

Federal Court



Cour fédérale

**Date: 20161007**

**Docket: ITA-11705-15  
ETA-7495-15**

**Citation: 2016 FC 1126**

**St. John's, Newfoundland and Labrador, October 7, 2016**

**PRESENT: The Honourable Madam Justice Heneghan**

**Docket: ITA-11705-15**

**BETWEEN:**

**IN THE MATTER OF THE *INCOME TAX ACT*,**

**and**

**IN THE MATTER OF an assessment or assessments by the Minister of National Revenue under one or more of the *Income Tax Act, Canada Pension Plan, Employment Insurance Act*,**

**AGAINST:**

**DONNA MARIE NOBLE  
148 Pownal Road RR 26  
Mount Mellick, Prince Edward Island  
C1B 3S3**

**Docket: ETA-7495-15**

**AND BETWEEN:**

**In the matter of the *Excise Tax Act, R.S.C. 1985, c. E-15***

**and**

**In the matter of an assessment or assessments  
by the Minister of National Revenue under the  
*Excise Tax Act*, against:**

**DONNA MARIE NOBLE  
148 Pownal Road RR 26  
Mount Mellick, Prince Edward Island  
C1B 3S3**

**REASONS FOR ORDER**

[1] These Reasons are issued pursuant to Orders that were issued on August 10, 2016.

[2] By Notices of Motion dated February 3, 2016, Her Majesty the Queen, representing the Minister of National Revenue, sought an order pursuant to section 56 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the “Federal Courts Act”), Rule 423 of the *Federal Courts Rules*, S.O.R./98-106, (the “Rules”) and section 43 of the *Land Titles Act*, S.N. B. 1981, c. L-1.1 (the “Land Titles Act”) that the memorial of judgment registered by the Canada Revenue Agency (the “CRA”) against the interest of Donna Marie Noble (the “Respondent-Judgment Debtor”) in certain real property situated in New Brunswick, shall continue to bind the interest of the Respondent until the expiry of the registration of the memorial of judgment. The Minister sought these Orders, notwithstanding the Affidavits of Response filed by the Respondent with the Registrar of Land Titles for the province of New Brunswick.

[3] The Notices of Motion were filed in causes ITA-11705-15 and ETA-7495-15 in respect of debts arising pursuant to the *Income Tax Act*, R.S.C., 1985., c. 1 (5<sup>th</sup> Supp.) (the “ITA”) and the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the “ETA”), respectively.

[4] Details about the assessment of those debts and the issuance of certificates, pursuant to the relevant legislation, are set out in the affidavit of Heather Smith, Resource Officer/ Complex Case Officer with the CRA.

[5] Ms. Smith outlined the tax litigation history relative to the subject lands, assessments, and certificates issued against David Stanley Noble, and Glenn Royce Marney, as well as previous steps taken by the CRA pursuant to the Land Titles Act.

[6] In her affidavit, Ms. Smith referred to certain orders issued by the Federal Court respecting the continued registration of judgments under the Land Titles Act respecting the five parcels of land referenced in the present Notice of Motion. She briefly addressed the history of tax litigation arising in relation to assessments made pursuant to section 325 of the ETA and section 160 of the ITA. Ultimately, the appeals were dismissed by the Federal Court of Appeal. An application for leave to appeal to the Supreme Court of Canada from that judgment was unsuccessful.

[7] In my opinion, it is unnecessary to go into much detail about the various procedural steps taken under the ITA and the ETA. There is one issue arising in this present motion and that is

whether the Minister's motion for an order, to continue the registration of the memorials, was made in a timely manner, in accordance with the relevant legislation.

[8] The Minister brought his motion pursuant to section 43 of the Land Titles Act.

Subsection 43 (4) is relevant and provides as follows:

A memorial of judgment ceases to be registered upon the expiration of thirty days from the giving of the notice pursuant to subsection (3) unless, within that time, the judgment creditor files with the registrar who gave the notice an order of the court extending the period of registration of the memorial of judgment and in such case the memorial of judgment remains registered for the period determined by the order.	L'enregistrement d'un extrait de jugement prend fin à l'expiration de trente jours de l'avis donné en vertu du paragraphe (3) à moins que, dans l'intervalle, le créancier sur jugement ne dépose auprès du registrateur qui a donné l'avis une ordonnance de la cour qui prolonge la période d'enregistrement de l'extrait de jugement, auquel cas ce dernier demeure enregistré pour la période fixée dans l'ordonnance.
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[9] The Registrar of Land Titles for New Brunswick issued a "Notice of Registration of Memorial of Judgment", dated November 20, 2015, to the Respondent-Judgment Debtor, relative to each of five parcels of land identified as follows: 60170560, 60157716, 60170578, 60031408, and 60142254.

