

DENNIS RADAGE

Appellant,

And

HER MAJESTY THE QUEEN

Respondent.

96 DTC 1615

TAX COURT OF CANADA

By: The Honourable Justice D. J. Bowman

Agent for the Appellant: L. Radage.  
Counsel for the Respondent: D.A. Drissell.

### JUDGMENT

These appeals are from assessments for 1991, 1992 and 1993 and involve a claim for the disability tax credit under section 118.3 of the *Income Tax Act*. No claim for the credit was made for 1991 and 1992 and no notice of objection was filed for those years. Accordingly, 1991 and 1992 are not validly before the court. For 1993, the question is whether the appellant's dependent son Taavi Radage suffered from a severe and prolonged mental or physical impairment within the meaning of sections 118.3 and 118.4.

Paragraph 118.3(1) reads:

Where

(a) an individual has a severe and prolonged mental or physical impairment,

(a.1) the effects of the impairment are such that the individual's ability to perform a basic activity of daily living is markedly restricted,

(a.2) a medical doctor, or where the impairment is an impairment of sight, a medical doctor or an optometrist, has certified in prescribed form that the individual has 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,

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

(c) no amount in respect of remuneration for an attendant or care in a nursing home, in respect of the individual, is included in calculating a deduction under section 118.2 (otherwise than because of paragraph 118.2(2)(b.1)) for the year by the individual or by any other person, for the purposes of computing the tax payable under this Part by the individual for the year, there may be deducted an amount determined by the formula  $A \times \$4,118$  where A is the appropriate percentage for the year.

Subsection 118.3(2) permits a parent, among others, to claim the credit in respect of a dependent.

Subsection 118.4(1) reads: 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;

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

(i) perceiving, thinking and remembering,

(ii) feeding and 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; and

(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.

The basis of the appellant's case is that his son Taavi is markedly restricted in his ability to think, perceive and remember, that is to say, all or substantially all of the time, he is unable to do so or requires an inordinate amount of time to do so.

At the time of the trial Taavi was 24 years of age. Both of his parents testified. His mother is a nurse and his father is an engineer. Taavi did not testify and, given his mental condition as described by Mr. and Mrs. Radage, I find this quite understandable. To have him testify would have been traumatic and embarrassing for him and in any event I doubt that I could have drawn any meaningful conclusions about his ability to think, perceive and remember from observing him in the witness stand. Indeed the best evidence of his mental condition is the testimony of his parents who have lived with him all his life. I draw no adverse inference from his failure to testify.

It became apparent to Taavi's parents that he had problems as early as the age of two. He was slow in learning to speak. He was bullied at school because he was "different". His hand-eye coordination was deficient. Indeed, even today he is uncoordinated to the extent that, as his father testified, he would be incapable of hammering a nail into a board. His motor skills are virtually non-existent. He is unable to participate in sports, although evidently he can ski. He is capable of reading, although he reads only the sports page of the newspapers, and he can watch television.

As a child, he attended special schools and, as an adolescent, he attended a special school in Ontario for persons with his type of problems and graduated from grade 12 in accordance with the standards of that school, which may not be the same as those of ordinary secondary schools in Ontario.

At present he works under supervision putting up shelves in a special program of the Alberta government. His father testified that he would not be able to do this type of work on his own. He cannot drive a car or ride a bicycle, but he can get around the city by public transit and would be capable of phoning the transit company to obtain instructions on how to get from one place to another. He was able to travel unaccompanied by plane to England, to visit a relative. He can buy things in stores but would not know, or at least would not notice, if he was being short-changed. He cannot do simple arithmetic in his head. His spatial perception is so limited that he would not realize that it would be impossible to put a square or rectangular shape in a round hole. He can feed and dress himself and can be left alone, although he would be unable to do anything but the simplest cooking, generally heating up meals previously prepared by his mother.

He is described in the medical certificate filed in support of the claim as having a borderline range of intelligence, impaired manual dexterity and hand-eye coordination. It is said as well that his receptive language skills are impaired. In the questionnaire filled out by Taavi in his own handwriting, but dictated by his mother, he described his problems in the following terms:

- developmental disability
- needs help and reminders about hygiene
- unable to manage money and other formal business
- unable to develop friendships
- motor coordination problems
- difficulty understanding some written material.

A further medical certificate states:

He is impulsive, emotionally labile and lacks an appreciation of consequences. He therefore is unable to manage money or day to day affairs. He can work in an unskilled job with constant supervision and assistance. He needs reminding to perform daily hygiene.

The evidence and argument advanced by both Mr. and Mrs. Radage can be summarized in the following passage from the notice of appeal: The attached reference from Dr. Stewart testifies that Taavi's disabilities are so severe that they make it impossible for him to function independently, therefore making him the responsibility of the state or some other capable person.

Taavi does not have a "single severe" disability, but the sum of his handicaps denies him the privilege of being able to address most of the issues generally expected from an able adult. This cumulatively amounts to a "severe disability" even though Taavi is not a person with visibly recognized disabilities that might provide wonderful photo opportunities for politicians and others looking for brownie points. He is one of those who fall between the cracks in the school systems, particularly secondary education, the job market and society in general. Taavi is currently earning approximately \$60/per week with no immediate avenues for increased earning power. His disabilities make his career prospects dismal indeed. He was able to find this job only because of the interventions and placement by the Chrysallis organization.

