rendered."[120] This definition includes physicians, dentists, nurses, and optometrists, but does not include acupuncturists, for example.[121] Certification by an educational consultant has been found not to be acceptable for the purposes of this definition.[122]

In *Hoare*,[123] the children had severe learning disabilities. Because no school in the area could accommodate their needs, their parents enrolled them in a distance learning program and hired a teacher trained in special education to teach them in their home. Since their family doctor recommended that "both children receive special needs education provided either at a specialist school for dyslexics or with an individual special needs tutor,"[124] the court held that the requisite certification was established. The court found that 75 percent of the teacher's time was spent on the distance learning course. The remaining 25 percent was found to be supplementary to this primary education and was the portion eligible for the medical expense credit in relation to tutoring.

The court in *Lang* independently raised as an issue whether the costs incurred could be considered tutoring, eligible for the medical expense tax credit, because the certification was insufficient to claim a medical expense credit under the category of tuition. It recognized that tuition fees could cover a few different items, including primary education, care and training, and tutoring (as a supplementary service). In our view, this matter was raised because Miller J empathized with the taxpayers (he referred to the inequity in the tax treatment between parents who pay for private

119 Paragraph 118.2(2)(l.91).

120 Paragraph 118.4(2)(a).

121 See CRA document no. 2002-0180857, February 17, 2003.

122 See CRA document nos. 2001-0096425, August 29, 2001; and 2005-0126661E5, June 7, 2005.

123 *Hoare v. The Queen*, 2007 TCC 292.

124 Ibid., at paragraph 28.

schooling, and those who use the public school system and pay for supplemental tutoring).[125] The court found that tutoring was provided because there were specially trained teachers to give additional instruction. This was supplemental to primary education and was "over and above what would be provided in the public system."[126] Finally, the court held that the fact that the fees were paid to a private school does not necessarily mean that they were not paid to a "person ordinarily engaged in the business of providing such services to individuals."[127] The issue of allocation was not analyzed in detail because *Lang* was heard under the informal procedure; the court used 20 percent as the allocation for tutoring services but made it clear that this amount had no precedential value.

The requirements for tutoring as a medical expense have been reviewed in only a very few technical interpretations. In one of these, the CRA was asked about a situation involving a psychologist whose clients were children with mental impairments and/or learning disabilities. It was proposed that the psychologist would provide tutoring services to a child whom the psychologist had certified with respect to the need for these services. The CRA noted that a tutor must be ordinarily engaged in the business of offering tutoring services and thought it unlikely that a psychologist with a full-time practice would qualify under this test.[128]

ALTERNATIVE PLANNING SOLUTIONS

Preferred Beneficiary Election

One planning alternative that could help parents with the cost of tuition is the use of the preferred beneficiary election (PBE). Originally introduced in 1971, the PBE established the concept that the income of a trust could be deductible to the trust even if it was not paid (or made payable)[129] to a particular beneficiary in the year.[130]

The PBE effectively allows accumulating trust income[131] to be taxed in the hands of the preferred beneficiary without the need to actually distribute the income to

125 In *Lang*, supra note 23, at paragraph 34, Miller J stated that "it results in the entitlement of a couple who keep their learning disabled child in regular school and pay for after-school tutoring to the medical expense credit, but no such entitlement to the couple who send their learning disabled child to a special school, unless they get a certificate that the child is there due to a mental handicap requiring care and training. Care and training for mentally handicapped versus tutoring for all the learning disabled."

126 Ibid., at paragraph 50.

127 Paragraph 118.2(2)(l.91).

128 See CRA document no. 2000-0047397, October 30, 2000.

129 Paragraph 104(6)(b), and under subsection 104(24) an amount is deemed not to have become payable, unless it was paid in the year to the beneficiary or the beneficiary was entitled in the year to enforce the payment.

130 Maria Elena Hoffstein, "Tax Planning with Trusts—Current Issues," in *2007 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2007), 13A:1-45, at 13A:26.

131 Subsection 108(1) definition of "accumulating income."

the beneficiary.[132] As a result, income of the trust may be taxed in the hands of beneficiaries, who may be in a low tax bracket, and the trustees of the trust can retain control over the income. This tax-paid income is added to the capital of the trust and can generally be distributed among any of the capital beneficiaries of the trust; it need not (necessarily) be distributed to the preferred beneficiary.[133]

Before 1996, the PBE was extremely tax-effective because it allowed income splitting with minor children, but the 1995 budget restricted the use of the PBE to trusts with disabled beneficiaries.[134]

In order for a child under 18 to be a preferred beneficiary, the child must be eligible for the disability tax credit.[135] The child must also be the trust's settlor; the settlor's spouse or former spouse; a child, grandchild, or great grandchild of the settlor; or a spouse (but not a former spouse) of a child, grandchild, or great grandchild of the settlor. A child who is 18 or older may be a preferred beneficiary if he or she is considered to be a dependant under the Act,[136] is dependent on another individual because of mental or physical infirmity, and has no more income than the basic personal amount.[137]

An individual qualifies as a "dependant"[138] of another individual for a taxation year if the individual is dependent on the other individual for support at any time in the taxation year and is the child or grandchild of the other individual or the other individual's spouse or the parent, grandparent, brother, sister, uncle, aunt, niece, or nephew of the other individual or of the other individual's spouse.[139]

A trust and a preferred beneficiary may jointly elect[140] to have a portion of the trust's accumulating income for the trust's taxation year included in computing

132 Subsection 104(14).

133 Hoffstein, supra note 130, at 13A:27, note 61, has noted, "The case *Sachs v. The Queen* (1980) CTC 358, 80 DTC 6291, 8 E.T.R. 39, 33 N.R. 40 (Federal Court of Appeal) seems to suggest that the making of a preferred beneficiary election gives the beneficiaries a vested interest in the amount elected on. Many discretionary trusts give the trustees power to make income and capital distribution among the beneficiaries in proportions that they determine and also provide that even if an election is made, the beneficiary participating in the election does not have a vested right to receive the income."

