Docket: 2009-2034(IT)I

BETWEEN:

PATRICK NICHOLLS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on common evidence with the motions of *Patrick Nicholls* (2010-2433(IT)APP) and *Patrick Nicholls* (2010-1587(IT)G) on March 31, 2011, at Toronto, Ontario

Before: The Honourable Justice L.M. Little

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Ricky Tang

AMENDED ORDER

Upon motion by the Appellant for:

> … reopening proceedings having satisfied the requirement to do so, sending to the Registry, a copy of the final judgment in T-565-09.

And upon cross-motion by the Respondent for:

1. An Order, pursuant to paragraph 58(3)(a) of the *Tax Court of Canada Rules (General Procedure)*("*Rules*"), dismissing the Appellant's appeal in respect of the Minister's decision not to extend the time to file a notice of eligibility for Canada Child Tax Benefit ("CCTB") payments under s.122.62(2) of the *Income Tax Act* ("*ITA*"). That issue is properly within the jurisdiction of the Federal Court. The Federal Court heard the

Appellant's judicial review application on that issue and dismissed the application with costs on December 7, 2010;

2. In the alternative, an Order pursuant to subsection 18.16(1) of the *Tax Court of Canada Act* ("*TCCA*"), extending the time within which the Respondent shall file and serve its Reply to the Notice of Appeal to 60 days from the date of this Court's order; and

3. Such further and other relief as counsel may advise and this Court may deem just;

And upon reading the pleadings and hearing submissions of the parties;

IT IS ORDERED THAT:

1. The Appellant's motion is dismissed;

2. Costs shall be payable forthwith to the Respondent by the Appellant in the amount of $1,000;

in accordance with the attached Reasons for Order.

Signed at Vancouver, British Columbia, this **3rd** day of June 2011.

"L.M. Little"

Little J.

Citation: 2011 TCC 287
Date: 20110602
Docket: 2009-2034(IT)I

BETWEEN:

PATRICK NICHOLLS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR ORDER

Little J.

A. FACTS

[1] The Appellant is claiming Canada Child Tax Benefit ("CCTB") payments in respect of his two children. The Appellant filed his application for CCTB payments on August 16, 2006 when he filed his 2005 income tax return. At that time, he claimed benefits for one child from June 25, 2005 onward and from October 17, 2001 onward for the other child.

[2] The Minister of National Revenue (the "Minister") accepted the Appellant's CCTB application for the 11 months prior to his application and paid him CCTB benefits back to September 2005. The Minister also exercised his discretion to accept the late-filed application and paid the Appellant benefits for three additional months back to July 2005 for one child and 14 additional months back to July 2004 for the other child. The Appellant wishes to obtain CCTB payments back to October 2001, but the Minister has refused to accept the application filed by the Appellant.

[3] On June 7, 2009, the Appellant filed a Notice of Appeal to the Tax Court since the Minister refused to grant him CCTB payments back to October 2001. At the

same time, the Appellant sought judicial review in the Federal Court of the Minister's decision not to accept the application beyond July 2004.

[4] The present appeal was held in abeyance by Justice D'Arcy of the Tax Court on September 30, 2009 pending a decision on the judicial review application that had been filed by the Appellant in the Federal Court.

[5] Justice Russell of the Federal Court upheld the Minister's discretion not to extend the time limit within which the Applicant could file a notice under subsection 122.62(2) of the *Income Tax Act* (the "*Act*").

[6] The Appellant now asks that the present appeal which was held in abeyance by Justice D'Arcy be reopened to allow the Tax Court to determine whether he was eligible for the CCTB payments prior to July 2004.

[7] In response, the Respondent has brought a cross-motion to strike the appeal for lack of jurisdiction pursuant to Rule 58(3)(a) or, in the alternative, issue estoppel.