Taavi requires medications costing over \$50 per month. He wears glasses and is due for new prescription. If his father was unable to provide for his medical needs, the state would clearly be accountable. Taavi does live at home. He would not be able to sign a lease with a meaningful understanding of the implications. He of course would not be able to afford a home on his own. If his father did not provide shelter, food and clothing, the state would have to. Taavi's disabilities cause his inability to manage budgets, complete official forms, to drive a car, participate in normal social milieu of his age group, he cannot draw even the simplest of diagrams or directions, cannot estimate or remember time references, distances or other spatial matters. All these do indeed place severe barriers to independent living, employment and social functioning. Taavi's scope is very limited indeed.

The letter dated March 1, 1995 from the consulting psychologist, Garth A. Stewart was also put in evidence and it reads as follows: In November of 1993 I completed a psychological assessment on Taavi. He is an emotionally immature individual, which in combination with his intellectual and academic limitations, will have a significant impact on his ability to function independently. Due to his impulsivity, excitability, and lack of judgment, it is likely that he will have a good deal of difficulty making important decisions and managing his own affairs. Of greatest concern is his vulnerability to be taken advantage of by others. Taavi will probably require the assistance of either his family members or an appointed individual for some time to come, and as in most cases I feel that it is in the best interests of all concerned if he can receive this support from members of his own family rather than an appointed trustee.

The evidence was that Taavi had an I.Q. in the 70-84% range, described as "borderline retardation", an expression that today is not in favour. I might observe that I would be reluctant to base any decision on the results of an I.Q. test without satisfactory evidence concerning the type of test administered and its accuracy. Without that type of evidence I would regard such tests as inconclusive and unreliable. They prove more about the presumption of psychometrists in purporting to devise means of measuring "intelligence", a concept that has no generally accepted definition, than they do about the intellectual capacities of the subject.

As the *Oxford Companion to the Mind* observes, Innumerable tests are available for measuring intelligence (see INTELLIGENCE: ITS ASSESSMENT), yet no one is quite certain of what intelligence is, or even of just what it is that the available tests are measuring. I accept the evidence of Mr. and Mrs. Radage. Taavi's problems and limitations are not insignificant and should not be minimized. Moreover, I am aware of the great sacrifices that Mr. and Mrs. Radage have made and continue to make on behalf of their son. He may need care and supervision in some degree for the rest of his life.

The question however that I have to decide is whether he falls within sections 118.3 and 118.4 of the *Income Tax Act* as having a severe and prolonged mental or physical impairment, the effects of which are such that his ability to perform a basic activity of daily living is markedly restricted. His impairment is certainly prolonged within the meaning of paragraph 118.4(1)(a). The basic activity of daily living which Mr. and Mrs. Radage contend is markedly restricted is that set out in subparagraph 118.4(1)(c)(i): perceiving, thinking and remembering

To meet the criteria in paragraph 118.4(1)(b) he must all or substantially all of the time either be unable to perform that activity or require an inordinate amount of time in which to do so. I question the appropriateness of "all or substantially all of the time" or "requires an inordinate amount of time" when we are dealing with

thought processes. Some quick and decisive thinkers facily arrive at the wrong conclusion. Some slow and ponderous thinkers laboriously arrive at the right one. Which one has the problem, the tortoise or the hare?

A preliminary question, before I come to the meaning of these words, is whether "and" is disjunctive or conjunctive. As *Maxwell On Interpretation of Statutes*, 12th Ed., observes at pp. 232-233, In ordinary usage, "and" is conjunctive and "or" disjunctive. But to carry out the intention of the legislature it may be necessary to read "and" in place of the conjunction "or", and vice versa. There is ample authority for this proposition. I think that this is a case in which "and" should be treated as disjunctive. It would appear to defeat the purpose of the provision if a person who was wholly incapable of remembering, but still retained a capacity to do, say, mental arithmetic, should be disqualified from claiming the credit. Although in principle it seems correct to treat "and" as disjunctive in this instance, it must be recognized that in most cases, as a practical matter, perceiving, thinking and remembering are related and interdependent aspects of the mind's function. They are all related facets of a broader phenomenon. Perception, in its simplest aspect of reception, is what a camera does. In a human context, however, the mere reception of sensory data, without more, is meaningless. The recipient must be capable of recognizing, sorting and cataloguing the data, relating it to previously stored information, making inferences and forming, weighing, selecting and rejecting hypotheses. Thus, meaningful perception requires both memory and analytical capacity. Memory itself is dependent upon antecedent analysis, just as that analysis is dependent upon both the reception of data and the recall of previously analyzed and stored data. The validity of this generalization, however, like other generalizations that I have tried to formulate in this area, is subject to exceptions. It may, nonetheless, have a limited utility in the context of sections 118.3 and 118.4 as a practical hypothesis.

