Federal Court  Cour fédérale

**Date: 20120905**

**Docket: T-1359-11**

**Citation: 2012 FC 1050**

**Ottawa, Ontario, September 5, 2012**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**TRACEY-DOREEN KENNEDY**

**Applicant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Tracey-Doreen Kennedy [the applicant] is a permanent resident of British Columbia and the mother of three children. She challenges the legality of a Canada Revenue Agency [CRA] notice dated July 20, 2011 [Notice], advising her that she has amounts owing of $9,737.65 with respect to the Canada Child Tax Benefit [CCTB] and $5,992.50 with respect to the British Columbia Family Bonus [BCFB].

[2] In her Notice of Application, the applicant seeks a judicial declaration that the CRA is prohibited, due to the expiration of the applicable limitation periods, from taking collection action respecting outstanding debts for the 1999 taxation year [the limitation issue]. She also asks the Court to declare that she was entitled to the CCTB and BCFB since 1999 [the entitlement issue].

[3] Moreover, in her Notice of Constitutional Question, the applicant questions the validity, application or effect of the federal *Income Tax Act*, RSC 1985, c 1 (5th supp) as amended [ITA], the British Columbia *Income Tax Act*, RSBC 1996, c 215 [BCITA], and the Tax collection agreement [Tax collection agreement] between the government of Canada and the province of British Columbia, claiming that they have not been legally enacted, are *ultra vires*, and are otherwise contrary to the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982* [Charter] [the constitutional issues].

**I. OVERPAYMENTS BY THE CROWN**

[4] According to the facts stated in the affidavit of Diane Bath (Team Leader in the National Subledger/Benefits Collection Centre at the Thunder Bay Tax Services Office of the CRA), and with which the applicant does not take issue, in January and July 2000 the Minister determined that overpayments were made for the 1996, 1997 and 1999 base taxation years, for a total of $7,403.70 as of August 2, 2000 [BCFB debt].

[5] On February 27, 2004, in accordance with section 223 of the ITA, the BCFB debt was certified in this Court as an amount payable by the applicant, and a writ of seizure and sale was accordingly issued on the same date in respect of the BCFB debt.

[6] According to Ms. Bath's review of the CRA's record, after having informed the applicant of the registration of a certificate with this Court by letter dated June 4, 2004, the CRA proceeded with several requirements to pay addressed to different financial institutions, such as the AIM Funds Management and Scotia Capital Inc. on August 11, 2004; the Canadian Bank of Commerce on June 13, 2005; TD Canada Trust on January 20, 2011.

[7] It turned out that all collection efforts taken by the CRA failed, either because the applicant's accounts with the institutions above were closed or because the applicant had no personal accounts with them. In July of 2011, the Minister applied the applicant's 2010 income tax credit of $1,411.20 [the 2010 credit] to offset part of the BCFB debt.

[8] Moreover, besides receiving BCFB overpayments, from 1997 to 2000, the applicant also received CCTB overpayments totalling $9,737.65 [CCTB debt]. According to the record before the Court, the Minister has also taken collection action with respect to the applicant's CCTB debt, including the issuance in 2011 of a requirement to pay addressed to TD Canada Trust.

**II. PRELIMINARY ISSUES**

[9] Two preliminary issues must be addressed before examining the limitation, constitutional, and entitlement issues raised by the applicant.

*Legal representation at the hearing*

[10] The applicant is self-represented. She has apparently signed the various documents served and filed to the Court. On the day of the hearing, the applicant's husband Mr. Robert Victor MacPherson Kennedy [Kennedy], sought authorization and was allowed by this Court to make oral submissions on behalf of the applicant. Respondent's counsel opposed Mr. Kennedy's oral request, but nonetheless complied with the Court's interlocutory ruling.

[11] In principle, individuals are disallowed from representation by another individual other than a solicitor, subject to limited exceptions. Rules 119 and 121 of the *Federal Courts Rules*, SOR/98-106 [FCR], prescribe:

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| 119. Subject to rule 121, an individual may act in person or be represented by a solicitor in a proceeding. | 119. Sous réserve de la règle 121, une personne physique peut agir seule ou se faire représenter par un avocat dans toute instance. |
| 121. Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor. | 121. La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières, n'en ordonne autrement. |

[12] The rules with respect to legal representation are clear and it is not question here to diminish their force and legal effect, or to create a new judicial exception allowing a spouse to act on behalf of a self-represented litigant. Religious convictions do not provide license to a party or a party's

spouse to ignore the general rules and orders governing the practice and procedure in the Federal Court (or the Federal Court of Appeal). However, case law recognizes that where the interests of justice and the particular circumstances so require, and in compliance with a just, expedient, and cost efficient judicial process, the Court may exercise its residual discretion to allow an individual to speak at the hearing on behalf of a self-represented individual.

