Federal Court of Appeal | Cour d'appel fédérale

Date: 20240821

Docket: A-199-22

Citation: 2024 FCA 135

CORAM: **WEBB J.A.**
LASKIN J.A.
GOYETTE J.A.

BETWEEN:

PRESIDENT'S CHOICE BANK

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on March 6, 2024.

Judgment delivered at Ottawa, Ontario, on August 21, 2024.

REASONS FOR JUDGMENT BY: GOYETTE J.A.

CONCURRED IN BY: LASKIN J.A.
DISSENTING REASONS BY: WEBB J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

I. Overview

[1] President's Choice Bank (PC Bank) offers financial services. Together with related corporations, PC Bank also participates in a loyalty program whose main purpose is to drive retail traffic to the Loblaws stores. The program involves PC Bank issuing credit card points, which cardholders obtain whenever they use their cards. Cardholders can only use these points at

Loblaws stores to get discounts on their purchases. PC Bank reimburses Loblaws for the discount that customers receive when they redeem their points at Loblaws stores (Redemption Payment).

[2] The issue in this appeal is whether PC Bank can claim notional input tax credits (NITCs) for the Redemption Payment. The Minister of National Revenue concedes that the Redemption Payment fulfills all but one of the criteria for NITCs: that the payment be made "in the course of a commercial activity". The Tax Court held in favour of the Minister (2022 TCC 84), concluding that the Redemption Payment is made in the course of a financial services activity. PC Bank appeals.

[3] For the following reasons, I would allow the appeal. The Redemption Payment meets the criteria for NITCs under subsection 181(5) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (Act). Unless otherwise indicated, all legislative references are to the Act.

II. Background

A. *Legislative Background*

[4] Part IX of the Act imposes a tax on most supplies of goods and services (GST): subsections 123(1) definition of "taxable supply", 165(1). The GST is a tax on consumption: it is paid by the end consumer. It is also a value-added tax because each business in the supply chain pays GST on the value it adds to the property or service. The mechanism for ensuring the GST

operates in this way is the input tax credit (ITC): *City of Calgary v. Canada*, 2012 SCC 20 at para. 16; *Bank of Montreal v. Canada (Attorney General)*, 2020 FC 1014 at para. 10.

[5] This mechanism is illustrated by the following example, which assumes a 15% combined federal provincial rate of GST and Harmonised Sales Tax (HST). A supplier sells a bottle of shampoo to a retailer for $6.00, and the retailer pays $0.90 GST/HST. The retailer then sells the shampoo for $10.00 to a customer in Canada, adding $4.00 of value and charging $1.50 GST/HST to the customer. To the extent that the retailer supplies the shampoo in the course of its commercial activities, it is entitled to an ITC of $0.90, corresponding to the GST/HST it paid the supplier: subsection 169(1). Thus, the retailer only remits $0.60 GST/HST to the government, corresponding to the tax on the $4.00 value it added to the shampoo.

[6] When the retailer accepts that the customer pays a portion of the $10.00 price for the shampoo using a $1.00 coupon or $1.00 of redeemable points (equivalent to a coupon for purposes of the Act), and expects that a particular person will reimburse it (the retailer) the $1.00, the rules in section 181 apply.

[7] Paragraphs 181(2)(*a*) and (*b*) deem the tax collectible and collected by the retailer to be the tax that would have been collected without the coupon. In the example above, and as explained at paragraph 17 of the Tax Court's reasons, the retailer is deemed to have collected and must remit $1.50:

Price of the shampoo	$10.00
GST/HST at 15%	$1.50
Subtotal	$11.50

Less coupon	($1.00)
Customer pays	$10.50

[8] Paragraphs 181(2)(*a*) and (*b*) create an overpayment of tax: the government collects $1.50, whereas normally, a $9.00 purchase would yield $1.35 of GST/HST.

[9] Paragraph 181(2)(*c*) and subsection 181(5) relieve this overpayment.

[10] First, paragraph 181(2)(*c*) deems the tax payable by the recipient (the purchaser of the goods/services) to be the tax collectible less the tax fraction of the coupon value. Subsection 181(1) defines the tax fraction of the coupon value as the fraction A/B where:

- A is the total rate set out in subsection 165(1) (5%) and the tax rate for that participating province (10% in this example) (5% + 10% = 15%), and

- B is the total of 100% and the amount determined for A (100% + 15% = 115%).

Thus, the tax fraction of the $1.00 coupon in the example above is 15/115 = 0.13 (13%), and the tax deemed payable by the recipient is $1.37, that is, $1.50 minus $0.13.

[11] Second, subsection 181(5) relieves the overpayment of tax "[b]y allowing the [person redeeming the coupon] an input tax credit [and ensuring] that the correct overall net amount of tax is remitted to the government in respect of the supply by the vendor": Canada, Department of Finance, *Draft Legislation to Amend the Excise Tax Act (GST) and Related Statutes, Explanatory Notes* (September 1992) at 106 [1992 Explanatory Notes]. Paragraph 181(5)(*c*) achieves this

result by granting the person redeeming the coupon an NITC equal to the tax fraction of the coupon value. In the example discussed above, the person paying for the $1.00 of points would be entitled to claim an NITC of $0.13.

[12] Crucial to this appeal is the fact that subsection 181(5) only applies where the person redeeming the coupon does so in the course of its commercial activity: Canada, Department of Finance, Technical Notes re s. 181(5), (February 1993). More precisely, subsection 181(5) provides that a particular person may claim an ITC when it "pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon."

B. *Factual Background*

[13] The Tax Court's reasons set out the facts in some detail. The following summary is sufficient for the purposes of this appeal.

[14] PC Bank, Loblaws Inc. (Loblaws), and President's Choice Services Inc. (PCSI) are directly or indirectly wholly-owned subsidiaries of Loblaw Companies Limited.

[15] PC Bank is a financial institution for the purposes of the Act. It is also registered for the purposes of Part IX of the Act.

[16] PC Bank issues President's Choice branded MasterCard credit cards (PC MasterCards) to its customers (cardholders). Cardholders can use their PC MasterCard to make purchases at

stores that accept PC MasterCards and obtain credit card points (PCB Points). Every time a PC MasterCard is used, PC Bank receives interchange fees.

[17] PC Bank is also a party to three agreements, rectified by order of the Ontario Superior Court: (1) a Licence Agreement with PCSI, (2) a Loyalty Services Agreement, also with PCSI, and (3) a Loyalty Expense Agreement with PCSI and Loblaws. These agreements form the Loyalty Program. For the Loblaws corporate group, a key purpose of the Loyalty Program is to drive retail traffic to Loblaws, whose revenue far exceeds PC Bank's MasterCard revenue.

[18] Pursuant to the Loyalty Program,

a) PC Bank has a royalty-free license to issue PCB Points to its PC MasterCard cardholders. PC Bank issues PCB Points to cardholders whenever they use their PC MasterCard. However, cardholders earn more PCB Points for purchases made at a Loblaws store, and they can only use their points at stores owned or controlled by Loblaws;

b) Loblaws pays to PC Bank:

- 0.75¢ for every $1.00 of purchases cardholders make at Loblaws stores using their PC MasterCard where PC Bank issues PCB Points to the cardholder; and

- $0.35 for every $1.00 of PCB Points cardholders use at Loblaws stores; and

c) PC Bank reimburses/pays Loblaws $1.00 for every $1.00 worth of PCB Points cardholders use at Loblaws stores (the Redemption Payment).

[19] As mentioned, the parties agree on all but one of the criteria for NITCs. Their disagreement turns on whether PC Bank makes the Redemption Payment "in the course of a commercial activity".