A second preliminary observation is that one cannot infer from a person's ability to perform all of the other activities of daily living enumerated under subparagraphs 118.4(1)(c)(ii) to (vi) that that person is able to perceive, think and remember. An inability to perform some or all of the other enumerated activities, may, however, under certain circumstances, be evidence of a deficiency under subparagraph 118.4(1)(c)(i), but the converse is not true. Subparagraph 118.4(1)(c)(i) stands as a separate head. The more difficult question is the meaning to be assigned to the words perceiving, thinking and remembering. In the French version of the Act the words are la perception, la réflexion et la mémoire. I presume that "thinking" and "la réflexion" are intended to mean the same, although I should have thought that "thinking" was more accurately rendered as "la pensée", and "la réflexion" was more accurately rendered as "reflection". There are obviously differences between the words, but however interesting it might be to pursue these linguistic subtleties, the court here is faced with the necessity of putting a sensible, practical and compassionate interpretation on the words that will give effect to the intention of Parliament, which is to give a measure of tax relief to persons with serious disabilities.

What does "perceiving, thinking and remembering" mean within the context of section 118.4? We use these words every day yet they are not susceptible of easy definition. Thinkers have struggled with the nature of thought since the days of Plato, and indeed before then. Descartes built an elaborate philosophical system, including the proof of the existence of God and of self, on his intuitively certain premise that he thinks: *cogito ergo sum*. Yet he gives us little assistance concerning what he thinks he is doing when he says *cogito*. One may ask if any useful purpose is to be served, in the everyday world in which sections 118.3 and 118.4 are intended to operate, in trying to define "perceiving, thinking and remembering". It is, I think, the obligation of the court to endeavour to do so or, if the conceptual difficulties of that task prove insurmountable, at least to indicate guidelines within which it sees the application of these terms.

Parliament has thrown the court a philosophically loaded package, which it cannot duck. We must attempt to apply these words to a concrete situation. Although it may appear that the court is embarking upon a theoretical enquiry for which it is ill-equipped, I can see no alternative to making the attempt. That is what, with considerable trepidation, I propose to try to do. Even though I realize that I may ultimately have to admit defeat in formulating clear definitions, the exercise will, I believe, at least demonstrate the protean nature of the terms and the danger in seeking to find and apply a rigid definition to something as complex as the workings of the human mind.

In this endeavour I have consulted a number of dictionaries and well known texts. No expert testimony was called and this is not surprising, given the amount of money involved. Had expert witnesses been called we would have become involved in an unproductive battle of experts in which philosophical and psychological concepts of mind were expounded or attacked with vigour and erudition, and the court would still be faced with the task of construing these deceptively simple words and applying them to Taavi Radage's situation.

The common understanding of words may well, as Lord Hailsham observed in *Girls' Public Day School Trust, Limited v. Ereaut*, [1931] A.C. 12 at page 25, be a question of fact, but the construction of words in the context of a particular statute is ultimately a question of law. To this end dictionaries and other sources may be consulted, but with caution. Dictionary definitions are frequently exercises in circularity and are often of little assistance in construing words in a statute. It would be tempting to throw up one's hands and say, "Well, everybody knows what perceiving, thinking and remembering means, so why bother looking for a definition?"

It is easy to recognize their presence or absence in a particular case." This would, I think, be to avoid the court's responsibility. There has been attributed to a United States Supreme Court judge the statement that he could not define obscenity but he could recognize it when he saw it. Dr. Samuel Johnson

evidently purported to refute Berkeley's metaphysical theories by kicking a stone. These pragmatic and seductively simplistic approaches may commend themselves but they do not work here.

Some practical meaning must be given to the words. I do not have the luxury, as evidently jesting Pilate did, of asking "What is truth?" and then not bothering to wait around for an answer. It seems clear that at least higher orders of sentient beings have cognitive faculties in greater or lesser degree, in the sense that they are capable of rational problem-solving and of responding to certain types of intellectual stimuli in a manner that goes beyond mere instinctive reaction. Studies of higher orders of mammal — chimpanzees, porpoises and certain other mammals — indicate that the faculty of logical thought may be latent and capable of development. Studies of non-human intelligence, however enlightening they may be in attempts to determine the nature of human intelligence, do not advance the enquiry that this court must make. In the quotations from various learned works that follow it will be apparent that even specialists have difficulty in assigning precise meanings to the words "perceiving, thinking and remembering".

### *THINKING*

Although "thinking" is the second word in the series I shall start with it because it seems to cover a broader field. Thinking, in its various forms, subsumes virtually all other forms of cognitive activity — reasoning, believing, reflecting, understanding, logical analysis, intuition, creativity, calculation and deliberation and forming judgements, to mention only a few. All are aspects of this elusive concept.

A quotation from the article Thought and Thought Processes in the 15th Edition of the *New Encyclopedia Britannica*, Vol. 28, p. 641 illustrates the difficulty of attempting to formulate a comprehensive definition of the word "thinking" that is useful or applicable in all cases under section 118.3 and 118.4: In everyday language the word thinking covers several distinct psychological activities. It is sometimes a synonym for "tending to believe," especially with less than full confidence. ("I think that it will rain, but I am not sure.") At other times it denotes attentiveness ("I did it without thinking"); or it denotes whatever is in consciousness, especially if it refers to something outside the immediate environment. ("It made me think of my old grandmother.") In the sense on which psychologists have concentrated, thinking is intellectual exertion aimed at finding an answer to a question or a means of achieving a desirable practical goal.

The psychology of thought processes concerns itself with activities similar to those usually attributed to the inventor, the mathematician, or the chess player; but psychologists have not reached agreement on any definition or characterization of thinking. For some is a matter of modifying "cognitive structures" (i.e., perceptual representations of the world or parts of the world).