[10] The operative part of the Notices provides as follows:

TAKE NOTICE that a memorial of judgment, a copy of which is attached hereto, has been registered against the specified parcel.

AND TAKE NOTICE that the registered owner of any person claiming an interest in the parcel is entitled to request in writing

that I give the judgment creditor a notice that the judgment shall cease to be registered upon the expiration of 30 days from the giving of the notice unless within that time the judgement creditor files with me a court order extending the registration period.

AND FURTHER TAKE NOTICE that such a request must be accompanied by an affidavit of some person having knowledge of the facts to the affect that

(a) the registered owner of the interest against which the judgment has been registered

(i) is not the judgment debtor, or

(ii) holds the land as a trustee; or

(b) the judgment debt

(i) is satisfied, or

(ii) is not enforceable for the reasons specified in the affidavit.

[11] The Respondent-Judgment Debtor responded with a Form 35.1 statement, pursuant to the Land Titles Act. She stated that the judgment “is not enforceable” and set out her grounds for that position.

[12] Subsequently, by a “Notice to Judgment Creditor”, in Form 36 as provided by the Land Titles Act, the Registrar of Land Titles gave the following Notice to the Judgment Creditor:

TAKE NOTICE that the registered owner has requested, for the reasons stated in the affidavit attached hereto, that I notify the judgment creditor that the memorial of judgment registered against the specified parcel shall cease to be registered upon the expiration of the 30 days from the giving of this notice unless within that time the judgment creditor files with me a court order extending the period of registration.

[13] According to the affidavit of Ms. Smith, at paragraph 19, the CRA received the Form 36 Notice on January 6, 2016.

[14] Subsection 43 (4) of the Land Titles Act provides as follows:

A memorial of judgment ceases to be registered upon the expiration of thirty days from the giving of the notice pursuant to subsection (3) unless, within that time, the judgment creditor files with the registrar who gave the notice an order of the court extending the period of registration of the memorial of judgment and in such case the memorial of judgment remains registered for the period determined by the order.	L'enregistrement d'un extrait de jugement prend fin à l'expiration de trente jours de l'avis donné en vertu du paragraphe (3) à moins que, dans l'intervalle, le créancier sur jugement ne dépose auprès du registrateur qui a donné l'avis une ordonnance de la cour qui prolonge la période d'enregistrement de l'extrait de jugement, auquel cas ce dernier demeure enregistré pour la période fixée dans l'ordonnance.
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[15] At the commencement of the hearing, a question was raised as to the timeliness of the Minister's motion since the motion was argued after the 30 day period referred to in subsection 43 (4) above.

[16] Counsel for the Minister advised the Court that he had been told by the Registrar of Land Titles for New Brunswick that the status quo would be maintained until delivery of an order by the Court.

[17] No affidavit evidence was submitted in support of the statements made by the Registrar of Land Titles.

[18] No request was made to seek leave to file an affidavit after the hearing.

[19] In these circumstances, there is no evidence before the Court about any “practice” in New Brunswick concerning the continued registration of a memorial of judgment, when the Judgment Creditor has failed to obtain a court order within the time specified in the relevant statute, that is subsection 43 (4) of the Land Titles Act.

[20] The dispositive question is whether the Minister brought his motion in accordance with the relevant legislation, that is the Land Titles Act. That legislation applies in light of section 56 of the Federal Courts Act. Subsection 56 (1) is relevant and provides as follows:

56 (1) In addition to any writs of execution or other process that are prescribed by the Rules for enforcement of its judgments or orders, the Federal Court of Appeal or the Federal Court may issue process against the person or the property of any party, of the same tenor and effect as those that may be issued out of any of the superior courts of the province in which a judgment or an order is to be executed, and if, by the law of that province, an order of a judge is required for the issue of a process, a judge of that court may make a similar order with respect to like process to issue out of that court.

56 (1) Outre les brefs de saisie-exécution ou autres moyens de contrainte prescrits par les règles pour l'exécution de ses jugements ou ordonnances, la Cour d'appel fédérale ou la Cour fédérale peut délivrer des moyens de contrainte visant la personne ou les biens d'une partie et ayant la même teneur et le même effet que ceux émanant d'une cour supérieure de la province dans laquelle le jugement ou l'ordonnance doivent être exécutés. Si, selon le droit de la province, le moyen de contrainte que doit délivrer la Cour d'appel fédérale ou la Cour fédérale nécessite l'ordonnance d'un juge, un de ses juges peut rendre une telle ordonnance.