III. Tax Court Decision

[20] The Tax Court stated that it needed to determine whether the "Redemption Payment [is] linked to the making of exempt or taxable supplies by PC Bank": TCC Reasons at para. 66. The Tax Court concluded that PC Bank makes the Redemption Payment "in the course of [its] MasterCard activity, which involves the provision of exempt supplies of financial services to [c]ardholders": TCC Reasons at paras. 65, 67, 75. The Tax Court reached this conclusion because:

a) PC Bank's core business is the provision of financial services to its customers: TCC Reasons at paras. 70–71;

b) PC Bank's revenue earned from Loblaws pales in comparison to the substantial revenue it earns from interchange fees: TCC Reasons at paras. 67, 73;

c) It is inconceivable and irreconcilable with normal commercial and business practices that PC Bank would accept to make a Redemption Payment of $1.00 to earn $0.35 and lose money: TCC Reasons at paras. 67, 73, 77; and

d) PC Bank makes the Redemption Payment for the PCB Points as consideration for having issued the PCB Points: TCC Reasons at para. 82.

IV. Issue and Standard of Review

[21] In their memoranda of fact and law, both parties acknowledge that the issue relates to the phrase "in the course of a commercial activity" in subsection 181(5). The appellant says the issue is whether the Tax Court made an error of law in interpreting that phrase. The respondent says the issue is whether the Tax Court made a palpable and overriding error in concluding that PC Bank does not make the Redemption Payment "in the course of a commercial activity."

[22] Ultimately, the appellate standard of review applies: *Housen v. Nikolaisen,* 2002 SCC 33 at paras. 8, 37. Questions of law are subject to correctness review, and questions of fact are only reviewable for palpable and overriding error. Findings of mixed fact and law are reviewable for palpable and overriding error unless they contain an extricable error of law. Extricable errors of law are reviewable on a correctness standard.

[23] The issue of whether PC Bank makes the Redemption Payment in the course of its commercial activity is a question of mixed fact and law. Thus, correctness review applies insofar as the Tax Court committed any extricable error of law in deciding this issue.

V. Analysis

[24] In my opinion, the Tax Court committed two extricable errors of law. First, it considered that the phrase "in the course of a commercial activity" entails an either/or test. Second, it considered profitability in determining the existence of a commercial activity. If one extricates these two legal errors, one finds that the Tax Court's factual findings lead to the conclusion that

PC Bank makes the Redemption Payment in the course of its commercial activity of driving customers to Loblaws. The following analysis demonstrates the Tax Court's legal errors, then illustrates how extricating those errors impact this case's outcome.

A. *There Is No Either/Or Test*

[25] The Tax Court based its analysis on the premise that it needed to determine whether PC Bank makes the Redemption Payment in the course of a financial services activity *or* in the course of a commercial activity. The Tax Court adopted this premise in saying that it needed to examine the evidence to determine whether the "Redemption Payment [is] linked to the making of exempt or taxable supplies": TCC Reasons at para. 66 [emphasis added]. Yet analyzing the text, context, and purpose of subsection 181(5) reveals that it is not an either/or test: it allows a person to pay an amount in the course of a commercial activity *and* in the course of an activity that is not commercial.

(1) Text

[26] Subsection 181(5) provides that a particular person may claim an ITC when it "pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon." The text of subsection 181(5) does not require that the amount be paid "exclusively" in the course of a commercial activity, nor does it require that the amount be paid "primarily" in the course of such an activity. Unlike the words exclusively and primarily, the phrase "in the course of" has a broad meaning; it means "incidental to" or "connected to" directly or indirectly: *Attorney General of Canada v. Metropolitan Toronto Hockey League*,

[1995] F.C.J. No. 944 at para. 14, n 1; *The Queen v. Blanchard*, 1995 CanLII 18940 (FCA); *M.N.R. v. Yonge Eglinton Building Ltd.*, 1974 CanLII 2476 (FCA), [1974] 1 F.C. 637 at 644–645.

[27] Reading subsection 181(5) as stating that a person can only pay an amount in the course of one activity would add words to the Act. Similarly, it would add words to the Act to read subsection 181(5) as requiring that an amount have a primary connection with a commercial activity.

(2) Context

[28] The context of subsection 181(5) supports the above textual interpretation.

(a) *A payment can be made in the course of more than one activity*

[29] Subsections 169(1), 141(2) and (4), 202(2), as well as paragraphs 199(2)(*a*), 217.1(6)(*c*), and 217.1(7)(*c*) show that the Act contemplates that a payment can be made in the course of doing one thing *and* in the course of doing another. More specifically, the Act contemplates that a payment can be made in the course of a commercial activity *and* in the course of an activity that is not commercial.

(i) Subsection 169(1)

[30] Subsection 169(1) provides the general rule for ITCs. It contains a formula, which grants an ITC for tax paid in respect of a property or service to the extent that the registrant acquires the

property or service for use in the course of its commercial activities. This formula results in the registrant being entitled to an ITC according to the percentage of use of the property or service in the course of commercial activities. The inclusion of the formula presupposes that a property or service can be acquired for use in the course of more than one activity. This was the case in *Midland Hutterian Brethren v. Canada*, 2000 CanLII 16725 (FCA) [*Midland*] where a colony purchased cloth for its members. The members could use the cloth to make two types of clothing: working clothes for the colony's commercial activity (farming) and clothes for their personal activities. Our Court rejected the Minister's argument that any personal use of clothing disqualified the work cloth from any ITC, and concluded that the colony was entitled to an ITC pursuant to the formula in subsection 169(1).

[31] *Midland* does not address whether the colony paid for the cloth in the course its commercial activity or in the course of its non-commercial activity of providing cloth to its members for personal use. Nevertheless, from the moment that the cloth was acquired for use in the course of more than one activity, it stands to reason that the colony paid for the cloth in the course of two activities.

(ii) Subsections 141(2) and (4)

[32] Subsection 141(2) provides that, where "substantially all" the consumption or use for which a person acquires a property or service is in the course of the person's commercial activities, all of the use or consumption is deemed to be in the course of those commercial activities. Similarly, subsection 141(4) provides that, where substantially all the consumption or use for which a person acquires a property or service is in the course of activities that are not

commercial, all of the use or consumption is deemed to be in the course of those non-commercial activities. This wording demonstrates that Parliament considers that an acquisition can be made substantially—but not totally—in the course of one activity and, to a smaller extent, in the course of another activity. Again, this entails that the payment for the property or service is made in the course of more than one activity.

(iii) Subsection 202(2)

[33] Subsection 202(2) provides that a registrant is not entitled to an ITC in respect of a vehicle or aircraft unless the vehicle or aircraft "was acquired […] for use exclusively in commercial activities of the registrant" [emphasis added]. The fact that Parliament requires that the vehicle or aircraft be acquired for exclusive use in commercial activities presupposes that a vehicle or aircraft can be acquired—and hence the payment made for that vehicle or aircraft—in the course of both commercial and non-commercial activities.

(iv) Paragraph 199(2)(*a*)

[34] Similarly, paragraph 199(2)(*a*) provides that a registrant is not entitled to an ITC in respect of capital property "unless the property was acquired (…) for use primarily in commercial activities of the registrant" [emphasis added]. Again, the requirement that the capital property be acquired for use primarily in commercial activities presupposes that the property can be acquired, and its payment made, in the course of more than one activity.

(v) Paragraphs 217.1(6)(*c*) and 217.1(7)(*c*)

[35] Paragraphs 217.1(6)(*c*) and 217.1(7)(*c*) provide rules for computing ITCs and rebates that financial institutions can claim in the context of the Division IV Tax on Imported Taxable Supplies. These paragraphs call for a determination of the extent to which an outlay or expense was made or incurred "in the course of commercial activities" of the financial institutions. If one talks about the "extent to which" an expense is incurred in the course of a commercial activity, then there must be an extent to which the expense was incurred in the course of a non-commercial activity. Therefore, Parliament presupposes that the payment of a single expense can be simultaneously in the course of a commercial activity and in the course of a non-commercial activity. This reinforces the interpretation that Parliament, in drafting subsection 181(5), presupposed that the payment redeeming a coupon could be simultaneously in the course of a commercial activity *and* in the course of a non-commercial activity.

[36] In drafting subsection 181(5), Parliament did not include explicit language that the credit be allocated only "to the extent" that the person made the payment in the course of a commercial activity. The absence of this allocative language indicates that Parliament intended to grant an NITC on the entire amount of a coupon redemption payment from the moment the payment was made in the course of a commercial activity.