Others view thinking as internal problem-solving behaviour. Perhaps the most satisfactory provisional conception of thinking is one that applies the term to any sequence of covert symbolic responses (i.e., occurrences within the human organism that can serve to represent absent events). If such a sequence is aimed at the solution of a specific problem and fulfils the criteria for reasoning, it is called directed thinking. Reasoning, of which rudimentary forms can be inferred to occur in infrahuman mammals, is a process of piecing together the results of two or more distinct previous learning experiences to produce a new pattern of behaviour. Directed thinking contrasts with other symbolic sequences that have different functions; e.g., the simple recall (mnemonic thinking) of a chain of past events.

In the past, psychologists and laymen often identified thinking with conscious experiences. But as the scientific study of behaviour came to be recognized generally as the task of psychology, the limitations of introspection as a source of data have become widely apparent. It thus has become more usual to treat thought processes as intervening variables or constructs with properties that must be inferred from relations between two sets of observable events. These empirically available events are inputs (stimuli, present and past) and outputs (responses, including bodily movements and speech). For many psychologists such intervening variables are of interest as aids in dealing with and in making sense of the immensely complicated network of associations between stimulus conditions and responses, the analysis of which otherwise would be prohibitively cumbersome. Others are concerned, rather, with identifying cognitive (or mental) structures that are held to underlie a human being's observable behaviour without his necessarily being aware of them.

The article then goes on to examine thought under a number of headings, as follows:

- Elements of thought
- The process of thought
- Motivational aspects of thinking
- Types of thinking
- Realistic thinking
- Convergent thought processes
- Problem solving
- Creative thinking
- Thinking in groups
- Autistic thinking
- Free association
- Fantasy
- Dreaming
- Pathological thinking

If the concept of thinking is approached as a philosophical rather than a psychological problem, the same difficulty in formulating a definition arises. In *The Oxford Companion to Philosophy*, under "Thinking", the following appears:

In its diverse forms — as reasoning, believing, reflecting, calculating, deliberating — thinking appears to enjoy an intimate connection with speech, but just what that connection might be is difficult to establish. It is seldom, as Plato would have it, a matter of an inward dialogue carried on by the mind with itself. Not only is wordless thought possible, as when we think how a room would look with the furniture rearranged; it does not even require attention to the matter in question for us to have thought that something was so, as when, tripping on a stair, we say we thought there was one fewer stair than there in fact was. It would appear obvious that speech is not a necessary aspect of thought although the two are as a rule connected.

The French version ("la réflexion") adds no clarification. The definition of "réflexion" in the *Grand Dictionnaire Encyclopédique Larousse* is as follows:

RÉFLEXION n.f. (même étym. que le précéd.)

1. Action de réfléchir, d'arrêter sa pensée sur qqch pour l'examiner, l'analyser, en avoir une connaissance plus complète: *Se donner le temps de la réflexion . Une proposition qui demande réflexion, qui donne matière à réflexion.*
2. Capacité de réfléchir, qualité de qqn qui évite la hâte, la précipitation dans ses jugements et dans ses décisions; discernement: *Manquer de réflexion.*
3. Pensée, considération, jugement, conclusion auxquels conduit cette activité de l'esprit: *Se laisser aller à des réflexions amères. Réflexions inspirées par un événement.*
4. Observation adressée à qqn pour critiquer sa conduite, son travail, etc.; remarque: *Il lui a fait une réflexion désobligeante devant tout le monde.*
5. *À la réflexion*, en y réfléchissant bien. *Réflexion faite*, après avoir réfléchi, tout bien pesé, examiné: *Réflexion faite, il n'y a aucune raison de s'inquiéter.*

Philos. Chez Hegel, mouvement qui rapporte en toute chose réelle l'intériorité et l'extériorité l'une à l'autre, et qui par conséquent pose l'identité entre l'essence et ses déterminations. (La réflexion [all. *Reflexion*] n'a donc aucune signification cognitive ou psychologique: elle est très directement et avant tout ontologique.

Hegel écrit : "La négativité de l'essence est la *réflexion* et les déterminations sont *réfléchies*, posées par l'essence elle-même et restant en elle comme supprimées" [*Science de la logique*, "Essence"]).

## PERCEIVING

One encounters the same elusiveness in trying to pin down what Parliament meant by "perceiving" ("la perception"). The *Encyclopedia Britannica*, in the article on Human Perception, opens with the following observation: Perception, or perceiving, refers to the process whereby sensory stimulation is translated into organized experience. That experience, or percept, is the joint product of the stimulation and of the process itself.

Relations found between various types of stimulation (e.g., light waves and sound waves) and their associated percepts suggest inferences that can be made about the properties of the perceptual process; theories of perceiving then can be developed on the basis of these inferences. Because the perceptual process is not itself public or directly observable (except to the perceiver himself, whose percepts are given directly in experience), the validity of perceptual theories can be checked only indirectly. That is, predictions derived from theory are compared with appropriate empirical data, quite often through experimental research.

