Federal Court  Cour fédérale

Date: 20101207

Docket: T-565-09

Citation: 2010 FC 1235

Ottawa, Ontario, December 7, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PATRICK NICHOLLS

Applicant

and

CANADA (REVENUE AGENCY)
and MINISTER OF NATIONAL REVENUE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

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.

BACKGROUND

[2] The Applicant, who is self-represented, has not provided a clear factual background setting out the relevant history and nature of this dispute. My review of the record suggests that the Respondents' account of what has happened and the framing of the issues are accurate.

[3] In an application form received by the CRA on August 16, 2006, the Applicant applied for retroactive CCTB payments for his children, Penny and Charles. He claimed benefits for Penny from June 25, 2005 and for Charles from October 17, 2001 to the date of his application.

[4] Prior to his application, Tylaine Nicholls, Mr. Nicholls's estranged wife, had been the eligible individual for the two children and had been receiving CCTB payments.

[5] As the period for which the Applicant requested CCTB payments overlapped the period for which Mrs. Nicholls had received payments, questionnaires regarding the residency and primary care of Penny and Charles were sent to both individuals.

[6] As a result of the questionnaire and documents submitted by the Applicant, the CRA granted him retroactive benefits for both children for 11 months back to September 2005. The CRA held off on deciding on the balance of the Applicant's request until it received the proof of citizenship and residency it had requested from him and until it heard back from Mrs. Nicholls regarding the questionnaire it had sent her.

[7] With a letter dated November 28, 2006, the Applicant provided the CRA the requested proof of citizenship and residency. In that same letter, he requested various additional months of retroactive CCTB benefits for both children, which were summer vacation months or, in one case, a three-month period during which he claimed that Penny had stayed with him while Mrs. Nicholls had been travelling.

[8] In a letter dated March 26, 2007, the CRA allowed the Applicant's claim for retroactive CCTB benefits back to the first months for which the CCTB payments originally issued to Mrs. Nicholls could still be recovered from her by the CRA, namely, July 2005 for Penny and July 2004 for Charles. This decision gave the Applicant all of the CCTB payments he had originally requested in respect of Penny.

[9] As the CRA was statute-barred from reassessing Mrs. Nicholls for CCTB payments that it had made to her before July 2004 in respect of Charles, it denied the Applicant's request for payments in respect of Charles for months prior to July 2004.

[10] After several letters from the Applicant reiterating his request for additional retroactive CCTB payments beyond those already credited, the CRA repeated its position in letters dated July 3, 2007.

[11] The Applicant filed a Notice of Application for judicial review with this Court in April 2008. The application was discontinued when the CRA agreed to conduct a fresh review, taking into

consideration whether a debt against Mrs. Nicholls could be established for a period that would otherwise be statute-barred on the basis that she made a misrepresentation in her tax filings.

[12] The CRA official assigned to conduct the fresh review, Ms. Shirley Geller, reviewed all materials previously provided by the Applicant. The Applicant was also invited to send additional materials and make further submissions if he so desired. The Applicant did not provide any further materials.

[13] In considering whether Mrs. Nicholls's statute-barred years could be reopened, Ms. Geller reviewed materials submitted by Mrs. Nicholls in support of her Notice of Objection to amounts the CRA was seeking from her as a result of the retroactive payments already made to the Applicant. Mrs. Nicholls provided documentation to suggest that the children had lived with her during certain months in dispute and that she and the Applicant had had an agreement that she would continue to claim the CCTB payments for Penny and Charles once they began living with the Applicant.

[14] Ms. Geller concluded that it was not clear that the CRA would be able to meet the burden of demonstrating that Mrs. Nicholls made a "misrepresentation attributable to neglect, carelessness or wilful default" in failing to advise the CRA that the children had moved in with the Applicant. As a result, she concluded that the CRA ought not to exercise the Minister's discretion to grant the Applicant further retroactive benefits beyond those he had already been paid.