(vi) The specific context of subsection 181(5)

[37] Many of the provisions discussed above refer to tax paid in the context of an acquisition of property or service. This makes sense because an acquisition of property or service, or an

equivalent transaction (*e.g.* importation), is ordinarily the triggering event for GST to become payable. In the case of a coupon, the particular person who pays for the coupon or makes the redemption payment does not acquire a property or service—the customer does. In the example discussed above, the customer acquires the shampoo, and the particular person pays for the coupon. Accordingly, subsection 181(5) could not use the same language as that used in ss. 169(1), 141(2) and (4), 202(2), 199(2)(*a*), 217.1(6)(*c*), and 217.1(7)(*c*). That said, from the moment that the Act contemplates that a payment for property or service can be made in the course of more than one activity, there is no reason why a redemption payment cannot be made in the course of more than one activity.

(b) *There is no requirement for a special connection between the payment for the redemption of the coupon and the commercial activity*

[38] Subsections 169(1), 202(2) as well paragraphs 199(2)(*a*), 217.1(6)(*c*), and 217.1(7)(*c*) also show that when Parliament wants a property or service acquired to have a special connection with a commercial activity, its states so expressly.

[39] For example, ss. 169(1), 217.1(6)(*c*), and 217.1(7)(*c*) provide that an ITC will only be allowed to "the extent" that the property or service is acquired or the outlay or expense is made or incurred for use in the course of commercial activities. Subsection 202(2) requires that a vehicle or aircraft be acquired for "use exclusively in the course of commercial activities of the registrant". As for paragraph 199(2)(*a*), it requires that a capital property be acquired for "use primarily in the commercial activities of the registrant". The absence of a similar constraint in subsection 181(5) indicates that Parliament did not intend to require a higher degree of

connection between the amount paid for the redemption of the coupon and the registrant's commercial activity.

(c) *The Act's structure indicates that one cannot extrapolate subsection 169(1)'s apportionment methodology to subsection 181(5)*

[40] It may be tempting to interpret subsection 181(5) in light of the general rule for ITCs in subsection 169(1), which provides a formula that only awards ITCs to the extent that a good or service was used in the course of a commercial activity. More specifically, one may be tempted to infer from subsection 169(1)'s apportionment methodology that Parliament did not contemplate that the whole redemption payment in subsection 181(5) could be made in the course of a commercial activity *and* in the course of a financial services activity. Yet the structure of the Act suggests that one cannot extrapolate subsection 169(1)'s apportionment methodology to subsection 181(5).

[41] Subsection 169(1) is in Subdivision B of Division II of Part IX. Subdivision B is entitled "Income Tax Credits" and contains general rules about ITCs. Subdivision C, which contains section 181, is entitled "Special Cases". Subdivision C comprises a plethora of rules to address "special" cases where applying the general rules in Subdivision B would lead to incongruous results undesirable to Parliament: *CWAY Logistics Ltd. v. The Queen*, 2017 TCC 225 at para. 24. This structural distinction suggests that Parliament intended to give separate or "special" treatment to input tax credits for the redemption of coupons. Consequently, one should be wary of extrapolating subsection 169(1)'s apportionment methodology to subsection 181(5) and

concluding that a redemption payment can only be made in the course of either a commercial activity or in the course of a non-commercial activity.

(3) Purpose

[42] The purpose of subsection 181(5) is to ensure that the "correct overall net amount of [tax] is remitted to the government in respect of the supply to the vendor": 1992 Explanatory Notes at 106 [emphasis added].

[43] In the example of the bottle of shampoo discussed above, the retailer is deemed to have collected, and must report and remit GST/HST of $1.50—that is, 15% of $10.00 (price of the shampoo before applying the coupon). Yet the customer did not pay the full price of the shampoo; it only paid $9.00. If the person redeeming the coupon paid the other portion of the price of the shampoo—the remaining $1.00—in the course of a commercial activity, then that person is entitled to claim an NITC equal to the tax fraction of the portion it paid. Without the NITC, the government would over-collect tax.

[44] There is an overpayment, and the purpose of subsection 181(5) is to relieve that overpayment. This purpose concords with Parliament's choice of a broad phrase like "in the course of", which merely requires a payment to be "connected to" or "incidental to" a commercial activity. Insofar as imposing an either/or test would restrict NITCs for payments connected to commercial activities, such an imposition would contravene Parliament's purpose.

[45] Additionally, the fact that the person redeeming the coupon is a financial institution is of no consequence if its redemption payment is in the course of a commercial activity. When Parliament intends to exclude financial institution from claiming an ITC, it does so expressly: see ss. 141, 199(1), 200(1). Subsection 181(5) contains no such exclusion.

(4) Conclusion: First extricable error of law

[46] The above textual, contextual, and purposive analysis reveals that subsection 181(5) is not an either/or test: a payment can be made in the course of a commercial activity *and* in the course of a non-commercial activity. Subsection 181(5) does not require a court to determine in the course of which of two activities an amount for the redemption of a coupon is paid. Moreover, subsection 181(5) does not require that the amount paid have a "primary" or "exclusive" connection with a commercial activity. Accordingly, the Tax Court erred in law by basing its analysis on the premise that it needed to determine whether the Redemption Payment is made in the course of a financial services activity *or* in the course of a commercial activity.

[47] In fairness to the Tax Court, the case was seemingly presented to it as an either/or test: "Appellant's written submissions to the Tax Court in respect of the NITC Issue", Supplemental Appeal Book, Vol. 8, Tab 16, at 2529 at para. 90; see also "Transcript of Opening Statements, dated January 31, 2022", Supplemental Appeal Book, Vol. 8, Tab 14 at 2480–81. However, given that 1) this new argument relates to an issue of statutory interpretation, 2) the appellant's new argument does not prejudice the respondent who had the opportunity to adduce evidence that could defeat this argument, and 3) the respondent does not take issue with this new argument being raised, I am of the view that the interests of justice require that this new argument be

considered: *Koch v. Borgatti Estate*, 2022 FCA 201 at para. 67; *Quan v. Cusson*, 2009 SCC 62 at paras. 36–37; *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53 at para. 45, leave to appeal to SCC refused, 38077 (8 November 2018). This is why I proceeded with a statutory analysis of subsection 181(5).

[48] I will now examine the Tax Court's second error of law.

B. *The Existence of a Commercial Activity Does Not Depend on Profitability*

[49] The Tax Court said that PC Bank did not establish the nature of the alleged commercial activity for which it claims NITCs: TCC Reasons at paras. 72–77. PC Bank alleged that the commercial activity was driving customer traffic to Loblaws in connection with its participation in the Loyalty Program: TCC Reasons at para. 72; "Appellant's written submissions to the Tax Court in respect of the NITC Issue", Supplemental Appeal Book, Vol. 8, Tab 16, 2505, 2508–10, 2529 at paras. 2, 15–21, 32, 89. The Tax Court refused to find that this constituted a commercial activity: it found such a proposition irreconcilable with "normal commercial and business practices" because it was "unimaginable" that "the [a]ppellant would accept to pay $1.00 to earn $0.35": TCC Reasons at para. 77. By contrast, PC Bank's credit card business is profitable: TCC Reasons at paras. 73–76. At first glance, the Tax Court's reasoning appears satisfactory. But on closer inspection, it contains an extricable error of law. In sales tax, unlike in income tax, profitability is extraneous to determining whether a corporation has a commercial activity. Relying on factors extraneous to a legal test is an error of law: *Smith v. Canada*, 2019 FCA 173 at para. 30.

[50] The definitions of "business" and "commercial activity" in subsection 123(1) make clear that a corporation's activity need not be profitable to qualify as a "commercial activity":

> ***business includes*** […] [an] undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit […]
>
> ***commercial activity*** of a person means […] a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals) except to the extent to which the adventure or concern involves the making of exempt supplies by the person […]

[51] In the definition of commercial activity in subsection 123(1), corporations are conspicuously absent from the list of entities that must have a reasonable expectation of profit. The Canada Revenue Agency and the Tax Court have acknowledged that, in sales tax, for corporations, a commercial activity does not require a reasonable expectation of profit: *Traitement de déchets JRG Inc. v. The Queen*, 2009 TCC 67 at para. 82; Canada Revenue Agency, Policy Statement P-176R, "Application of Profit Test to Carrying on a Business" (30 September 1998).