The question of perception is discussed under a large number of headings, including the philosophical aspects, perceptual organization, Gestalt principles, individual (including gender and cultural) differences in perceiving, perception of movement, space perception, time perception, illusions and hallucinations. Two quotations from the article will serve to illustrate the conceptual difficulty in formulating a useful definition for the purposes of sections 118.3 and 118.4: Historically, systematic thought about perceiving was the province of philosophy. Indeed, perceiving remains of interest to philosophers, and many issues about the process that were originally raised by philosophers are still of current concern. As a scientific enterprise, however, the investigation of perception has especially developed as part of the larger discipline of psychology.

Philosophical interest in perception stems largely from questions about the sources and validity of what is called human knowledge (see EPISTEMOLOGY). Epistemologists ask whether a real, physical world exists independently of man's experience, and if so, how man can come to learn its properties and how the truth or accuracy of that experience can be determined. They also ask whether there are innate ideas or whether all experience originates through contact with the physical world, mediated by the sense organs. For the most part, psychology by-passes such questions in favour of problems that can be handled by its special methods.

The remnants of such philosophical questions, however, do remain; researchers are still concerned, for example, with the relative contributions of innate and learned factors to the perceptual process. Such fundamental philosophical assertions as the existence of a physical world, however, are taken for granted among most scientific students of perceiving. Typically, researchers in perception simply accept the apparent physical world particularly as it is described in those branches of physics concerned with electromagnetic energy, optics, and mechanics. The problems they consider are those relating to the process whereby percepts are formed from the interaction of what is called physical energy (for example, light) with the perceiving organism. Of further interest is the degree of correspondence between percepts and the physical objects to which they ordinarily relate. How accurately, for example, does the visually perceived size of an object match its physical size as measured (e.g., with a yardstick)?

Sensing and perceiving. Many philosophers and psychologists have commonly accepted as fundamental a distinction made on rational grounds between sensing and perceiving (or between sensations and percepts). To demonstrate empirically that sensing and perceiving are indeed different, however, is quite another matter. It is often said, for example, that sensations are simple and that percepts are complex. Yet, only if there is offered some agreed upon (*a priori*) basis for separating experiences into two categories — sensations and percepts — can experimental procedures demonstrate that the items in one category are "simpler" than those in the other. Clearly, the arbitrary basis for the initial categorization itself cannot be subjected to empirical test. Similarly, the article on perception in the *Oxford Companion to the Mind* illustrates the nature of the problem of definition:

### *PERCEPTION*

Our senses probe the external world. They also tell us about ourselves, as they monitor positions of the limbs and the balance of our bodies, and through pain they signal injury and illness. More subtly, there are innumerable internal signals monitoring physiological activities, and conveying and maintaining our well-being; though little of this enters our consciousness. It may surprise the non-scientist just how little of the day-by-day, second-by-second perception that allows us to survive in a threatening world is conscious. But although the processes are generally unconscious, through investigating them experimentally we can discover a great deal about the physiological basis of perception and how, as babies and later, we discover the world of objects and come to read meanings in pictures and symbols.

In perception, as Sir Ernst Gombrich (1950) realized to such good effect, art and science meet. Just how we know things through sensory experience is a question that was discussed by the Greek philosophers and has been ever since.

But, perhaps curiously, planned experiments in the spirit of the physical sciences were hardly attempted much earlier than the mid-nineteenth century. Since then, the experimental study of perception has yielded fundamental knowledge for physiology and psychology, especially from the outstanding work of Hermann von Helmholtz (1867). It has revealed many surprises in the form of processes of which we are unaware, though they can often be demonstrated simply and dramatically. The study of perception, especially of vision and hearing, has allowed psychology to grow from its philosophical roots into an experimental science; yet deeply puzzling philosophical questions remain — especially over the role of consciousness. It is puzzling, both that we are aware of so *little* of perception — and that we have *any* awareness!

It is worth asking why we have both perceptions and *conceptions* of the world. Why is perception somehow separate, and in several ways different, from our conceptual understanding? Very likely it is because perception, in order to be useful, must work very quickly, whereas we may take years forming concepts, since knowledge and ideas are in a sense timeless. It would probably be impossible for perception to draw upon all of our knowledge, as it has to work so fast. Rather, it employs a rapid but not deep intelligence with a small knowledge base.

In the *Harper Dictionary of Modern Thought* perception is said to be a "theory-laden word". The article reads as follows: perception. In general, awareness or appreciation of objects or situations, usually by the senses.

Specific technical meanings are related to the many theories of perception still extant in PHYSIOLOGY, PSYCHOLOGY, and PHYSIOLOGY. It is a theory laden word, and so changes its meanings and implications across rival theories. There are, in particular, two essentially different theories of perception:

(1) That perceptions are *selections of reality*: i.e., they are essentially like, and made of the same stuff as, objects of the external world. This notion has a strong appeal to philosophers wishing to accept perceptions as the unquestionable basis of empirical TRUTH. Errors of perception — illusions and hallucinations — are clearly embarrassing for such a theory; and indeed the *argument from illusion* (see ILLUSION) claims to disprove it. How can we know that a perception is true, if we have reason to believe that other perceptions appearing just as sound are illusory?

(2) That perceptions are not any kind of selection of reality; but are rather *accounts, descriptions*, or, most interesting, *hypotheses* of the object world. On this view perception is only indirectly related to reality, and there is no difficulty over illusions. But, correspondingly, it offers no guarantee that any particular perception can be relied upon as true. Thus all knowledge based on perceptions is essentially uncertain: perceptions must be checked before they can be relied

upon, and even then perhaps no set of perceptions can be *completely* trusted as true. It is generally accepted that this holds also for all scientific observations, instrument-readings, or signals.