[15] With respect to the individual months for which the Applicant was requesting CCTB payments, the CRA allowed one month, August 2004, on the basis of the Federal Court of Appeal's decision in *Matte v. Canada*, 2003 FCA 19, in January 2003, but refused to exercise its discretion for the remaining months as they were claimed prior to the *Matte* decision and/or the CRA was statute-barred and could not establish a debt against Mrs. Nicholls for those months.

[16] In a letter dated March 9, 2009, executed by Ms. Kaeding, Ms. Geller's supervisor, the CRA informed the Applicant that it was exercising its discretion to allow him only one additional CCTB payment for August 2004 and set out detailed reasons for its Decision.

[17] The Applicant brought the present application for judicial review on or about April 8, 2009.

[18] On May 4, 2009, the Applicant served on the Respondents an affidavit dated May 4, 2009, sworn by him in support of his application for judicial review and attaching two exhibits that were not submitted to the CRA prior to its Decision:

a. Exhibit "D" to the Affidavit – one-page excerpt from a preliminary hearing between Mr. Nicholls and Her Majesty the Queen, dated May 5, 2003; and

b. Exhibit "H" to the Affidavit – an endorsement of the Ontario Court of Justice from a proceeding between Mr. and Mrs. Nicholls, dated May 29, 2008.

[19] On the same day, the Applicant also served on the Respondents an affidavit dated May 4, 2009 and sworn by Penny Nicholls, and an affidavit dated May 9, 2009 and sworn by Charles

Nicholls. Neither of these two documents were before the CRA when it made the Decision under review.

THE DECISION

[20] Ms. Geller reviewed all of the materials filed and concluded that CRA would not be able to meet the burden of demonstrating that Mrs. Nicholls had made "a misrepresentation attributable to neglect, carelessness or wilful default" in failing to advise the CRA that Penny and Charles had moved in with Mr. Nicholls. As a result, she concluded that CRA ought not to exercise the Minister's discretion under subsection 122.62(2) of the Act to grant the Applicant an extension for further retroactive benefits beyond those he had already been paid.

[21] With respect to the individual months for which the Applicant had claimed CCTB benefits, the CRA allowed one month, August 2004, on the basis of the Federal Court of Appeal's decision in *Matte*, above, but refused to exercise its discretion for the other individual months claimed because they were prior to *Matte* and should, in any event, not be granted to the Applicant because CRA was statute-barred and could not establish a debt against Mrs. Nicholls for those months.

RELEVANT STATUTORY PROVISIONS

[22] The following provisions of the Act are applicable to the present application:

122.62 (1) For the purposes of this subdivision, a person	122.62(1) Pour l'application de la présente

may be considered to be an eligible individual in respect of a particular qualified dependant 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.

sous-section, une personne ne peut être considérée comme un particulier admissible à l'égard d'une personne à charge admissible au début d'un mois que si elle a présenté un avis au ministre, sur formulaire prescrit contenant les renseignements prescrits, au plus tard onze mois après la fin du mois.

(2) The Minister may at any time extend the time for filing a notice under subsection 122.62(1).

(2) Le ministre peut, en tout temps, proroger le délai prévu au paragraphe (1).

…

…

152 (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

152 (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

(*a*) the taxpayer or person filing the return

a) le contribuable ou la personne produisant la déclaration :

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or	(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

ISSUES RAISED

[23] The issues raised, as set out in paragraph 52 of the Applicant's Memorandum of Fact and Law, are as follows:

a. Should the Decision made in bad faith be set aside?

b. Did the Minister exceed the authority to pay and recover CCTB?

c. If not, can the Applicant request derivative reassessment?

d. If not, then when is the other individual statute-barred?

e. If so, does *Matte* apply?

f. Is proof of material misrepresentation beyond normal reassessment met?

g. Is the Applicant's estranged wife, pursuant to Rule 399, in contempt?

h. Is the Minister unjustly enriched?