[52] Thus, the Tax Court erred in law by finding that PC Bank's participation in the Loyalty Program could not be a commercial activity simply because that participation did not provide PC Bank any reasonable expectation of profit.

C. *PC Bank Makes the Redemption Payment in the Course of a Commercial Activity*

[53] If one extricates the two legal errors identified above, one finds that the Tax Court's factual findings lead to the conclusion that PC Bank makes the Redemption Payment in the course of a commercial activity of driving customers to Loblaws.

[54] The Act's definition of "business", reproduced in paragraph [50], refers to an "undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit".

[55] No one disputes that PC Bank's activity of providing financial services is a business.

[56] The Tax Court's factual findings concerning the agreements that form the Loyalty Program reveal that PC Bank has another business. By virtue of being a party to the agreements that form the Loyalty Program, PC Bank participates in a program that aims to drive retail traffic to Loblaws: TCC Reasons at paras. 7 (citing paragraphs 7–18 of the partial agreed statement of facts), 78–80, 84. The Licence Agreement grants PC Bank a licence to issue PCB Points to its cardholders: TCC Reasons at para. 43. The Licence Agreement also says that PC Bank "acknowledges that by virtue of being a Licensee, it will be liable for the [Redemption Payment]": TCC Reasons at para. 7, citing paragraph 16b of the partial agreed statement of facts. The Tax Court found that PC Bank earns revenue from participating in the Loyalty Program: TCC Reasons at para. 67. It earns 0.75¢ for PCB Points it issues when cardholders make $1.00 of purchases at Loblaws, and $0.35 for every $1.00 of PCB Points cardholders use at Loblaws stores: TCC Reasons at para. 7, citing paragraphs 18a–b of the partial agreed statement of facts. In this context, I can only conclude that by virtue of being party to the agreements that form the Loyalty Program, PC Bank has a business of participating in driving customers to Loblaws (the driving customers business).

[57] This conclusion is further supported by the Tax Court's comparison of the revenue PC Bank earns from its financial activities with the revenue it earns from the Loyalty Program. This comparison indicates the Tax Court's recognition PC Bank has two businesses.

[58] There is no denying that PC Bank makes the Redemption Payment in the course of its financial services activity.

[59] That said, and as discussed above, subsection 181(5) does not require that redemption payments be made "exclusively" or "primarily" in the course of a commercial activity. PC Bank *also* makes the Redemption Payment in the course of its commercial activity—namely, its business of driving customers to Loblaws. Indeed, the Loyalty Expense Agreement provides that PC Bank must make the Redemption Payment to Loblaws for every $1.00 worth of PCB Points cardholders use. It follows that, when PC Bank makes the Redemption Payment, it does so pursuant to its driving customers business, and consequently, in the course of a commercial activity as required by subsection 181(5). To that effect, our Court has previously held that promotional or marketing services that drive more customers to a business constitute a taxable supply—*i.e.*, services that drive increased customers to a business are in the course of a commercial activity: *Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 96 at paras. 15, 30, 67.

[60] Because PC Bank makes the Redemption Payment in the course of its commercial activity, it is entitled to claim NITCs. This outcome is concordant with Parliament's purpose of

correcting over-collection of tax where redemption payments are made in the course of a commercial activity.

VI. Conclusion

[61] In light of the above, I would allow the appeal with costs in this Court and the Court below, and set aside the judgment of the Tax Court. Rendering the judgment that the Tax Court should have rendered, I would allow PC Bank's appeal from the notices of reassessment dated March 26, 2014 (for the annual reporting period commencing December 31, 2008 and ending December 30, 2009) and June 23, 2015 (for the annual reporting periods ending December 30, 2010, December 30, 2011 and December 30, 2012) and refer the reassessments back to the Minister for reassessment on the basis that PC Bank is entitled to claim the notional input tax credits in respect of the Redemption Payment that it makes.

"Nathalie Goyette"
J.A.

"I agree.
J.B. Laskin J.A."

WEBB J.A. (Dissenting Reasons)

[62] The issue in this appeal is whether President's Choice Bank (PC Bank) was entitled to the notional input tax credit (NITC) as provided in subsection 181(5) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA) when it reimbursed Loblaws Inc. (Loblaws) as a result of PC Bank's credit

card customers redeeming the points awarded to them by PC Bank, as payment towards a taxable supply (that is not a zero-rated supply) made by Loblaws.

[63] In order to qualify for the NITC, PC Bank must have paid the reimbursement payment referred to above in the course of a commercial activity of PC Bank. The Tax Court found that PC Bank did not make the payment as contemplated by subsection 181(5) of the ETA in the course of a commercial activity of PC Bank and, therefore, PC Bank was not entitled to this NITC (2022 TCC 84, *per* Hogan J.).

[64] For the reasons that follow, I would dismiss this appeal.

VII. Background

[65] The Tax Court decision includes several excerpts from the partial agreed statement of facts submitted by the parties at the Tax Court hearing. Although there were a number of issues raised before the Tax Court, the only issue raised in this appeal relates to the NITC as provided in subsection 181(5) of the ETA. Therefore, only the facts relevant to this issue will be recited.

[66] PC Bank is indirectly a wholly-owned subsidiary of Loblaws. PC Bank is listed in Schedule I to the *Bank Act*, S.C. 1991, c. 46 and is a listed financial institution for the purposes of the ETA. PC Bank is also registered for the purposes of Part IX of the ETA.

[67] PC Bank issues President's Choice branded MasterCard credit cards to its customers (Cardholders). The Cardholders use these credit cards to make purchases and to obtain cash advances.

[68] President's Choice Services Inc. (PCSI), an indirect subsidiary of Loblaws, acquired the points program from PC Bank, effective March 1, 2008. PCSI granted PC Bank, under the rectified Licence Agreement, a non-exclusive, royalty-free licence to issue points to PC Bank's customers (PCB Points). PC Bank acknowledged that it would be liable for the redemption of PCB Points. Under the points program, PC Bank's Cardholders are awarded PCB Points whenever they use their PC Bank MasterCard — 20 PCB points for every $1 spent at a Loblaw-banner store where President's Choice products are sold and 10 PCB points for every $1 spent at other places (paragraph 15 of the partial agreed statement of facts as set out in paragraph 7 of the reasons of the Tax Court Judge).

[69] The PCB Points can be redeemed as payments towards purchases made at Loblaws stores (including certain stores owned by a subsidiary of Loblaws and certain franchises operating under a trademark owned or controlled by Loblaws).

[70] The Loyalty Expense Agreement entered into by PC Bank, PCSI and Loblaws, as rectified, provided for the following payments, as set out in paragraph 18 of the partial agreed statement of facts:

a. for every $1.00 of purchases made by Cardholders using their PC MasterCard at Loblaw Stores where PC Bank issues PCB Points to the Cardholder, Loblaws will pay $0.0075 to PC Bank;

b. for every $1.00 of notional value of PCB Points accumulated by a Cardholder using a PC MasterCard and redeemed by such Cardholder, Loblaws will pay $0.35 to PC Bank; and

c. for every $1.00 of notional value of PCB Points accumulated by a Cardholder using a PC MasterCard and redeemed by such Cardholder, PC Bank will reimburse/pay [Loblaws] $1.00 (the "Redemption Payment").

[71] The NITC in issue in this appeal arises as a result of the redemption payments (Redemption Payments) as set out in paragraph c. above.

VIII. Subsections 181(1), (2) and (5) of the ETA

[72] Subsection 181(1) of the ETA sets out definitions for certain terms used in section 181. Subsection 181(2) of the ETA sets out the rules for determining the tax when a coupon is used. The NITC that is available to a person who reimburses a retailer for accepting a coupon is payable under subsection 181(5) of the ETA. The full text of these provisions is set out in the Appendix to these reasons.