The status of perception may be very like that of scientific hypotheses. What we see is affected by what is likely; and we can be driven into error by following assumptions which are not appropriate for the available sensory data. This is a development of Hermann von Helmholtz's notion that perceptions are unconscious inferences from sensory and memory data.

Some illusions may be fallacies of perceptual inference. The author of that definition is Richard L. Gregory, Professor of Neuropsychology and Director of the Brain and Perception Laboratory at the University of Bristol. He is also the editor of the *Oxford Companion to the Mind*, from which I have drawn extensively in these reasons, and the author of *Eye and Brain*, a recognized text on the psychology of seeing. It is a very readable treatise on the complex question of visual perception, in both its physiological and psychological aspects. Of course, subparagraph 118.4(1)(c)(i) is concerned not only with visual perception. The senses of touch, smell, taste and hearing are also involved. Professor Gregory observes that our perception of familiar things may be shaped by preconceptions concerning what we expect to perceive, whereas our perception of a wholly new and unfamiliar situation requires adjustments to the manner in which we react to what we perceive and the formulation and testing of new hypotheses.

What the foregoing demonstrates is the danger of taking for granted that perceiving, even in a provision that also refers to such mundane and easily recognized activities as walking, dressing and feeding oneself, hearing and speaking, is a readily comprehensible concept that lends itself to facile definition.

### *REMEMBERING*

Developing a definition of remembering that is useful under section 118.4 is only slightly less difficult. Remembering is a function of the faculty of memory. Any consideration of remembering necessarily involves a consideration of the nature of memory. The materials from which I quoted above contain similarly erudite articles on the nature of memory. For example, in the article on Memory in the *Encyclopedia Britannica*, the following appears: That experiences influence subsequent behaviour is evidence of an obvious but nevertheless remarkable activity called remembering.

Learning could not occur without the function popularly named memory. Practice results in a cumulative effect on memory leading to skilful performance on the tuba, to recitation of a poem, and even to reading and understanding these words. So-called intelligent behaviour demands memory, remembering being prerequisite to reasoning. The ability to solve a problem or even to recognize

that a problem exists depends on memory. Typically, the decision to cross a street is based on remembering many earlier experiences.

In speculating about the evolution of memory, it is helpful to consider what would happen if memories failed to fade. Forgetting clearly aids orientation in time: since old memories weaken and the new tend to be vivid, clues are provided for inferring duration. Without forgetting, adaptive ability would suffer; for example, learned behaviour that might have been correct a decade ago may no longer be.

Cases are recorded of people who (by ordinary standards) forgot so little that their everyday activities were full of confusion. Thus, forgetting seems to serve the survival of the individual and the species.

The *Oxford Companion to Philosophy* observes: ... memory is of various kinds. As well as facts, events, people, places and experiences, one can remember how things looked, where to find them, what to do with them, to do something and also how to do it; this last (remembering how) has been singled out for special contrast with another kind involving images (Bergeson, Russell) but without much justification.

The *Oxford Companion to the Mind* has several articles on memory. The general article commences with the unhelpful and enigmatic statement: When we learn something there must be a change in the brain, but no one knows what the change is. The article then goes on to draw analogies between the human nervous system and computers.

In the article on the biological basis of memory the following comment is made: Indeed memory is a portmanteau expression which includes within itself two processes and, by hypothesis, a thing. The processes are the learning of some new skill, behaviour pattern, or piece of information (sometimes called the *acquisition* of the memory) and, at some later time, the recall and re-expression of the skill or information (sometimes called *retrieval*). The thing that connects the two processes of learning and recall is a change in the properties of the brain system so as to store the new information which the learning represents, in such a form that it can subsequently, in response to appropriate cues, be searched for and retrieved. This change is known as the memory trace, or engram. The relationship between the language used to discuss these phenomena in the brain and that used in the description of the properties of computers and their memory stores is not accidental, for much of our present-day thinking about biological memory is directed — and constrained — by a framework of analogies from computer technology and information theory.

The enthusiasm with which psychologists have embraced the analogy between human memory and computer memory demonstrates the paucity of information that heretofore existed about this aspect of the mind. Computers have been

around only for decades, memory since time immemorial. Current explanations of memory had to await the advent of the computer.

It is interesting to note that in the first edition of the *Encyclopedia Britannica*, published well over two centuries ago, memory is described as "a faculty of the human mind whereby it retains and recalls [*sic*] the ideas it has once perceived". Although the verbiage has proliferated the concept remains unchanged.

I had not intended this judgment to become a treatise on mind. It has no pretensions to being such. It barely skims the surface. Yet in attempting to come to grips with such elusive and charged concepts as perceiving, thinking and remembering it is essential that one recognize their theoretical and philosophical underpinnings and their daunting complexity. At the commencement of these reasons, I proposed to attempt to formulate workable definitions of these words.

It will be apparent that the attempt has not been a noticeable success. It has, however, been useful, at least for me, in emphasizing the difficulty in applying the words to the myriad of mental problems from which humans may suffer, and the extreme caution that must be exercised in attempting to do so. It has also served to delineate, to some extent, the boundaries of the territory that these words cover — boundaries that overlap and do not necessarily remain constant.