ISSUES:

[8] The issues are:

1. Whether the appeal should be dismissed due to lack of jurisdiction?

2. Whether the appeal should be dismissed based on the principle of issue estoppel?

3. Whether the Respondent should be granted an extension of time to file its Reply to the Notice of Appeal?

B. ANALYSIS AND DECISION

[9] According to Counsel for the Respondent, the relevant provisions of the *Act* are subsections 122.62(1) and 122.62(2):

> Eligible Individuals
>
> **122.62**(1) For the purposes of this subdivision, a person may be considered to be an eligible individual in respect of a particular qualified dependent at the beginning of a month only if the person has, no later than 11 months after the end of the month,

> filed with the Minister a notice in prescribed form containing prescribed information. (Emphasis added)
>
> Extension for notices
>
> (2) The Minister may at any time extend the time for filing a notice under subsection 122.62(1).

[10] The Respondent maintains that subsection 122.62(2) of the *Act* is a discretionary measure similar to the fairness provisions contained in the *Act* to cancel interest and penalties under subsection 220(3.1), or the ability to accept a late-filed election under subsection 85(7.1) of the *Act*. The Respondent then relies on the jurisprudence to establish that questions regarding the Minister's discretion are within the jurisdiction of the Federal Court and not the Tax Court of Canada.

[11] The Appellant's response to this is that these provisions are irrelevant since he is not asking the Tax Court to assess the Minister's discretion. Instead, he is asking the Tax Court to determine his eligibility for the years in question as the Minister has not made this determination and the Tax Court has the jurisdiction to do this. The Appellant's argument is notwithstanding that he did not apply within 11 months and notwithstanding that the Minister has not granted extension, he would like the Tax Court to determine his eligibility.

[12] I have determined that the Federal Court has the exclusive jurisdiction to examine the question of the Minister's discretion. Accordingly, what must be examined is whether the Tax Court has the jurisdiction to make a determination of eligibility for CCTB payments where the Minister has not made this determination first.

[13] I must, therefore, determine whether the Appellant can circumvent Parliament's requirement to apply for CCTB payments within 11 months of eligibility and the Minister's sole discretion to extend this filing period.

[14] In *Nicholls v Canada (Revenue Agency)*, 2010 FC 1235, Justice Russell of the Federal Court said at paragraph [1]:

> **APPLICATION**
>
> [1] This is an application for judicial review of a decision by the Canada Revenue Agency (CRA) dated March 9, 2009 (Decision) not to extend the time limit

> within which the Applicant could file notice under subsection 122.62(2) of the *Income Tax Act* (Act) to be considered as an eligible individual to receive the Canada Child Tax Benefit (CCTB) for certain months during which CRA was statute-barred from recovering CCTB benefits already paid to the Applicant's estranged wife for their children, Charles and Penny, during the same period. (Emphasis added)

[15] At paragraph [41], Justice Russell said:

> [41] As regards the merits, the only real issue before the Court is whether, on the facts of this case, the Minister reasonably exercised his discretion under subsection 122.62(2) of the Act not to extend in the Applicant's favour the time for the filing of notice under subsection 122.62(1) of the Act. (Emphasis added)

[16] At paragraph [45], Justice Russell said:

> [45] The CRA did not determine which spouse was entitled to the CCTB payments during the period in dispute. It simply concluded that the statute-barred payments already made could not be recovered from Mrs. Nicholls and that it could not prove that Mrs. Nicholls had made a misrepresentation that is attributable to neglect, carelessness or wilful neglect in failing to advise CRA that she was no longer the eligible recipient for the period in question, so that it would not be reasonable to accede to Mr. Nicholls's full claim for payments going back to 2001.

[17] And at paragraph [49], Justice Russell said:

> [49] … In the present case, it cannot be said that the CRA policy not to pay CCTB retroactively unless payments already made to another caregiver can be recovered is an unreasonable basis for the exercise of the discretion or that the discretion was applied unreasonably in this case. The policy has a rational basis and it cannot be said that it was applied unfairly or unreasonably in this case. The Applicant has allowed a situation to develop whereby CCTBs were made to Mrs. Nicholls during a period of time when he now says they should have been paid to him. As the Decision points out, the Applicant has failed to explain why he allowed this situation to develop by not claiming CCTBs at a time when he says he was entitled to them. (Emphasis added)

[18] The Application made by the Appellant was dismissed by Justice Russell.