[73] At paragraph 17, the Tax Court Judge recited the following example, provided by the Crown and also adopted by PC Bank, to illustrate the operation of subsection 181(2) of the ETA:

> 38. Consider, for example, a customer who uses a reimbursable coupon for $1.00 off of a $10 bottle of shampoo, before HST of 15%, at a retailer:
>
> | | |
> |---|---|
> | Price of the shampoo | $10.00 |
> | HST at 15% | $1.50 |
> | Subtotal | $11.50 |
> | Less coupon | (1.00) |

Customer pays $10.50

39. In this example, the registrant (retailer) is deemed to have collected HST of $1.50 pursuant to subsection 181(2). It must report and remit $1.50 of HST.

40. Pursuant to paragraph 181(2)(c), however, the recipient (customer) cannot claim an ITC of $1.50. The recipient's tax payable is deemed to be the tax collectible by the registrant (in this case, $1.50) less the tax fraction of the coupon value (in this case, $1.00/ 1.15 = $0.13). Therefore, the recipient may claim an [input tax credit], if the purchase satisfies subsection 169(1) of the Act, in the amount of $1.37.

[74] Although the example produces the correct result for the monetary amount for the tax fraction of the coupon value ($0.13), this result is not obtained by dividing $1.00 by 1.15 (which would be $0.87). Rather, the tax fraction, as determined in accordance with the definition of tax fraction as set out in subsection 181(1) of the ETA, is determined by dividing

(a) the total of the rate set out in subsection 165(1) (currently 5%) and the tax rate for the participating province (10% in this example)

by

(b) the total of 100% and the amount determined under paragraph (a):

(5% + 10%) / (115%) = 15/115 = 0.13 (or 13%)

[75] The result of the calculation of the tax fraction, as set out in the definition of tax fraction, is a fraction, not a monetary amount. Since the coupon in the above example is a $1 coupon, the monetary amount of the tax fraction of the coupon value would be 13% of $1 or $0.13.

[76] Subsection 181(5) of the ETA allows the person who reimburses the retailer for the amount of the coupon to recover the monetary amount of the tax fraction of the coupon value ($0.13 in the example provided above) as a NITC, provided that the conditions imposed by subsection 181(5) of the ETA are satisfied.

[77] The only dispute in this appeal relates to the entitlement of PC Bank to the NITCs. The calculation of the total amount of NITCs is not in dispute.

IX. The Tax Court Decision

[78] The only condition imposed by subsection 181(5) of the ETA that was in issue in the appeal to the Tax Court was whether PC Bank made the Redemption Payments to Loblaws in the course of a commercial activity of PC Bank (paragraph 9 of the reasons of the Tax Court Judge). The Tax Court Judge also noted, in paragraph 9:

> If PC Bank made the Redemption Payment in the course of an exempt "financial service", then the Redemption Payment could not have been made "in the course of a commercial activity" because the "commercial activity" definition specifically excludes exempt supplies. PC Bank is only entitled to claim an NITC pursuant to subsection 181(5) if the Redemption Payment was made in the course of a "commercial activity" of PC Bank.

[79] The Tax Court Judge noted, in paragraph 10 of his reasons, that PC Bank's position at the Tax Court hearing was "that it made the Redemption Payments in the course of its operation of the Loyalty Program, which it states is a commercial activity". The Tax Court also noted that

"[f]or PC Bank, there is no basis to conclude that the Redemption Payment was made in the course of a different activity (i.e. the PC Bank MasterCard business)".

[80] The Tax Court Judge reviewed the definitions of "commercial activity", "exempt supply" and "financial service". There is no dispute that PC Bank's MasterCard credit card business is a financial service, and, therefore, that PC Bank is making exempt supplies in carrying on this business.

[81] The Tax Court Judge found that the previous court decisions addressing subsection 181(5) of the ETA did not provide significant guidance in relation to the relevant issue in this appeal. Neither party is disputing this finding in the appeal to this Court.

[82] In considering the meaning of the phrase "in the course of", the Tax Court Judge found that this expression has a wide meaning. In paragraph 29 of his reasons, the Tax Court Judge quoted the following excerpts from *Midland Hutterian Brethren v. Canada*, [2000] G.S.T.C. 109, 195 D.L.R. (4th) 450 (FCA) (*Midland Hutterian Brethren*):

> This Court has already interpreted these words to mean that, when a registrant incurs a GST expense in connection with its commercial activities, it is entitled to an ITC. As Stone J.A. explained in *Metropolitan Toronto Hockey League* [[1995] F.C.J. No. 944, [1995] G.S.T.C 31 (FCA)] decision:
>
> > The scheme of the Act allows a business to claim refund or credit of any tax paid on the purchase or services <u>connected</u> to its sale of taxable supplies. In this way the tax is ultimately paid only by the final non commercial purchaser of a taxable supply.
>
> When the phrase "connected to" was used by Justice Stone to explain the words in the statute, the meaning it conveyed was that the supplies must contribute to the production of articles or the provision of services that are

> taxable. It would not be enough to qualify as being connected to the business activity if something, like a cigarette, were merely consumed while engaged in the business activity, for that would not contribute to the commercial activity that will ultimately produce taxable supplies.
>
> There is no language in subsection 169(1) that requires the use in question to be exclusively commercial or that distinguishes between property acquired and used directly and property acquired and altered before its use in commercial activities. Once an item is found to be acquired and used in connection with the commercial activities of a GST registrant and that item directly or indirectly contributes to the production of articles or the provision of services that are taxable, then an ITC is available using the formula in that subsection. Any possible abuse is to be combatted by requiring evidence of intended use and an adjustment in the percentage of ITC allowed by the Minister.
>
> [Emphasis added by the FCA.]

[83] The Tax Court Judge also noted, at paragraph 32, that when a person carries on a business of making taxable supplies and also carries on a business of making exempt supplies, the business that consists of making exempt supplies is notionally severed from the other business, as stated by this Court in *Canada v. 398722 Alberta Ltd.*, [2000] G.S.T.C. 32, [2000] F.C.J. No. 644:

> [22] Any business may consist of a number of components, each of which is integral to the business as a whole. The definition of "commercial activity" recognizes that possibility but requires, for GST purposes, that any part of the business that consists of making exempt supplies be notionally severed. The statutory definition dictates that the business of the respondent is not a "commercial activity" in so far as it consists of the rental of the units of the four-plex. On that basis I agree with the Crown that the respondent is not entitled to an input tax credit to offset the GST payable on the self-supply of the four-plex.

[84] The Tax Court Judge considered the historical overview of the points program (which was also referred to as the loyalty program) and he reviewed the relevant agreements: the

Licence Agreement, the rectified Loyalty Services Agreement, and the rectified Loyalty Expense Agreement. He also considered the testimony of the witnesses.