STANDARD OF REVIEW

[24] Subsection 122.62(1) of the Act provides that a person may be considered an eligible individual to receive CCTB payments in respect of a particular qualified dependant at the beginning of a month only if that person has, no later than 11 months after the end of the particular month, filed with the Minister a notice in prescribed form containing prescribed information. Subsection 122.62(2) provides that the Minister may at any time extend the time for filing a notice under subsection (1).

[25] The Federal Court of Appeal has consistently found similarly worded provisions to confer discretionary decision-making powers on the Minister and, consequently, to be reviewable on the standard of reasonableness. The reasoning in both *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 and *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153 are, in my view, applicable to the Decision under review.

[26] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[28] The Applicant's allegations that the Minister took into account irrelevant information and ignored relevant materials, failed to give adequate reasons, had a reasonable apprehension of bias and failed to carry out the duty of procedural fairness are questions of law reviewable on a standard of correctness. See *Matte*, above.

ANALYSIS

General Problems

[29] Mr. Nicholls has represented himself in an energetic and resourceful manner. He came to the hearing in Toronto on September 28, 2010 with a dense, twenty-six page script, most of which he read out to the Court. In this script, he raised some new arguments and issues that did not appear in the twenty-six page Memorandum of Fact and Law that he had already filed with the Court and served upon the Respondents.

[30] In both the written memorandum and the script, the Applicant's arguments are often convoluted and difficult to follow. He presents his case in a categorical style that constantly courts opacity through his use of unconventional syntax and grammar. He often cites legal principles without attribution or context, and he often fails to distinguish between evidentiary fact, opinion and speculation. All of this makes it very difficult to organize or assess the merits of his position.

[31] In his (scripted) oral argument, the Applicant attempts to summarize his position as follows:

> a. In evidence the Minister attempts to do so here. The decision-maker fettered the decision relying solely on guidelines or policy exacerbated by their secrecy or unlawfulness. If she did look, she largely looked at, and gave weight to, irrelevant information and ambiguous sections of the Act, as are 122.6 and 152(4), the former described as incredibly complex and nearly beyond comprehension while the latter legislative provisions under scrutiny are a mess.
> b. They do not lend themselves to a literal interpretation leading to incongruous results. Where ambiguity is in the sum of qualifying phrases that are sometimes found in the Act only 152(4) adds anomaly. The reassessment is limited to the objection and no license to reassess on any other ground. 152(4.2) is for error relief, and has nothing to do with fairness. The absurd result in this case is that the third party's "normal reassessment period" had already expired before the Minister made the determination.
> c. This does not make sense. This case has necessitated a lengthy process of interpreting a provision obviously enacted for a taxpayer's benefit but lacking the elusive characteristic of clarity. "Nice points of law" should not be the offspring of imprecise legislation. There have been at least three different interpretations of its application. Its application *may* have seemed clear to the legislative drafters but certainly is not clear. The two constructs are ambiguous speaking of a 'necessary assessment' to be correct in law, suggesting that refunding child tax benefit to an eligible individual is not just a discretionary exercise and that the meaning of "not been already allowed" meant 'not already allowed to the taxpayer entitled' or 'not already correctly or lawfully allowed'.
> d. The Minister may issue a refund if it is satisfied that such a refund or reduction would have been made if the return or request had been filed or made on time, provided that then that necessary assessment

is correct in law. Assessment must be corrected even if a year is statute barred, although it does not change the amount assessed for that year. If the Minister makes a discretionary error it too must be corrected, if found to be unreasonable. It is only "a foolish consistency [that] is the hobgoblin of little minds … ." wrote Ralph Waldo Emerson. Where there is a sound and practical reason to assess in a consistent manner that is not prohibited by statute, the Minister should not fear doing so."