[13] The Court notes that in *Erdmann v Canada*, 2001 FCA 138, 55 DTC 5387 [*Erdmann*], Justice Sharlow of the Federal Court of Appeal dismissed a motion made by the husband of the appellant to be added as a party in his wife's appeal, without prejudice to the right of his wife who was self-represented to request that her husband be permitted to speak on her behalf at the hearing before the Federal Court of Appeal, assuming she was not then represented by counsel. In her decision, Justice Sharlow writes: "An argument might be made that the Court has the inherent jurisdiction to permit representation by a non-lawyer if the interests of justice so require" (para 11).

[14] Further, in *Scheuneman v Canada (AG)*, 2003 FCA 439, [2003] FCJ No 1736 (available on CanLII), a full bench of the Federal Court of Appeal did not rule out the possibility of a non-lawyer representing another individual in certain circumstances. Referring to the reasoning in *Erdmann*, Justice Evans notes that "[t]he Court may well have an inherent discretion, exercisable in unusual circumstances, to permit a person other than a lawyer to represent a litigant when the interests of justice so require … However, if it exists, this residual discretion can only properly be exercised in the context of specific facts, including the suitability of the person who has agreed … to represent him" (para 5).

[15] Such flexible and fact-specific driven approach is certainly consistent with the Judge's duty to ensure a fair and equitable process in Court, and it reflects the paramountcy of Rule 3 FCR in the application of the other Rules:

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| 3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. | 3. Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible. |

[16] Months before the hearing, the applicant indicated in the Requisition for Hearing served and filed with the Court on March 7, 2012 that her husband would be acting on her behalf and, following the serving of same, without apparent opposition from the respondent. Such silence may have led the applicant to believe that there would be no problem at the hearing. It appeared to the Court at the hearing that Mr. Kennedy had taken considerable time to prepare arguments, while the applicant on her part was manifestly not ready to develop some of the legal arguments raised in the Memorandum of Facts and Law and the Notice of Constitutional Question.

[17] Considering all relevant factors, including the interests of justice and its better administration, the financial situation of the applicant, the (small) amounts of money in question, the delays already incurred by the parties and the inconvenience of adjourning the hearing, the possible injustice that would have been caused in forcing the applicant to make oral submissions on all issues at the hearing, the marital relationship Mr. Kennedy has with the applicant, his personal knowledge of the facts of this case and the absence of prejudice on the respondent, Mr. Kennedy has been exceptionally allowed to speak at the hearing on behalf of the applicant.

[18] The interlocutory ruling made by the Court was strictly made for the limited purpose expressed at the hearing. It does, by no means, allow Mr. Kennedy to act in the future as the legal representative of the applicant, to sign any proceeding on her behalf, or to appear in her name at any other occasion.

*Lack of details in the Notice of Application*

[19] As a further preliminary issue, the respondent asks the Court not to examine the constitutional issues, because they have been improperly raised and pleaded by the applicant. Indeed, the Notice of Application does not specifically make mention of any constitutional arguments, nor does it ask the Court to declare provisions of the ITA inoperative, *ultra vires* or unconstitutional.

[20] In her Requisition for Hearing, the applicant announced that a Notice of Constitutional Question would be served and filed. While proper Notice of Constitutional Question has effectively been served and filed by the applicant in accordance with section 57 of the *Federal Courts Act*, RSC, 1985, c. F-7) [FCA] and Rule 69 FCR, the respondent points to Rule 301(e) FCR, which states that an application shall be commenced by a Notice of Application containing:

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| (*e*) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on | *e*) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable |

[21] Paragraph 52(1) of *The Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides that the "Constitution of Canada is the supreme law of Canada, and any

law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." Thus, the purpose of the serving and filing of the Notice of Constitutional Question – which is mandatory under section 57 of the FCA – is to entitle the Attorneys General to intervene, to present evidence, and to make representations in any proceeding where the constitutional validity, applicability, or operability of an Act of Parliament or of the legislature of a Province is questioned by a party.