[85] His key findings include the following:

> [65] … I endorse the Respondent's theory, which is that PC Bank became liable to make the Redemption Payments to Loblaws in the course of its MasterCard business. PC Bank issued the PCB Points to Cardholders to reward them for making purchases using their PC MasterCard.
>
> [66] The question in dispute must be answered from the perspective of PC Bank, a distinct legal entity subject to the GST consequence with respect to its inputs, redemption expenses and supplies. This is clear from the part of subsection 181(5) that provides that "a particular person [PC Bank] at any time pays, in the course of a commercial activity of the particular person [PC Bank]". The evidence must be examined to determine the reason or cause for the Redemption Payment. Stated differently, is the Redemption Payment linked to the making of exempt or taxable supplies by PC Bank?
>
> [67] In my opinion, the Redemption Payments were made in the course of PC Bank's MasterCard activity, which involves the provision of exempt supplies of financial services to Cardholders. PC Bank issued the PCB Points to generate revenue from its PC MasterCard portfolio. PC Bank earned significant revenue from interchange fees that pales in comparison [*sic*] to the minimal revenue it received from Loblaws. PC Bank is a highly regarded legal entity licensed to carry on certain banking operations for profit. It is inconceivable to me that PC Bank made the Redemption Payments to lose money.
>
> …
>
> [73] PC Bank's business consists of earning money from a profitable credit card business. Even from the consolidated reporting perspective (i.e. LCL [Loblaw Companies Limited]), the reporting on the financial services segment (i.e. PC Bank) looks at how profitable the PC Bank credit card business was. It earns substantially all of its net income from that activity. It is my view that PC Bank obtained the right to issue PCB Points to Cardholders for the purpose of enticing them to acquire the PC MasterCard in the first place and thereafter for the purpose of encouraging Cardholders to use their PC MasterCards.
>
> …

> [82] As noted earlier, the focus of subsection 181(5) is squarely on PC Bank. What caused PC Bank to make the Redemption Payment? After considering the testimonial evidence, my opinion remains the same. PC Bank issued the PCB Points to attract clients to subscribe for and, more importantly, thereafter use their PC MasterCards. This was done to grow PC Bank's MasterCard operations. PC Bank made the Redemption Payment for the redeemed PCB Points as consideration for having issued the PCB Points in the first place.

[86] The Tax Court Judge found, at paragraph 85, that PC Bank made the Redemption Payments in carrying on its financial services business and, therefore, it was not entitled to the NITC as provided in subsection 181(5) of the ETA.

X. Issue and Standard of Review

[87] In its memorandum, PC Bank stated:

> 29. The issue on this appeal is whether the TCC Judge erred in interpreting the phrase "in the course of a commercial activity" in subsection 181(5) of the ETA.
>
> 30. The TCC Judge failed to conduct a textual, contextual, and purposive interpretation and erred in his interpretation of the provision in three respects:
>
> (a) He misinterpreted the text of the provision, which does not require that PC Bank make the Redemption Payment "exclusively" or "primarily" in the course of a commercial activity;
>
> (b) He relied on the fact that PC Bank's primary business is the credit card business, even though the taxpayer's primary business is not a relevant consideration under subsection 181(5); and
>
> (c) He relied on the fact that PC Bank earns profits from the credit card business but not its commercial activities with Loblaws, which is also not a relevant consideration under subsection 181(5).

[88] At the hearing of this appeal, PC Bank reframed the issues as:

(a) "in the course of" is not an "either/or" test;

(b) "commercial activity" does not require an expectation of profit for corporations; and

(c) the "core business" of PC Bank does not determine its entitlement to the NITCs under subsection 181(5) of the ETA.

[89] Although PC Bank also submitted that it was entitled to the NITC based on its view of the proper interpretation of subsection 181(5) of the ETA, the conclusion that PC Bank is entitled to the NITCs will only need to be addressed if PC Bank is successful in its arguments concerning the correct interpretation of subsection 181(5) of the ETA.

[90] PC Bank is not challenging any of the factual findings made by the Tax Court Judge. The only issue relates to the interpretation of subsection 181(5) of the ETA, which is a question of law. The standard of review is therefore correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

XI. Analysis

[91] Statutory provisions are to be interpretated based on a textual, contextual and purposive analysis (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para. 10). The interpretation issue is focused on the following phrase in subsection 181(5) of the ETA:

> … a particular person at any time pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon …

[92] This text, which focuses on the payment of an amount in the course of a commercial activity, is unique to subsection 181(5) of the ETA. PC Bank stated that it could not find any other provision of the ETA that used this language.

[93] PC Bank does not dispute the finding of the Tax Court Judge that the Redemption Payments were made by PC Bank in carrying on its credit card business and therefore were made in carrying on a financial services business. Rather, PC Bank argues that the Tax Court erred in law by failing to consider that the same Redemption Payments were also made in the course of a commercial activity.

[94] PC Bank framed this issue as whether "in the course of" is an "either/or" test. PC Bank submits that, in addition to carrying on a financial services business, it is also carrying on a commercial activity: "its service of driving retail traffic to Loblaws" (paragraph 62 of PC Bank's memorandum). The Tax Court Judge, in paragraph 10 of his reasons, stated that PC Bank had identified its commercial activity as follows: "PC Bank's position is that it made the Redemption Payments in the course of its operation of the Loyalty Program, which it states is a commercial activity". The Tax Court Judge also acknowledged at paragraph 78 that Ms. Davis, the Chief Financial Officer of Loblaw Companies Limited at the relevant time for this appeal, "emphasized that the main purpose of the Loyalty Program was to 'drive more retail traffic' to Loblaws".

[95] As noted in paragraph 79 above, the Tax Court Judge stated at paragraph 10 of his reasons that "[f]or PC Bank, there is no basis to conclude that the Redemption Payment was made in the course of a different activity (i.e. the PC Bank MasterCard business)". Since PC Bank was arguing that the Redemption Payments were only made in the course of a commercial activity, it would appear that PC Bank's argument that the Redemption Payments could be found to have been made both in carrying on a financial services business and in the course of a commercial activity was not made at the Tax Court hearing.

[96] PC Bank's argument concerning its commercial activity — "its service of driving retail traffic to Loblaws" — is based on the Minister of National Revenue assessing tax under the ETA on the payments as described in paragraphs 18 a. and b. of the partial agreed statement of facts as set out in paragraph 70 above:

> a. for every $1.00 of purchases made by Cardholders using their PC MasterCard at Loblaw Stores where PC Bank issues PCB Points to the Cardholder, Loblaws will pay $0.0075 to PC Bank;
>
> b. for every $1.00 of notional value of PCB Points accumulated by a Cardholder using a PC MasterCard and redeemed by such Cardholder, Loblaws will pay $0.35 to PC Bank; …

[97] The Crown disputes that these payments were made in the course of a commercial activity. However, tax under the ETA is only imposed on taxable supplies (subsection 165(1) of the ETA) and taxable supplies are supplies made in the course of a commercial activity (definition of taxable supply in subsection 123(1) of the ETA). Whether tax should have been imposed on these payments is not in issue in this appeal. For the purposes of this appeal, since tax was imposed it will be assumed that the tax was properly imposed and, therefore, that PC

Bank was carrying on a commercial activity, in addition to its financial services business. Whether the Redemption Payments were made in the course of this commercial activity is a separate question of fact or mixed fact and law.

[98] The question is whether PC Bank paid the Redemption Payments to Loblaws in the course of its commercial activity, not whether PC Bank acquired any particular property or service for consumption, use or supply in the course of a commercial activity (as would be the case for the determination under subsection 169(1) of the ETA of an input tax credit when a person acquires a particular property or service). PC Bank confirmed during the hearing of this appeal that no property or service was acquired by PC Bank for the Redemption Payments. Although PC Bank submitted that its commercial activity was "its service of driving retail traffic to Loblaws", PC Bank submitted that it did not make the Redemption Payments to Loblaws for the purpose of driving retail traffic to Loblaws, but rather that the Redemption Payments were made to pay a liability of PC Bank.

[99] Whether the Redemption Payments were made in the course of a commercial activity of PC Bank is a question of fact or mixed fact and law as the interpretation of certain contracts is relevant. As noted by the majority of this Court in *Midland Hutterian Brethren*:

> When the phrase "connected to" was used by Justice Stone to explain the words in the statute, the meaning it conveyed was that the supplies must contribute to the production of articles or the provision of services that are taxable. It would not be enough to qualify as being connected to the business activity if something, like a cigarette, were merely consumed while engaged in the business activity, for that would not contribute to the commercial activity that will ultimately produce taxable supplies.

[100] In *Midland Hutterian Brethren*, this Court confirmed that a particular property or service is acquired for consumption or use in the course of a commercial activity if the property or service contributed to the commercial activity. In applying this principle to determine if a person pays an amount in the course of a commercial activity, paying such amount must contribute to the commercial activity. In this case, the question is whether making the Redemption Payments contributed to the commercial activity of PC Bank, which PC Bank is now describing as a "service of driving retail traffic to Loblaws".