e. This Court is warranted to intervene when the decision is based on a misapprehension of the relevant facts. The Minister must assess according to law. In other words, the Minister must not, and this Court must not, perpetuate an error in a future year in order to arrive at a result consistent with a prior year in which another taxpayer erred. Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed. The Minister produces no evidence that 122.62(2) was even invoked.
f. The Minister does not have a carte blanche in terms of setting out any assumption which suite the Minister's convenience. On being challenged by evidence in chief he must be expected to present something more concrete than a simple assumption that it is paid on the books. Generally speaking, bookkeeping entries do not create reality. They are useful only to the extent that they record or reflect reality, which they do not today in this case.
g. Presumption exists in favour of the taxpayer in taxing situations. A taxing provision could be so arbitrary and unjust as to amount to an improper confiscation of property rather than to a proper exercise of a taxation power. The Minister has a duty to be careful and not to pay entitlements simultaneously, as the Minister has, nor pay twice to the same person, as to Mr. Guest, or an ineligible individual with no right to put those errors on an independent taxpayer's back to make amends for those types of errors.
h. The Minister with proof has a duty to reassess in cases of misrepresentation, if only to assist in recovery of the misdirected Crown Debt having been abrogated by the Minister. The decision maker "must understand correctly the law that regulates his or her decision-making power and must give effect to it and has not done so here. Ms. Keading (*sic*) has misunderstood legal terms and incorrectly evaluated facts that are essential for decision whether or not she has certain powers or exceeds authority.
i. The decision must be set aside. Likewise if the decision unlawfully sub delegates, errs in fact or law, ignores relevant considerations or takes irrelevant considerations into account, judicial review is generally allowed. The decision is unreasonable; in defiance of logic and accepted moral standards that no sensible person who had

applied his mind to the question could have arrived at it. Even though an authority may establish internal guidelines, it should be prepared to make exceptions on the basis of every individual case. An Act of Parliament may subject the making of a certain decision to a procedure. The rules of natural justice require the decision maker to approach the process with 'fairness'. Bias deals with the appearance of bias: "Justice must be seen to be done."

j. The requirement is that the person gets the chance to present his or her case. If the Applicant has certain legitimate expectations, promised a benefit, it would be unfair to break the promise, even if there are public interest grounds for his breaking it. Ms. Geller has a tone, an appearance of female presumption tainting Ms. Keading's (*sic*) decision. Her outcome is not defensible in respect of the facts and law, cannot withstand probing examination, is based on false assumption, as it is, lowers the standard of reasonableness to correctness. It is well established that procedural fairness is reviewable on a correctness standard.

k. Her reasons are improper, inadequate and unintelligible. The assumptions are not justified; they do not of themselves support the assessment decision. The Applicant as claimant had a legitimate expectation that a certain result would be reached in this, and submits that fairness may require more extensive procedural rights than would otherwise be accorded. The Minister cannot plead an alternative assumption when to do so would fundamentally alter the basis on which his assessment was based.

l. In fact the Crown renders it as an entirely new assessment. If the Crown alleges a fact that is not among the facts assumed by the Minister, the onus of proof lies with the Crown. This tempers the unique relationship between the Minister of National Revenue, its Agency, and the Department of Justice in tax matters. If extra words are added to the Act to justify the assumption, they must be struck. In this situation, this Honourable Court's intervention would be appropriate.

m. The Minister demonstrably fails to recognize certain facts for lack of serious and genuine inquiry within assumptions, the onus on the Minister, that may shift and the court may then relieve the Minister of that burden. When the Minister has no assumption the case goes to the cause and the Minister should know discretion here is duty in disguise. The Minister has a duty to assess and must then send notice of that assessment for any year under subsection 150(2); failure to do so is dereliction in that duty. The Minister must assess to collect or refund.

n. Where the Act says "Shall" the Minister must, has no choice, and is compelled to carry out the intention of Parliament. This Honourable