The following conclusions may be drawn from the cursory review I have made of the above materials.

(1) While one must recognize and respect the philosophic bases that underlie the development of these concepts, one must endeavour to apply practical criteria that are meaningful in everyday life. On the other hand, one should not blithely proceed on the assumption that everyone knows what these common words mean and that therefore no attempt need be made to determine their meaning.

(2) As noted above, although I believe the words are used disjunctively, the activities of perceiving, thinking and remembering are closely connected. One cannot "think" without being able to retain concepts in one's mind. Similarly, perceiving the external world is a necessary adjunct to rational thought.

(3) While a comprehensive definition of these terms that would satisfy all academics and theoreticians is likely impossible, for the practical purposes of applying sections 118.3 and 118.4, the following guidelines seem workable:

- (a) Perceiving: The concept must be predicated upon the existence of an objectively verifiable external reality. However intellectually satisfying the theories of Hume and Berkeley may be in an academic or philosophical setting, they are out of place in the workaday world in which sections 118.3 and 118.4 must operate. Perception involves the *reception* and *recognition* of sensory data in a manner that conforms

reasonably to common human experience. The man who mistook his wife for a hat would not be perceiving in the sense in which I have used the term.<sup>[1]</sup> To revert to the passage quoted above from the *Oxford Companion to the Mind*, perceiving, in the sense in which I believe it is used in section 118.4, involves both percept and concept.

(b) Thinking: A state of anosia is not necessary to qualify under sections 118.3 and 118.4. Thinking, for the purpose of those sections, involves a rational comprehension, marshalling, organization and analysis of that which the person has perceived and the formulation of conclusions there from that are of practical utility or theoretical validity. The determination of the threshold that must be crossed is a matter of judgement. I am supported in this view by the judgment of Bowie, J. of this court in *Parsons v. The Queen* 95-3409(IT), June 14, 1996. In that case he stated, after referring to the definition of "think" in the *Oxford English Dictionary*, 2nd. Ed.: The element which these definitions share, and which is therefore a necessary part of the process of thinking, is some degree of ratiocination. This is an active mental process which involves the formulation of original ideas, and the manipulation of ideas and concepts perceived. I am satisfied from the evidence of Mr. Parsons and Dr. Hanley that Mrs. Parsons is not capable in any real sense of forming original ideas, or of any reasoning process in respect of that which she perceives from the world about her. I find therefore that she is not capable of thinking, and thus that her condition satisfies the requirement of subparagraph 118.4(1) (c)(i) of the Act.

(c) Remembering: An inability to perform the mental activity of remembering — i.e., the retrieval of previously perceived and stored data — is more than mere absent mindedness or the fading of the faculty of memory that besets many of us with advancing years. On the other hand, it is not only total amnesia that qualifies. A blow on the head, an accident or other trauma may bring about recent memory amnesia and yet distant memory may remain unimpaired.<sup>[2]</sup> Remembering, as the passage from the *Oxford Companion to the Mind* quoted above indicates, is both the acquisition of the memory and its retrieval. This analysis is appropriate for the purposes of sections 118.3 and 118.4. As in the case of thinking, the severity of the impairment for the purposes of section 118.3 is ultimately a matter of judgement.

(4) It is easier to recognize either an ability or an inability to perceive, think and remember than to define the terms. One must attempt, on a case by case basis, to identify the type of impairment from which the individual suffers and determine whether that impairment is of such a severity that to grant the tax relief

contemplated by sections 118.3 and 118.4 would fall within the object that those provisions envisage.

One should guard against jumping too quickly to a conclusion that a person has a severe mental impairment. Such a finding may be based upon a failure to recognize that just because a person is "different" or sees the world differently from most of us, that person is mentally impaired. In a recent case, I concluded that a combination of extreme depression, anorexia and severe, prolonged and frequent migraines that rendered an otherwise intelligent person incapable of any type of rational thought during the frequent attacks qualified the taxpayer for the credit. In another, I allowed the appeal of a person suffering from severe bi-polar disorder. Each case depends on its own facts and to a degree upon the court's perception of the severity of the problem. If asked "Where do you draw the line?"

I can only answer that I draw the line in any given case where my own common sense, based on the evidence and on a compassionate view of what I think Parliament was trying to achieve in section 118.3, tells me to draw it.

(5) I do not mean by the foregoing to imply by any means that the determination be based on an arbitrary and subjective knee-jerk reaction. It must be based not only on the facts of the particular case but upon appropriate legal principles. I shall try to state briefly those principles upon which this decision is based:

- (a) The legislative intent appears to be to provide a modest amount of tax relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons. The intent is neither to give the credit to everyone who suffers from a disability nor to erect a hurdle that is impossible for virtually every disabled person to surmount. It obviously recognizes that disabled persons need such tax relief and it is intended to be of benefit to such persons.
- (b) The court must, while recognizing the narrowness of the tests enumerated in sections 118.3 and 118.4, construe the provisions liberally, humanely and compassionately and not narrowly and technically. In *Craven v. The Queen*, 94-2619(IT)I, I stated: The application of the inflexible tests in section 118.4 leaves the court no room to apply either common sense or compassion in the interpretation of the disability tax credit provisions of the *Income Tax Act* — provisions that require a compassionate and common sense application. In my view I stated the test unduly narrowly in that case. I have heard many disability tax credit cases since that time and my thinking has evolved. My present view of the approach that should be taken is more accurately set out in such cases as *Noseworthy v. The Queen*, 95-1862(IT)I, *Lawlor v. The Queen*, 95-1585(IT)I, *Hillier v. The Queen*, 95-3097(IT)I, and *Lamothe v. The Queen*, 95-2868(IT)I and 95-3949(IT)I. If the object of Parliament, which is to give to disabled

persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provision must be given a humane and compassionate construction. Section 12 of the *Interpretation Act* reads as follows: Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

(c) If there is doubt on which side of the line a claimant falls, that doubt should be resolved in favour of the claimant.