[22] Because the applicant is self-represented, the applicant may have thought that it was sufficient to make some constitutional arguments in her Memorandum of Facts and Law and to complete these by way of serving a Notice of Constitutional Question to all Attorneys General. It turns out that if leave to amend her Notice of Application to include the constitutional issues raised in the Notice of Constitutional Question would have been formally sought by the applicant prior to the hearing, in all likelihood, leave would have been granted by the Court on such terms as would protect the rights of all parties, as the case may be (Rules 53 to 58 and 75).

[23] In the interests of just, expeditious, and cost-effective determination of proceedings, however, the Court may hear arguments of applicants regardless of specific non-compliance with certain procedural requirements in the Rules, such as Rule 301(e). Practically speaking, Rule 60 FCR addresses the procedural failure to formally mention in the Notice of Application itself the constitutional issues developed in the Notice of Constitutional Question:

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| 60. At any time before judgment is given in a proceeding, the Court may draw the attention of a party to any gap in the proof of its case or to any non-compliance with these | 60. La Cour peut, à tout moment avant de rendre jugement dans une instance, signaler à une partie les lacunes que comporte sa preuve ou les règles qui n'ont pas été |

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| Rules and permit the party to remedy it on such conditions as the Court considers just. | observées, le cas échéant, et lui permettre d'y remédier selon les modalités qu'elle juge équitables. |

[24] The Court may even grant an adjournment to allow the party to remedy the deficiency or to ensure that the other party does not suffer a prejudice from anything done, as the case may be. See by analogy *Mayflower Transit v Bedwell* (2003), 2003 FC 943 at paras 8-11, 238 FTR 144, where the interests of justice were upheld against the opposing party while a lack of prejudice was simultaneously insured. Indeed, in the case at bar, the respondent has had full opportunity to respond to the constitutional arguments made by the applicant, did not seek a postponement of the hearing, nor leave to make additional written submissions with respect to any new constitutional argument made at the hearing by Mr. Kennedy.

[25] The purpose of section 57 of the FCA has been achieved here and nothing would be gained by refusing today to decide the matter because the Notice of Application is somewhat deficient (see by analogy *Eaton v Brant County Board of Education* (1997), [1997] 1 SCR 241 at para 51, 142 DLR (4th) 385, where Justice Sopinka undertakes an analysis of prejudice resulting from the failure to give Notice of Constitutional Question and refers to *Ontario (Workers' Compensation Board) v Mandelbaum, Spergel Inc* (1993), 12 OR (3d) 385, at paras 390-91, [1993] OJ No 510 (O(CA))).

[26] Accordingly, the Court has accepted in principle to consider the constitutional issues, and subject to its discretion, not to decide same if it turns out that the limitation is determinative.

**III. LIMITATION ISSUE**

[27] Relying on section 32 of the *Crown Liability Proceedings Act*, RSC 1985, c C-50 [CLPA] and this Court's decision in *Gibson v Canada*, 2004 FC 809, 254 FTR 54 [*Gibson* (FC)], the applicant basically submits that the Minister was statute-barred from retaining the 2010 credit and from taking further tax collection action against the applicant with regard to the BCFB debt and the CCTB debt.

[28] If the Minister was indeed statute-barred from commencing collection action against the applicant, then there would be no need for the Court to determine whether the applicable provisions of the ITA have been validly enacted by Parliament and are constitutional. Thus, I will first deal with the limitation issue. In this respect, the applicant has not seriously challenged the legal arguments made by the respondent both in her Memorandum of Facts and Law and at the hearing.