Court, if intervention is warranted, may set aside the decision, make declaration about the discretionary decisions within your jurisdiction, or substitute the decision that should have been made, determining all or some of the entitlement periods requested. As well, to apply *mandamus* and have the Minister release the held back claim amount. If *mandamus* is requested than be satisfied that this case merits that fairly rare, discretionary tool for remedy; however the Court has no discretion to refuse *mandamus* when it is the only means of securing performance of a ministerial duty. The Applicant here meets the 7 conditions to satisfy for *mandamus* to issue:

i. there must be a public legal duty to act under the circumstances;
ii. the duty must be owed to the applicant;
iii. there must be a clear right to performance of that duty, and in particular the applicant must have satisfied all conditions precedent giving rise to the duty;
iv. no other adequate remedy is available to the applicant;
v. the order sought must have some practical effect;
vi. in the exercise of its discretion, the court must find no equitable bar to the relief sought; and,
vii. on a balance of convenience, an order of *mandamus* should issue.

o. The decision may be set aside for any one or more of these a to z reasons:
    i. The Minister has a duty to refund child tax credit;
    ii. The Minister did fully not accomplish assessment before exhausted;
    iii. The Minister cannot assign the benefit thus it was unlawfully conveyed;
    iv. The Minister has no authority to recover the benefit once paid;
    v. The Minister cannot be unjustly enriched;
    vi. The Minister cannot make a second party creditor to a first or third;
    vii. The Minister's failed to disclose fully;
    viii. The Minister cannot have a change of heart;
    ix. The signing delegate was not authorized to sign;
    x. The decision is not fresh;
    xi. The Crown added unnecessary complexing issues;
    xii. The best interests of children is fatally absent;
    xiii. The decision relied on irrelevant and immaterial evidence;
    xiv. The decision did not rely on relevant and material evidence;

xv. The decision relies, in part, on the female presumption, rebutted;
xvi. The signing delegate did not investigate first hand or thoroughly;
xvii. The delegate made errors in law and of fact relying on false assumptions;
xviii. The delegate fettered her decision relying on invalid policy;
xix. The delegate, in part, relied on a secret, thus unlawful, policy in *Matte*;
xx. The delegate waived or forgave "notices of change" in error;
xxi. The reviewer failed to make out the case to meet, suppressing disclosure;
xxii. The reviewer was biased, albeit taken in by misrepresentation and ruse;
xxiii. The reviewer treated the applicant differently than other taxpayers;
xxiv. The reviewer breached legitimate expectation for fresh one issue decision;
xxv. The decision is illegal, irrational and lacks procedural fairness;
xxvi. The Minister is liable to repay on overpayment to the correct individual.

p. The issue in this case is simply stated: the Government seeks to avoid paying the whole amount of a refund otherwise wholly owing to a taxpayer on the basis of a claimed one-year limitation period which it infers from the language of the taxing statute. For a Court so to limit a taxpayer's right to what would otherwise be his own money would necessitate a clear statutory directive indeed. Where an otherwise constitutional or intra vires statute or regulation is applied in error to a person to whom on its true construction it does not apply, the general principles of restitution for money paid under a misstate should be applied, and, subject to equitable considerations, should favour recovery.
q. The Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant. It should also be noted that, I (*sic*) this Honourable Court's view, the provisions in question should be read generously in favour of enabling the children to receive the child tax benefit, which they have not, intercepted by the fraudulent third party.
r. For me this is about my children's securing the Canada Child Tax Benefit funds they are entitled misdirected in error to other than their

> primary care giver at the times claimed. Funds still needed to support these children in University. I argue here today for them, not party to the judicial review, impacted significantly by the outcome.
>
> s. As it is the fourth review it would be pointless to send this back for a redetermination because the Minister's decision is based on false assumptions. I conclude now requesting that if costs are awarded to the cause, they be a lump sum award after submissions in writing reminded that secret policies et al are inconsistent with a free and democratic society.

[32] Notably missing from the Applicant's presentation is any real focus upon the Decision itself, the reasons contained in the Decision, and the statutory authority and legal principles cited and relied upon in the Decision. For example, the Applicant states that the reasons for the Decision are unclear and inadequate. However, my reading of the Decision suggests to me that this is not the case. Whatever else may be wrong with the Decision, a lack of clarity or adequacy in the reasons is not a problem. The Applicant has ascertained that "inadequate reasons" is a recognized ground for judicial review, and he has thrown this ground into the mix without showing or explaining what is inadequate or unclear in the reasons. The same problem arises with respect to his allegations of bias and other issues.