134 Subsection 108(1) definition of "preferred beneficiary."

135 Subsection 118.3(1).

136 Under subsection 118(6).

137 Subsection 108(1) definition of "preferred beneficiary."

138 The expression "dependant" is discussed in *Interpretation Bulletin* IT-513R, "Personal Tax Credits," February 24, 1998.

139 Subsection 118(6).

140 Under regulation 2800, an "election under subsection 104(14) of the Act in respect of a taxation year shall be made by filing with the Minister a written statement (a) in which the election in respect of the year is made; (b) in which is designated the part of the accumulating income in respect of which the election is being made; and (c) that is signed by the preferred beneficiary and a trustee having the authority to make the election."

the income of the preferred beneficiary for the beneficiary's taxation year in which the trust's taxation year ended.[141]

Particular care must be exercised, however, if the preferred beneficiary is the spouse of the settlor or a child under the age of 18 years, since the attribution rules[142] may result in some, if not all, of the elected amount being deemed to be income of the settlor (or another person who has transferred or loaned property to the trust).[143] Careful planning is necessary to ensure that the attribution rules do not apply.

Prescribed Rate Loan Trust Planning

An alternative to the use of a trust and the preferred beneficiary election is the use of a family trust in combination with a prescribed rate investment loan. This strategy provides parents with an opportunity to fund their children's tuition and other expenses in a tax-effective manner.

Generally, if parents were simply to give their children money to invest, any dividends or other income earned from the money would be attributed back to the parents and taxed in their hands.[144]

There are two important exceptions to the rule about income splitting with minor children. The first is that capital gains earned on money given to minor children are not attributed to the transferor parent and therefore can be taxed in the children's hands.[145] In addition, if a prescribed rate loan is made to a child for investment, any income earned on the invested proceeds is not subject to attribution.[146]

While it is legally problematic to lend funds directly to a minor child, a formal discretionary family trust, with the minor children as beneficiaries, can solve this problem. A parent may make a loan to the family trust at the current prescribed interest rate (currently, a record low of 1 percent). The trust can invest the funds in guaranteed investment certificates, bonds, or dividend-paying securities and earn an annual yield. The trust pays the parent/lender 1 percent interest on the loan. Any income earned in the trust after deducting the interest expense can be distributed to the minor children and taxed in their hands.

If a minor child has no other income, he or she can earn up to $11,327[147] in income or approximately $50,000 in Canadian dividends from the family trust

141 Subsection 104(14).

142 Sections 74.1 to 74.5.

143 *Interpretation Bulletin* IT-510, "Transfers and Loans of Property Made After May 22, 1985 to a Related Minor," December 30, 1987.

144 Subsection 74.1(2). There is an exception for funds received from the child tax benefit and the universal child care benefit.

145 This occurs because the attribution rule in subsection 74.1(2) refers only to "any income or loss, as the case may be, of that person for a taxation year from the property" and is silent concerning the attribution of capital gains.

146 Subsection 74.5(2) provides the attribution exception for prescribed rate loans.

147 Paragraph 118(1)(c): the basic personal amount, indexed annually by subsection 117.1(1).

completely free of any personal federal tax in 2015.[148] Of course, this money need not actually be given to the child, but rather can be used to pay the child's expenses.

The advantage of establishing a prescribed rate loan when the prescribed rate is very low is that this rate continues to apply to the loan as long as it is outstanding, and attribution will not apply (even if interest rates rise).[149] Therefore, if a 20-year demand loan to the family trust is made when the prescribed rate is set at 1 percent, the 1 percent rate is to be used for the entire 20 years, even if the quarterly rate eventually increases in the years ahead. The only caveat is that the trust must pay the 1 percent interest to the parent by January 30 of the following calendar year; otherwise, attribution will apply for the current and all future tax years.[150]

CONCLUSION

While it is clear that the medical expense tax credit can provide some relief to help offset the cost of private school tuition and tutoring, the qualification criteria are difficult to meet, and each case is ultimately decided on the basis of its own facts and merits. However, there are some steps that can be taken to strengthen a taxpayer's basis for claiming the tax credit. For example, it is prudent to obtain a certification from a medical practitioner before enrolling the child in a private school. This certification should specifically refer to the particular mental or physical handicap, and what is required to address the specific needs of the child; it should also include the name of the school being considered. The school should be carefully chosen. It is best if the school makes special education its dominant focus, rather than an adjunct to its academic program. It appears to be insufficient if the school is merely able to accommodate students with handicaps. It seems to be essential that the staff receive special training to assist students with similar needs. A claim for the credit on the basis of amounts paid for tutoring as a supplemental service may also be considered. When the credit is unavailable, use of the preferred beneficiary election or a prescribed rate loan may help to fund tuition expenses.

148 Owing to a combination of the federal basic personal amount and the federal dividend tax credit. The tax-free amount of eligible dividends varies by province and territory.

149 Subparagraph 74.5(2)(a)(i).

150 Paragraphs 74.5(2)(b) and (c).