[29] Section 32 of the CLPA prescribes a six-year limitation period for any proceedings by or against the Crown where the cause of action does not arise in a province. It also provides that where the relevant time bar is found in the CLPA or in any other Act of Parliament, those provisions shall apply:

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| 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of | 32. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une |

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| a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. | province, la procédure se prescrit par six ans. |

[30] Limitation period provisions of the ITA that find application in this case are the following:

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| 222. (3) The Minister may not commence an action to collect a tax debt after the end of the limitation period for the collection of the tax debt. | 222. (3) Une action en recouvrement d'une dette fiscale ne peut être entreprise par le ministre après l'expiration du délai de prescription pour le recouvrement de la dette. |
| (4) The limitation period for the collection of a tax debt of a taxpayer | (4) Le délai de prescription pour le recouvrement d'une dette fiscale d'un contribuable: |
| (*a*) begins | *a*) commence à courir : |
| (i) if a notice of assessment, or a notice referred to in subsection 226(1), in respect of the tax debt is sent to or served on the taxpayer, after March 3, 2004, on the day that is 90 days after the day on which the last one of those notices is sent or served, and | (i) si un avis de cotisation, ou un avis visé au paragraphe 226(1), concernant la dette est envoyé ou signifié au contribuable après le 3 mars 2004, le quatre-vingt-dixième jour suivant le jour où le dernier de ces avis est envoyé ou signifié, |
| (ii) if subparagraph (i) does not apply and the tax debt was payable on March 4, 2004, or would have been payable on that date but for a limitation period that otherwise applied to the collection of the tax debt, on March 4, 2004; and | (ii) si le sous-alinéa (i) ne s'applique pas et que la dette était exigible le 4 mars 2004, ou l'aurait été en l'absence de tout délai de prescription qui s'est appliqué par ailleurs au recouvrement de la dette, le 4 mars 2004; |
| (*b*) ends, subject to subsection (8), on the day that is 10 years after the day on which it begins. | *b*) prend fin, sous réserve du paragraphe (8), dix ans après le jour de son début. |

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| (5) The limitation period described in subsection (4) for the collection of a tax debt of a taxpayer restarts (and ends, subject to subsection (8), on the day that is 10 years after the day on which it restarts) on any day, before it would otherwise end, on which | (5) Le délai de prescription pour le recouvrement d'une dette fiscale d'un contribuable recommence à courir — et prend fin, sous réserve du paragraphe (8), dix ans plus tard — le jour, antérieur à celui où il prendrait fin par ailleurs, où, selon le cas : |
| (*a*) the taxpayer acknowledges the tax debt in accordance with subsection (6); | *a*) le contribuable reconnaît la dette conformément au paragraphe (6); |
| (*b*) the Minister commences an action to collect the tax debt; or | *b*) le ministre entreprend une action en recouvrement de la dette; |
| (*c*) the Minister, under subsection 159(3) or 160(2) or paragraph 227(10)(*a*), assesses any person in respect of the tax debt. | *c*) le ministre établit, en vertu des paragraphes 159(3) ou 160(2) ou de l'alinéa 227(10)*a*), une cotisation à l'égard d'une personne concernant la dette. |

[31] The Minister's legal authority to retain amounts owed by a person who is indebted to the federal Crown is found in section 224.1 of the ITA:

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| 224.1 Where a person is indebted to Her Majesty under this Act or under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of the taxes payable to the province under that Act, the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to the person by Her | 224.1 Lorsqu'une personne est endettée envers Sa Majesté, en vertu de la présente loi ou en vertu d'une loi d'une province avec laquelle le ministre des Finances a conclu un accord en vue de recouvrer les impôts payables à la province en vertu de cette loi, le ministre peut exiger la retenue par voie de déduction ou de compensation d'un tel montant qu'il peut spécifier sur tout montant qui peut être ou qui peut devenir |

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| Majesty in right of Canada. | payable à cette personne par Sa Majesté du chef du Canada. |

[32] Section 49 of the BCITA provides that section 222 of the ITA applies for the purposes of the BCITA. Section 224.1 of the ITA is applicable in this matter by virtue of the Tax Collection Agreement. The latter came into force on January 1, 2004, and amends an earlier agreement, pursuant to subsection 7(2) of the *Federal-Provincial Fiscal Arrangements Act* (RS 1985, c F-8).

[33] In adopting Bill C-30, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament* on 23 March 2004, 3d Sess, 37th Parl, 2004 (received Royal Assent on May 14, 2004), Parliament intended that the existing time limitations under other federal or provincial legislations be given no effect for the purposes of tax collection. Where applicable, subparagraph 222(4)(a)(ii) of the ITA overrules any limitation period that existed prior to the adoption of Bill C-30, including the six-year time bar found at section 32 of the CLPA.