[101] Whether the Redemption Payments made to Loblaws contributed to the commercial activity of PC Bank's "service of driving retail traffic to Loblaws", is a question of fact or mixed fact and law. There was no finding of fact made by the Tax Court Judge that the Redemption Payments were made in the course of a commercial activity of PC Bank. Rather, the Tax Court Judge found, in paragraph 72 of his reasons, that "PC Bank has not identified the commercial activity for which it claims entitlement to NITCs" and at paragraph 76, "PC Bank issues the points and pays their redemption price … to earn income from the supply of financial services".

[102] In this appeal, PC Bank has not challenged any factual findings made by the Tax Court Judge, including the finding that "PC Bank has not identified the commercial activity for which it claims entitlement to NITCs". The only issue raised in this appeal is the question of law, which PC Bank identified as the "either/or" question. PC Bank's argument is that the Tax Court Judge, having found that the Redemption Payments were paid in carrying on a financial services business, erred by not considering whether PC Bank also paid the same amounts in the course of a commercial activity. However, since PC Bank has not appealed any findings of fact, the Tax

Court Judge's factual finding that "PC Bank has not identified the commercial activity for which it claims entitlement to NITCs" stands.

[103] In my view, in order to address the legal question of whether the Redemption Payments could have been made both in carrying on a financial services business and in the course of a commercial activity, PC Bank would first have had to establish, at the Tax Court, in the course of what commercial activity PC Bank is alleging that the payments were made. Since the factual finding that PC Bank has not identified the particular commercial activity has not been challenged in this appeal, it is not open to PC Bank, in this appeal, to now attempt to establish a finding of fact that PC Bank failed to establish at the Tax Court hearing.

[104] However, since, in my view as noted above in paragraph 97, the Crown cannot argue that no commercial activity was being carried on by PC Bank, the legal question of whether the Redemption Payments could be made in carrying on a financial services business and also in the course of a commercial activity will be addressed.

[105] PC Bank linked this legal question to the interpretation of "in the course of". In my view, however, this is not the relevant question. The question is not whether "in the course of" has a broad meaning and whether a particular good or service that has been acquired could be found to have been acquired for use in a commercial activity and also in a financial services business. Rather, the relevant question is whether the particular payment of money, as contemplated by subsection 181(5) of the ETA, could be made in carrying on a financial services business and the same payment of money could also be made in the course of a commercial activity.

[106] Subsection 181(5) of the ETA contemplates a payment of money, not an acquisition of any good or service:

> … a particular person at any time pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon …
>
> [Emphasis added.]

[107] To illustrate PC Bank's legal argument related to whether the payment contemplated by subsection 181(5) of the ETA could be made in the course of a commercial activity and also in carrying on a financial services business, assume that a particular Redemption Payment made as a result of a customer redeeming PCB Points is $10. PC Bank's argument is that this $10 can be found to have been paid in the course of a commercial activity and this same $10 can also be found to be paid in carrying on its financial services business. As more fully discussed below, I do not agree that this is the correct interpretation of subsection 181(5) of the ETA.

[108] PC Bank referred to *Midland Hutterian Brethren, Canada v. General Motors of Canada Limited*, 2009 FCA 114 (*General Motors*), and *Glencore Canada Corporation v. Canada*, 2024 FCA 3, leave to appeal to SCC refused, 41149 (8 August 2024) (*Glencore Canada*) in support of its interpretation that a single payment could be made in the course of a commercial activity and in carrying on a financial services business.

[109] *Midland Hutterian Brethren* and *General Motors* both relate to the entitlement to input tax credits under subsection 169(1) of the ETA. The full text of this provision is set out in the Appendix attached to these reasons. This subsection provides that a person is entitled to an input

tax credit for a property or a service that is acquired for consumption, use or supply in the course of a commercial activity and prescribes the amount of such input tax credit that may be claimed.

[110] In particular, subsection 169(1) of the ETA limits the entitlement to input tax credits to the extent that the particular property or service is acquired for consumption, use or supply in the course of a commercial activity of the person. This limitation is reflected in the formula (A x B) set out in subsection 169(1) of the ETA. The scheme of the ETA is that a particular property or service cannot be considered to be used 100% in carrying on a business of making exempt supplies and 100% in the course of a commercial activity. Given this context, in my view, Parliament would not have intended that the entire payment of a particular amount could be considered to be made both in carrying on a financial services business and in the course of a commercial activity.

[111] Neither *Midland Hutterian Brethren* nor *General Motors* address the issue of whether a single payment can be made in the course of a commercial activity and also made in carrying on a financial services business. In my view, it does not necessarily follow that because the ETA contemplates that a particular property or service may be acquired for use in more than one activity, Parliament contemplated that the person paid the full amount for the property in the course of each activity.

[112] To illustrate, assume that a person pays $100 to acquire a particular property. Assume the property is used 60% in the course of a commercial activity and 40% in carrying on a financial services business. By recognizing that the property is used 60% in the course of a commercial

activity and 40% in carrying on a financial services business, in my view, it does not necessarily follow that Parliament contemplated that the $100 was paid in the course of a commercial activity and the same $100 was also paid in carrying on a financial services business.

[113] In *Glencore Canada* the relevant issue was whether a particular amount was "received in the course of earning income from a business or property" for the purposes of paragraph 12(1)(*x*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA). Since *Glencore Canada* related to a different statute (the ITA versus the ETA) and the inclusion of an amount in income for the purposes of the ITA, it is also of no assistance in determining whether a single payment can be made in the course of a commercial activity and also in carrying on a financial services business for the purposes of subsection 181(5) of the ETA.

[114] The text of subsection 181(5) of the ETA indicates that the payment of the amount in the course of a commercial activity is a condition that must be satisfied and that this condition is either satisfied or it is not:

> … a particular person at any time pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon …

[115] The section contemplates "a particular person at any time" paying "an amount" and is seeking a response of either:

- yes, the particular person paid that amount in the course of a commercial activity; or
- no, the person did not pay that amount in the course of a commercial activity.

[116] The relevant condition in subsection 181(5) of the ETA is focused on making a payment. A person only pays a particular amount once. The person does not pay the same amount twice. Having found that PC Bank paid the entire amount of the Redemption Payments in carrying on a financial services business, there was no amount, in relation to the Redemption Payments, that could be found to be paid in another activity.

[117] In my view, Parliament intended to focus on the single payment transaction and whether, on a balance of probabilities, the person pays the particular amount in the course of a commercial activity. If, on a balance of probabilities, the person pays the particular amount in carrying on a financial services business, the person is not entitled to the NITC. If there are two possible activities (*e.g.* a commercial activity and a financial services business), the issue for the Court to determine is whether, on a balance of probabilities, the person pays the particular amount in the course of a commercial activity.

[118] A single payment could be considered to be, in part, made in the course of a commercial activity and, in part, made in carrying on a financial services business. For example, a payment of $10 could be allocated between the two activities — $6 to the commercial activity and $4 to the financial services business. However, this is not PC Bank's argument. PC Bank is not disputing that, for a Redemption Payment of $10, the $10 was paid in carrying on its financial services business. PC Bank's argument is that the entire payment of $10 (in this example) would be considered to be paid both in the course of a commercial activity and in carrying on a financial services business.

[119] The definition of commercial activity in subsection 123(1) of the ETA is also relevant. The full text of this definition is set out in the Appendix attached to these reasons. Paragraph (*a*) of the definition of commercial activity provides that to the extent that a business involves the making of exempt supplies, it is not a commercial activity:

> … a business carried on by the person … except to the extent to which the business involves the making of exempt supplies by the person …

[120] An activity cannot be both a business of making exempt supplies and a commercial activity. Since an activity cannot be both a business of making exempt supplies and a commercial activity, it would seem logical that Parliament would not have intended that a single payment could, at the same time, be considered to be made both in the course of a commercial activity and in carrying on a business of making exempt supplies, such as a financial services business.