[33] Also, it would be unfair to allow the Applicant to raise new issues at the oral hearing that were not set out in his written memorandum and for which he made no effort to alert the Respondent in advance of the hearing. In effect, the Applicant came to the oral hearing with a second written memorandum, some of which can be connected to his earlier memorandum and some of which is new. He simply read his second memorandum into the record. Examples of new issues are the accusations against Mr. Diaz and the argument of tainting and bias based upon those accusations as well as the inapplicability of subsections 122.62(1) and (2) of the Act because of

references to the Minister of National Health and Welfare. The new best interests of the children argument is in the same category but is, in any event, irrelevant because the Decision is not about eligibility but is, rather, about when the Minister should accept a late filing.

[34] The new issues raised in the (scripted) oral presentation have not been properly placed before the Respondent in a way that would allow for a fair response and hence they are not properly before the Court as part of this application. Moreover, having reviewed each of them in turn, it is my view that they do not establish grounds for reviewable error.

[35] My general assessment of the case that the Applicant is attempting to make is that he believes CRA was wrong or unreasonable not to allow him the CCTBs that he claimed for the disputed period. He asserts that CRA incorrectly and unreasonably invoked and applied a policy that prevented him receiving benefits outside of the period stipulated in subsection 122.62(1) of the Act because those benefits had already been paid to another caregiver and were, on the advice of the Department of Justice, not recoverable from Mrs. Nicholls. The Applicant says that he was not aware of this policy and so was prevented from providing evidence and making submissions on point. He also says that CRA displayed bias (reasonable apprehension and real bias) and that CRA neglected relevant evidence and took into account irrelevant evidence. He says further that the Decision based upon subsection 122.62(2) of the Act is wrong in law and/or unreasonable.

The Issues

[36] The Applicant has raised a number of issues for which there are simply no grounds or evidence on the record before me.

[37] For example, there is no evidence or basis for the Applicant's bald allegations of bias, or procedural unfairness, or insufficient reasons. Nor is there any basis for saying that the CRA took into account irrelevant evidence or failed to consider relevant evidence. The Applicant simply disagrees with the Decision and is seeking to have the Court set it aside and award him the CCTBs to which the CRA decided he was not entitled.

[38] This approach can be seen in the Applicant's attempts to introduce new evidence before me that was not before the CRA when it made its Decision. The Applicant was made aware of the issues the CRA had to decide and was given every opportunity to make submissions and submit evidence to the CRA before it made its Decision but simply refused or neglected to do so. He cannot make up for that omission now by bringing new evidence before me and asking me to consider matters *de novo*. See *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at page 775; *Amchem Products Inc. v. British Columbia (Worker's Compensation Board)*, [1992] S.C.J. No. 110, 192 N.R. 390 at paragraph 6; *R. v. General Electric Capital Canada Inc.*, 2010 FCA 290 at paragraph 11; and *Franck Bruncknorst Co. v. Gainers Inc. et al.*, [1993] F.C.J. No. 874 (C.A.) at paragraph 2.

[39] In addition, the Applicant has asked for remedies in this application that, for reasons given by the Respondent, the Court has no power to grant. The Applicant fails to ask for the relief which,

conceptually at least, might be available to him in this kind of application. For this reason alone, the Court would have to dismiss the application.

[40] My review of the record suggests to me that the Applicant was not, contrary to his present ascertions, ambushed by an unpublished policy and prevented from making submissions on the issues that underlie the Decision. The Decision was the second review and the record shows that the Applicant was aware that CRA's resistance to allowing him any further CCTBs turned upon the benefits already allowed to Mrs. Nicholls during the disputed period, the difficulty of CRA's reclaiming those benefits from Mrs. Nicholls, and CRA's view that the Applicant should not now be granted benefits so long after the period stipulated in subsection 122.62(1) when those benefits had already been paid to Mrs. Nicholls for the children and were not recoverable because of subsection 152(4) of the Act. These matters were squarely in front of the Applicant. His own failure to claim the benefits within the stipulated time (a failure he did not explain) was at the root of the problem. He was invited to make submissions and was free to take legal advice and submit any evidence or argument he chose.