[34] In *Gibson v Canada*, 2005 FCA 180, 334 NR 288 [*Gibson* (FCA)] leave to appeal refused: [2005] SCCA 326, which set aside the Court's decision in *Gibson* (FC), above, the Federal Court of Appeal considered subsection 222(4) of the ITA. It held that the Minister was authorized to take collection action on a tax debt that arose fourteen years prior because, according to the new legislation, the ten-year limitation period for the collection of a tax debt arising before March 4, 2004 does not expire until March 3, 2014. Indeed, a tax debt that was prescribed prior to the adoption of Bill C-30 can nevertheless be enforced by the federal Crown under the ITA; the 2004 amendments to section 222 of the ITA being of retroactive effect (see *Gibson* (FCA), above, at paras 10-13).

[35] In this proceeding, the record before the Court does not contain any information as to when the applicant was informed of the Minister's decisions in 2000 with respect to the overpayments of CCTB and BCFB. The applicant never took issue with the Minister's decisions in January and July of 2000 that the applicant was no longer entitled to the CCTB and the BCFB as a result of the overpayments that had been made to her. However, the BCFB debt, having been certified as an amount payable by the applicant on February 27, 2004 and a writ of seizure and sale having been accordingly issued against the applicant, the Court finds that the tax debt here at issue is deemed to have become payable prior to March 4, 2004, and that the limitation period expires only on March 3, 2014, in application of subparagraph 222(4)(a)(ii) of the ITA.

[36] There is no need for the Court to determine whether the Minister should or should not be allowed to benefit from an extension of the limitation period pursuant to paragraph 222(5)(b) of the ITA, as a result of subsequent actions taken against the applicant to collect the tax debt, including the requirements to pay. Also, the Court finds that the Minister did not exceed the powers delegated by Parliament in requiring retention of the applicant's 2010 income tax credit. Subsection 222(1) of the ITA defines actions to collect the tax debt as including "a proceeding in a court and anything done by the Minister under subsection 129(2), 131(3), 132(2) or 164(2), section 203 or any provision" of Part XV of the ITA. As such, these actions include the recovery by deduction or set-off under section 224.1 of the ITA. Finally, I find that the Minister is not statute-barred from taking collection actions with respect to the remaining CCTB and BCFB amounts due by the applicant.

**IV. CONSTITUTIONAL ISSUES**

[37] I have closely examined the constitutional arguments made by the applicant in her Notice of Constitutional Question (which were extensively developed by Mr. Kennedy at the hearing), and have concluded that they have no merit whatsoever.

[38] The Court has noted in *Collins v Canada (Customs and Revenue Agency)*, 2005 FC 1431, 281 FTR 303 and *Wax v Canada (Attorney General)*, 2006 FC 675, 294 FTR 58, that the consequential amendments to section 222 of the ITA by virtue of Bill C-30, were adopted as a response to the Supreme Court of Canada's decision in *Markevich v Canada*, 2003 CSC 9, [2003] 1 SCR 94, in which the Supreme Court gave effect to a time limitation found in provincial legislation, stating that the "federal Crown's right to collect provincial taxes is no greater than the right delegated to it by the province."

[39] The ITA and consequential amendments have been validly passed and enacted. It is settled law that the ITA is *intra vires* the federal government under section 91(3) of *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*The Constitution Act, 1867*]. As such, the Court need not engage in an exhaustive discussion pertaining to the constitutional issues. While I am substantially in agreement with the reasoning contained in paragraphs 10 to 32 of the Respondent's written representations on the Notice of Constitutional Question, I will make a number of additional observations.

*Statutes validly enacted*

[40] First, the impugned provisions of the ITA (and as the case may be, of the BCITA) must be presumed valid and constitutional. The applicant has failed to adduce any evidence showing that they have not been validly enacted by Parliament (or the Legislature of British Columbia). Suffice it to say that any legal condition for the coming into force of the ITA has been apparently respected, including any condition mentioned in sections 53 and 54 of *The Constitution Act, 1867* or in another statute, as the case may be, and which are legal and enforceable (sections 4 and 5 of the *Interpretation Act*, RSC 1985, c I-21).