(d) The provisional meanings assigned above to the words "perceiving, thinking and remembering" are more in the nature of guidelines than definitions. They are:

Perceiving: The reception and recognition of sensory data about the external world that conforms reasonably to common human experience.

Thinking: A rational comprehension, marshalling, analysis and organization of that which the person has perceived and the formulation of conclusions therefrom that are of practical utility or theoretical validity.

Remembering: The mental activity of storing perceived data and of retrieving it in a manner that enables the person reasonably to perform the function of thinking. In these guidelines I have emphasized the need to recognize the way in which one function depends on the others, and to attempt to relate the use of those functions to some meaningful result in everyday life.

(e) Finally there must be considered — and this is the most difficult principle to formulate — the criteria to be employed in forming the judgement whether the mental impairment is of such severity that the person is entitled to the credit, i.e., that that person's ability to perceive, think and remember is markedly restricted within the meaning of the Act. It does not necessarily involve a state of complete automatism or anosia, but it should be of such a severity that it affects and permeates his or her life to a degree that it renders that person incapable of performing such mental tasks as will enable him or her to function independently and with reasonable competence in everyday life.

In this case, I am cognizant of the difficulties that Taavi will probably have for the rest of his life, and of the emotional and financial problems that his condition causes his parents. I have concluded that, on

balance, his intellectual limitations are severe enough to justify the credit. It cannot be said that his capacity to think, perceive and remember is non-existent, but it is sufficiently limited to fall within the guidelines I have indicated above. In arriving at this conclusion I have endeavoured to put into the balance that which he can do and that which he cannot do. There are certainly things that he can do, but they are in my opinion outweighed by his severe intellectual limitations that render him incapable of performing such mental tasks as will enable him to function independently and with reasonable competence in everyday life. If we are to adopt, as we must, in accordance with the judgment of the Supreme Court of Canada in *Corporation Notre-Dame de Bon-Secours v. Communauté Urbaine de Québec et al.*, a teleological approach to the construction of sections 118.3 and 118.4, it is evident that the telos at which those provisions is aimed is a person with the type of mental impairment suffered by Taavi Radage.

The appeals for 1991 and 1992 are quashed, since no notice of objection was filed from the assessments for those years.

The appeal from the assessment for 1993 is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment to allow the appellant the disability tax credit under section 118.3 in respect of Taavi Radage.

## Footnotes

[1] Anyone interested in pursuing the matter would do well to start with the neurologist Dr. Oliver Sacks' books, "*The Man who Mistook his Wife for a Hat*", and "*An Anthropologist on Mars*". Despite their rather whimsical titles, they are serious and true descriptions of persons with neurological and other problems that seriously affect their abilities to perceive. What the case studies in those books illustrate is that highly talented people may have neurological deficiencies that affect or distort in striking and bizarre ways their perception of the external world.

[2] A striking example of this is described in "*The Man who Mistook his Wife for a Hat*". The patient, Jimmie G. whom he described as "The Lost Mariner" was admitted to the Home for the Aged at age 49 with the transfer note "Helpless, demented, confused and disoriented". In fact his memory of his life up to 1945, when he was discharged from the navy, was clear and detailed, but, after that, time seems to have stopped for him. He could not retain memories of things, people or events for more than a few seconds. Two short passages from Sacks' book are revealing:

"On intelligence testing he showed excellent ability. He was quick-witted, observant, and logical, and had no difficulty solving complex problems and

puzzles — no difficulty, that is, if they could be done quickly. If much time was required, he forgot what he was doing. He was quick and good at tic-tac-toe [*sic*] and checkers, and cunning and aggressive — he easily beat me. But he got lost at chess — the moves were too slow. Homing in on his memory, I found an extreme and extraordinary loss of recent memory — so that whatever was said or shown or down [*sic*] to him was apt to be forgotten in a few seconds' time.

... Jimmie's scientific knowledge was that of a bright high school graduate with a penchant for mathematics and science. He was superb at arithmetical (and also algebraic) calculations, but only if they could be done with lightning speed. If there were many steps, too much time, involved, he would forget where he was, and even the question. He knew the elements, compared them, and drew the periodic table — but omitted the transuranic elements." I cite this example to demonstrate two points:

(a) the difficulty of separating "thinking" — from "remembering" and (b) the extreme danger in reaching quick conclusions in an area of enormous complexity.

If the court were presented with the case of Jimmie G. as a claim under section 118.3 would he qualify for the credit? I shall not speculate. In one sense he can think and remember, and in another he cannot.