[19] I agree with the comments made by Justice Russell and I agree with his conclusion.

[20] It is clear from reading subsection 122.62(1) of the *Act*, that it was Parliament's intent to limit a retroactive application for CCTB payments to 11 months prior to the application subject to the Minister's discretion to extend it. Accepting the Appellant's interpretation would lead to the result that taxpayers could undermine this intent by bringing their application to the Tax Court for all years that were eligible. In an extreme case, it might be possible to go back 17 years.

[21] If we examine the *Act* contextually, especially the portions relating to Appeals, it is apparent that there is a general requirement that the Minister must first issue a Determination or Assessment before an appeal can be commenced in the Tax Court. For example, sections 171, 169 and 165 of the *Act* all make reference to the assessment:

> Disposal of Appeal
>
> **171**.(1) The Tax Court of Canada may dispose of an appeal by
>
> (*a*) dismissing it; or
> (*b*) allowing it and
> (i) vacating the assessment,
> (ii) varying the assessment, or
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.
>
> Appeal
>
> **169**.(1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either
> …
>
> Objections to assessment
>
> **165.(**1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,
> …

[22] Subsections 152(1) and 152(1.1) of the *Act* establish the Minister's duty to assess tax or determine losses. The Minister has the requirement to assess or determine "with all due dispatch". Where the Minister does not issue an assessment or determination, there can be no appeal. The assessment and the determination are both Ministerial duties and Ministerial duties are in the realm of administrative law and, as a result, would be within the jurisdiction of the Federal Court. For example, the jurisprudence has held that where the Minister fails to assess, the proper recourse

is to seek an order of *mandamus* compelling the Minister to determine eligibility. This was the case in *Merlis Investments Ltd v MNR*, 2000 D.T.C. 6634, where the court declined to issue the order as the assessment was held up to allow the GAAR committee to investigate the transaction. Another example is the decision in *Burnett v MNR*, 98 D.T.C. 6205. However, in that case the Federal Court of Appeal did issue the *mandamus* order.

[23] The Minister refused to accept the new application beyond the limitation period contained in 122.62(1). It therefore follows that there is no determination and there is nothing to appeal from. The Applicant's argument cannot be accepted to circumvent the 11 month limitation period.

[24] The Minister has decided not to accept the Appellant's late filed application. That is a decision which is within the discretion of the Minister and the Minister's discretion cannot be reviewed, considered or reversed by the Tax Court of Canada.

[25] The **Appellant's Motion** is dismissed.

[26] Since I have concluded that the Tax Court does not have the jurisdiction to hear this appeal, I do not have the authority to deal with the issue estoppel argument.

Costs

[27] On March 31, 2011, I heard these Motions and two other Motions filed by the Appellant. In addition, the Appellant has filed other Motions before the Tax Court, the Federal Court, the Federal Court of Appeal and other Courts in Ontario. The applications made by the Appellant are very similar to the points raised before me by the Appellant.

[28] In my opinion, the Appellant is wasting the time of the Court and wasting the time of the Respondent in bringing this type of Motion. I award costs of $1,000.00 payable by the Appellant to the Respondent. The costs are to be payable forthwith.

Signed at Vancouver, British Columbia, this **3rd** day of June 2011.

"L.M. Little"

Little J.

CITATION:	2011 TCC 287
COURT FILE NO:	2009-2034(IT)I
STYLE OF CAUSE:	PATRICK NICHOLLS AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 31, 2011
AMENDED REASONS FOR ORDER BY:	The Honourable Justice L.M. Little
DATE OF AMENDED ORDER:	June **3**, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Ricky Tang

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Myles J. Kirvan
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Ottawa, Canada