[41] Second, the applicant challenges the validity of the ITA based on its alleged lack of publication in the *Canada Gazette*. The respondent rightly points out that section 221(2) ITA, which contains a publication requirement, relates to regulations and not to the entirety of the ITA:

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| 221(2) A regulation made under this Act shall have effect from the date it is published in the *Canada Gazette* or at such time thereafter as may be specified in the regulation unless the regulation provides otherwise and it | 221(2) Les dispositions réglementaires d'application de la présente loi ont effet à compter de leur publication dans la *Gazette du Canada* ou après si elles le prévoient. Toute disposition réglementaire peut toutefois avoir un effet rétroactif, si elle comporte une disposition en ce sens, dans les cas suivants : |
| (a) has a relieving effect only; | a) elle a pour seul résultat d'alléger une charge; |
| (b) corrects an ambiguous or deficient enactment that was not in accordance with the objects of this Act or the *Income Tax Regulations*; | b) elle corrige une disposition ambiguë ou erronée, non conforme à un objet de la présente loi ou de son règlement; |
| (c) is consequential on an | c) elle met en oeuvre une |

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| amendment to this Act that is applicable before the date the regulation is published in the *Canada Gazette*; or | disposition nouvelle ou modifiée de la présente loi applicable avant qu'elle ne soit publiée dans la *Gazette du Canada*; |
| (d) gives effect to a budgetary or other public announcement, in which case the regulation shall not, except where paragraph 221(2)(a), 221(2)(b) or 221(2)(c) applies, have effect | d) elle met en œuvre une mesure — budgétaire ou non — annoncée publiquement, auquel cas, si l'alinéa a), b) ou c) ne s'appliquent pas par ailleurs, elle ne peut avoir d'effet : |
| (i) before the date on which the announcement was made, in the case of a deduction or withholding from an amount paid or credited, and | (i) avant la date où la mesure est ainsi annoncée s'il y a déduction ou retenue sur des montants versés ou crédités, |
| (ii) before the taxation year in which the announcement is made, in any other case. | (ii) sinon, avant l'année d'imposition au cours de laquelle la mesure est ainsi annoncée. |

[42] Thus, the Court concludes that all procedural requirements, if any, have been followed by the House of Commons, the Senate, and the Government of Canada, as the case may be.

*No improper delegation*

[43] British Columbia was admitted to Canada in 1871 by imperial order in council, made at the request of its Legislative Council, which was the procedure provided by section 146 of the British North America Act. In 1871, British Columbia acquired a fully elected Legislature, and, in 1872, the province achieved responsible government.

[44] At the time of Confederation, the federal government levied no income tax and collected two-thirds of its revenues from customs duties and the remainder from excise taxes. Indeed, the federal government did not levy an income tax until 1916, when it enacted a tax on business profits to help finance Canadians participation in the First World War. The next year, the federal government enacted the *Income War Tax Act (1917)*, the direct predecessor of the current ITA. See David G Duff et al, eds, *Canadian Income Tax Law*, 3d ed, Canada: LexisNexis, 2009 at 14).

[45] The applicant has not demonstrated to the satisfaction of the Court that there has been improper legislative delegation from Parliament to the Legislature of British Columbia, or vice-versa, and that, for this reason, the impugned provisions of the ITA, the BCITA, and the Tax collection agreement are *ultra vires* of the exclusive powers conferred respectively by sections 91 and 92 of *The Constitution Act, 1867* to Parliament and the Legislatures of the provinces.

[46] In *R v Watson*, 2005 BCPC 59, at para 11, the British Columbia Provincial Court (Criminal Division) [BCPC] held that "[t]he arrangement between Canada and British Columbia is not the delegation of provincial jurisdiction." The BCPC referenced *Guillemette v Canada*, [1999] FCJ No 637 (leave to appeal to the Supreme Court denied, [1999] SCCA No 225), a decision of the Federal Court of Appeal and cited paragraph 4 from that decision:

> Nor are provincial powers over taxation or tax collection unlawfully delegated to federal authorities through the operation of the income tax system. The provincial power to tax set out in section 92 head 2 of *The Constitution Act, 1867* is in respect of "direct taxation within the Province in order to the raising of a revenue for provincial purposes.". Each province has enacted income tax legislation fixing the tax base and rates applicable to its residents. The Government of Canada by administrative arrangement collects provincial income taxes for nine provinces along with the federal taxes. But the law it applies for provincial tax collection is provincial law. The fact that

> these laws are framed by the provinces to be consistent with the system employed by the federal *Income Tax Act* is due to a choice the provinces in question make in order to avoid the extra expense and trouble of running their own collection systems. There is, however, no delegation by the provincial legislatures of legislative power of taxation to the Parliament of Canada.