[21] The Form 36 Notice was received by the Judgment Creditor on January 6, 2016. There is no dispute that the date of receipt of the Notice is the date from which the 30 day period is to be calculated; see the decision in *St. John's (City) v. F.W. Woolworth Co.* (1981), 130 D.L.R. (3d) 171 (Nfld. C.A.).

[22] According to the *Interpretation Act*, R.S.N.B. 1973, c I-13, subsection 22 (k), time periods are calculated as follows:

where a period of time dating from a specified day, act, or event is prescribed or allowed for any purpose, the time shall be reckoned exclusively of such day or of the day of such act or event.

lorsqu'un délai est fixé ou accordé pour un objet quelconque et qu'il est calculé à compter d'un jour, acte ou événement particulier, le délai ne comprend pas ce jour ou celui de cet acte ou de cet événement.

[23] The Minister filed his Notice of Motion on February 4, 2016. The motion was argued on February 10, 2016. No order was issued within 30 days of receipt of the Form 36 Notice by the Judgment Creditor.

[24] In argument, the Minister submitted that the Court could address the issue of timeliness by exercising its discretion to apply the principle of *nunc pro tunc*.

[25] This doctrine relates to the inherent jurisdiction to issue orders *nunc pro tunc*. In *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 S.C.R. 801 at paragraph 85, the Supreme Court of Canada said the following:



The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil Procedure*: “An order is effective from the date on which it is made, unless it provides otherwise.” [emphasis in original]

[26] Rule 392 (2) of the Rules provides as follows:

(2) Unless it provides otherwise, an order is effective from the time that it is endorsed in writing and signed by the presiding judge or prothonotary or, in the case of an order given orally from the bench in circumstances that render it impracticable to endorse a written copy of the order, at the time it is made.

(2) Sauf disposition contraire de l'ordonnance, celle-ci prend effet au moment où elle est consignée et signée par le juge ou le protonotaire qui préside ou, dans le cas d'une ordonnance rendue oralement en audience publique dans des circonstances telles qu'il est en pratique impossible de la consigner, au moment où elle est rendue.

[27] Courts have an inherent jurisdiction to issue orders *nunc pro tunc*; see *Canadian Imperial Bank of Commerce, supra* paragraph 85. This jurisdiction is related to the maxim *actus curiae neminem gravabit*, meaning that an act of the Court shall prejudice no one; see *Canadian Imperial Bank of Commerce, supra* at paragraph 86.

[28] In determining whether to exercise their inherent jurisdiction to make an order *nunc pro tunc*, courts should consider the following non-exhaustive factors as outlined in *Canadian Imperial Bank of Commerce* at paragraph 90:

whether the opposing party will be prejudiced by the order;

whether the order would have been granted had it been sought at the appropriate time;

whether the irregularity was not intentional;

whether the order will effectively achieve the relief sought or cure the irregularity;

whether the delay has been caused by an act of the court and the order would facilitate justice.

[29] Courts should not grant *nunc pro tunc* orders where to do so would undermine the purpose of the legislation at issue; see *Canadian Imperial Bank of Commerce, supra* at paragraphs 93-94. Where the time has expired, a Court cannot give itself jurisdiction by antedating its judgment and ordering it to be entered *nunc pro tunc*; see *Re Trecothic Marsh*, [1905] 37 S.C.R. 79.

[30] In my opinion, the issuance of an order *nunc pro tunc* in this case would indeed undermine the purpose of the legislation at issue, that is the Land Titles Act of New Brunswick.

[31] The Motions were filed too late to meet the requirements of subsection 43 (4) of the Land Titles Act and for that reason, the Motions were dismissed with costs to the Respondent-Judgment Debtor by Orders issued on August 10, 2016.

[32] These Reasons shall be filed in cause number ITA-11705-15 and in cause number ETA-7495-15.

"E. Heneghan"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** ITA-11705-15  
ETA-7495-15

**STYLE OF CAUSES:** ITA v. DONNA MARIE NOBLE  
ETA v. DONNA MARIE NOBLE

**PLACE OF HEARING:** HALIFAX, NOVA SCOTIA

**DATE OF HEARING:** FEBRUARY 10, 2016

**REASONS FOR ORDER:** HENEGHAN J.

**DATED:** OCTOBER 7, 2016

**APPEARANCES:**

Gregory A. MacIntosh FOR THE APPLICANT

Donna Noble FOR THE RESPONDENT (ON HER OWN BEHALF)

**SOLICITORS OF RECORD:**

William F. Pentney, Q.C. FOR THE APPLICANT  
Deputy Attorney General of  
Canada