[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.

[42] The reasons for the Minister's refusal are clearly set out in the Decision. The gist of it is that the CRA concluded that it was statute-barred from recovering CCTB payments made to Mrs. Nicholls prior to July 2004, and that the CRA would not likely be successful in establishing a debt against Mrs. Nicholls for her otherwise statute-barred years because it did not appear that she had made a misrepresentation attributable to neglect, carelessness or wilful default.

[43] This brought into play the CRA's policy that where CCTB payments have already been made with respect to the same children the CRA will grant retroactive benefits to an eligible individual in those situations only where it can recover the payments made to the previous caregiver.

[44] The Applicant objects to the exercise of the subsection 122.62(2) discretion on the grounds stated, but he has not established facts or authority to support any allegation that the exercise of discretion was either incorrect or unreasonable within the *Dunsmuir* range.

[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.

[46] In assessing the reasonableness of the Decision in this case I think it also has to be borne in mind that the Applicant waited until August 2006 to request CCTB payments going back to October 2001, and he did not explain why he had waited so long to do this if he felt he was the eligible person for those payments.

[47] Given the lack of statutory criteria for an exercise of discretion under subsection 122.62(2) of the Act, it is clear that Parliament left it to the Minister to establish policies and criteria for the exercise of that discretion. That is what has occurred in the present case.

[48] The Applicant has referred to various other sections of the Act and principles of law that he feels should override subsections 122.62(1) and (2) and, in effect, render them nugatory. He claims an overriding right to the CCTBs in question which he says cannot be taken away by subsections 122.62(1) and (2). He further claims that the CCTB payments already made to Mrs. Nicholls cannot be used to deny his claim and that there are, in any event, other provisions of the Act that CRA can use to recover payments inappropriately made, so that CRA is obliged to address the entitlement issue. However, the Applicant has provided no authority or principle, in my view, to support a finding that subsections 122.62(1) and (2) can somehow be left out of account and that the Minister was either incorrect or unreasonable in establishing the policy applied in this case or in applying it to the facts that were before the CRA. The Applicant simply disagrees with the policy and the Decision and has attempted to invent grounds (many of which are without authority or any evidentiary support) for challenging the Decision.

[49] Both the Applicant and the Respondents agree that there is no case law regarding the exercise of the Ministerial discretion under subsection 122.62(2) of the Act. However, I think it is correct for the Respondent to point out that courts have been reluctant to intervene where Parliament has granted discretionary authority to an administrative decision-maker. In *Telfer*, above, the Federal Court of Appeal addressed the discretion under section 220(3.1) of the Act and decided that the unstructured nature of the Minister's statutory power meant that the court should not subject the decision-making process under that section to close scrutiny. In other words, in such a situation, Parliament's intent is that the Minister should be left to establish suitable criteria for the exercise of his or her discretion. 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.

[50] Both parties have made written costs submissions which I have reviewed in their entirety. It is my view that the Respondents should have their costs in accordance with Column III of Tariff B and their disbursements, all in accordance with their draft bill of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. The Respondent shall have costs and disbursements in the amount of $3,973.99.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-565-09
STYLE OF CAUSE:	PATRICK NICHOLLS Applicant - and - CANADA (REVENUE AGENCY) and MINISTER OF NATIONAL REVENUE Respondents
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 28, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	December 7, 2010

APPEARANCES:

Mr. Patrick Nicholls	APPLICANT (Self-represented)
Ms. Iris Kingston Ms. Nancy Arnold	RESPONDENTS

SOLICITORS OF RECORD:

Mr. Patrick Nicholls	APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	RESPONDENTS