[47] In her Notice of Constitutional Question, the applicant notably makes reference to, among other cases, the *Lord Nelson* case (*Nova Scotia (AG) v Canada (AG)*, [1951] SCR 31. In fact, one particular case, which ultimately held that the ITA was *intra vires* but where the applicant had nonetheless relied on *Lord Nelson*, is *Bruno v Canada Customs*, 2002 BCCA 047, [2002] BCCA 47 [*Bruno*]. As the applicant's representative and husband noted during the hearing of the case at bar, he was the "representing agent" for Mr. Bruno during the *Bruno* hearing. As a result, he is certainly already familiar with Justice Low's statement at paragraph 18 in *Bruno* that "[t]he Lord Nelson case dealt with whether the Parliament of Canada has the power to delegate constitutional jurisdiction to a province. There is nothing to be found in the decision that assists Mr. Bruno in the argument he presents now as to the constitutional invalidity of the federal Income Tax Act [emphasis added]."

[48] I come to the same conclusion. Thus, the ITA is valid legislation that has force of law in Canada.

*No violation of section 7*

[49] The Charter attack centers on an alleged violation of section 7. This allegation has no merit since the applicant's right to life, liberty and security of the person is not engaged by the application of the ITA collection provisions. Nor am I being able to find any breach of a principle of fundamental justice in this case.

[50] First, the applicant engages in an improper comparison between certificates issued under the *Immigration and Refugee Protection Act*, SC 2001, c 27 – referencing *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*] – and certificates issued out of the Federal Court Registry in tax matters. As the respondent has rightfully responded, the certificates in *Charkaoui* relate to declarations of inadmissibility to Canada of foreign nationals and permanent residents and lead to detention – this context does not extend to income tax collection procedures taken under the ITA.

[51] Second, the applicant invokes *Re Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536, but this case does not support the general proposition that the ITA collection provisions violate the applicant's right to life, liberty and security of the person. In any event, the Court finds that the requirements to pay issued by the CRA do not violate any constitutional guarantee to a fair and public hearing.

[52] It was the applicant's burden to convince the Court of a section 7 Charter violation and this has simply not been accomplished in the case at bar.

**V. ENTITLEMENT ISSUE**

[53] At the hearing, the applicant herself made very few oral representations. However when she spoke at the invitation of the Court, she placed great focus on her alleged right to receive CCTB and BCFB payments.

[54] I note that the entitlement issue has not really been addressed in the Memorandum of Facts and Law of the applicant, leading respondent's counsel to state at the hearing that he thought that the entitlement issue had been abandoned by the applicant.

[55] Be that as it may, the applicant has failed at the hearing to develop any form of legal reasoning to support her contention. In January and July 2000, it was decided that the applicant was no longer entitled to these payments due to the prior overpayments; the problem is that the applicant did not take appropriate legal action at the time. Furthermore, the Court wishes to note that this is not an appeal of a Notice of Assessment, which falls within the jurisdiction of the Tax Court of Canada. This is a judicial review of the legality of the CRA's enforcement measures.

**VI. CONCLUSION**

[56] In conclusion, for the reasons above, the present application for judicial review must fail and shall be accordingly dismissed by the Court.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

"Luc Martineau"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1359-11 |
| **STYLE OF CAUSE:** | TRACEY-DOREEN KENNEDY v<br>HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | Kelowna, British Columbia |
| **DATE OF HEARING:** | August 16, 2012 |
| **REASONS FOR JUDGMENT:** | MARTINEAU J. |
| **DATED:** | September 5, 2012 |

**APPEARANCES:**

| | |
|---|---|
| Tracey-Doreen Kennedy | FOR THE APPLICANT<br>(ON HER OWN BEHALF) |
| Jason Levine | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Tracey-Doreen Kennedy<br>West Kelowna, British Columbia | FOR THE APPLICANT<br>(ON HER OWN BEHALF) |
| Myles J, Kirvan,<br>Deputy Attorney General of Canada<br>Vancouver, British Columbia | FOR THE RESPONDENT |