[121] In paragraph 48 of its memorandum, PC Bank referred to several provisions of the ETA that refer to the acquisition of property or a service exclusively or primarily in the course of a commercial activity:

> 48. Where Parliament intended to limit the recovery of ITCs to taxpayers who make a supply or payment "exclusively" or "primarily" in the course of a commercial activity, it did so expressly. For instance, subsection 202(2), which governs the recovery of ITCs on the acquisition of a passenger vehicle or aircraft, requires that a passenger vehicle or aircraft acquired by an individual or partnership be used "***exclusively***" in the course of commercial activities. Paragraph 199(2)(a), which governs the recovery of ITCs on the acquisition of capital personal property, permits ITCs on supplies acquired for use "***primarily***" in a commercial activity. Section 141.02 refers to inputs that are used "***directly and exclusively***" for the purpose of making taxable supplies.

[Emphasis added by PC Bank.]

[122] These provisions all refer to the use of the particular property or service that is acquired, not to the payment of a single amount.

[123] In my view, there is a distinction to be drawn between acquiring a particular property or service for use in a commercial or other activity and the paying of an amount. A particular property may be used multiple times in different activities and a service may be rendered in part to one activity and in part to a different activity. Therefore, a property or service could be used primarily or exclusively in a particular activity. In my view, these provisions do not assist PC Bank.

[124] PC Bank argues that because subsection 181(5) of the ETA does not require that "a person pays an amount exclusively or primarily", the same payment can be found to have been made in carrying on a financial services business and in the course of a commercial activity. However, in my view, the text "a particular person at any time pays, in the course of a commercial activity of the particular person, an amount", requires a focus on the particular payment that is made and requires a determination of whether it was made in the course of a commercial activity or otherwise. This language, in my view, does not support the proposition that a single payment (which is only made once) can be considered to be paid twice — once in carrying on, in this case, a financial services business and again in the course of a commercial activity.

[125] A person only pays a single payment once. Just as the scheme of the ETA does not contemplate that 100% of a particular property or service that is acquired can be considered to be used in both a commercial activity and a business of making exempt supplies, Parliament did not intend that 100% of a single payment that is made could be considered to be made in both the course of a commercial activity and in the making of exempt supplies.

[126] In *Nestlé Canada Inc. v. The Queen*, 2017 TCC 33, Lamarre A.C.J. described the policy underlying the treatment of coupons under the ETA:

> [39] Subsection 181(2) thus requires the customer to overpay GST/HST on the Nestlé products and then deems the customer to have paid only the GST/HST attributable to the post-discount price. The reason for implementing this practice was explained by counsel for the Respondent in his oral submissions, in which he referred the Court to the policy underlying the treatment of discount coupons. The object of the practice was to simplify the treatment of coupons for small grocers, who, in the 1990s, did not have easy access to cash registers that, for the purpose of the application of the GST/HST, could distinguish between coupons for taxable supplies and coupons for non-taxable (or zero-rated) supplies.
>
> [40] This excess GST/HST does not go to the government however. Instead, subsection 181(5) allows the provider of the coupon, here Nestlé, to obtain an input tax credit for the excess GST/HST paid by the Costco customer.

[127] The rules related to the tax treatment of coupons were implemented to simplify the process for retailers, as not all retailers had access to cash registers that could properly process coupons for taxable supplies and for non-taxable supplies. The available NITC under subsection 181(5) of the ETA was also simplified by not requiring any proration of the reimbursement payment made to the retailer. All of the NITC would be paid to the person who pays the redemption amount of the coupon in the course of a commercial activity.

[128] The general rule for input tax credits provides that such credits are only available to the extent that a particular property or service is acquired for consumption, use or supply in the course of a commercial activity. If a particular property or service is acquired only for consumption, use or supply in a carrying on a business of making exempt supplies, the person is not entitled to any input tax credit. Although no property or service is acquired as a result of making the reimbursement payment to a retailer as contemplated by subsection 181(5) of the ETA, the general principle that there is a link between the entitlement to an input tax credit and the extent of a connection to a commercial activity, should be maintained. In my view, Parliament would not have intended that the entire NITC would be made to a person who, on a balance of probabilities, does not pay the amount contemplated by subsection 181(5) of the ETA in the course of a commercial activity.

[129] Rather, Parliament would have intended that the NITC would be paid to a person who, on a balance of probabilities, paid the amount in the course of a commercial activity. The question of whether a particular amount was paid in the course of a commercial activity is a question of fact (or mixed fact and law to the extent that the interpretation of any contracts is relevant).

[130] In my view, based on the text, context and purpose of subsection 181(5) of the ETA, the correct interpretation is that when a person is carrying on a commercial activity and also a financial services business, the person pays the amount as contemplated by this subsection either in the course of a commercial activity or in carrying on a financial services business. A person only pays a particular amount once and therefore the person, for the purposes of subsection 181(5) of the ETA, either pays the particular amount in the course of carrying on a commercial

activity or in carrying on some other activity. The full amount of a single payment cannot be considered to be made both in the course of a commercial activity and also, at the same time, made in carrying on a financial services business.

[131] Since, as acknowledged by PC Bank, the Redemption Payments were made to satisfy a liability of PC Bank, the appropriate question to ask is the question as framed by the Tax Court Judge in paragraph 66 of his reasons:

> The evidence must be examined to determine the reason or cause for the Redemption Payment. Stated differently, is the Redemption Payment linked to the making of exempt or taxable supplies by PC Bank?

[132] Having framed the appropriate question, the Tax Court Judge did not commit any legal errors. His findings of fact have not been challenged in this appeal. In particular his key finding in paragraph 82 of his reasons is dispositive:

> PC Bank issued the PCB Points to attract clients to subscribe for and, more importantly, thereafter use their PC MasterCards. This was done to grow PC Bank's MasterCard operations. PC Bank made the Redemption Payment for the redeemed PCB Points as consideration for having issued the PCB Points in the first place.

[133] As a result, the Redemption Payments made by PC Bank to Loblaws were made by PC Bank in carrying on its financial services business and not in the course of a commercial activity. Therefore, PC Bank is not entitled to the NITCs under subsection 181(5) of the ETA in relation to the Redemption Payments.

[134] Although PC Bank argued that the Tax Court Judge erred by relying on financial data and the primary business of PC Bank, the financial data and the primary business of PC Bank are part of the factual matrix that the Tax Court Judge considered in determining whether the Redemption Payments were made in the course of a commercial activity or in carrying on a financial services business. The Tax Court Judge did not make any finding that the definition of "commercial activity" required a corporation to carry on a business with a reasonable expectation of profit or that subsection 181(5) of the ETA required the payment in issue to be made as part of the core business of PC Bank.

XII. Conclusion

[135] As a result, I would dismiss the appeal with costs.

"Wyman W. Webb"
J.A.

APPENDIX

Provisions of the *Excise Tax Act,* R.S.C. 1985, c. E-15 (the ETA)

Definition of "Commercial Activity" in Subsection 123(1) of the ETA

commercial activity of a person means	***activité commerciale*** Constituent des activités commerciales exercées par une personne :
(*a*) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,	***a*)** l'exploitation d'une entreprise (à l'exception d'une entreprise exploitée sans attente raisonnable de profit par un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où l'entreprise comporte la réalisation par la personne de fournitures exonérées;
(*b*) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and	***b*)** les projets à risque et les affaires de caractère commercial (à l'exception de quelque projet ou affaire qu'entreprend, sans attente raisonnable de profit, un particulier, une fiducie personnelle ou une société de personnes dont l'ensemble des associés sont des particuliers), sauf dans la mesure où le projet ou l'affaire comporte la réalisation par la personne de fournitures exonérées;
(*c*) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply;	***c*)** la réalisation d'une fourniture, sauf une fourniture exonérée, d'un immeuble de la personne, y compris les actes qu'elle accomplit dans le cadre ou à l'occasion de la fourniture.

Subsection 169(1) of the ETA:

169 (1) Subject to this Part, where a person acquires or imports property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula is an input tax credit of the person in respect of the property or service for the period:

A × B

where

A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and

B is

(*a*) where the tax is deemed under subsection 202(4) to have been paid in respect of the property on the last day of a taxation year of the person, the extent (expressed as a percentage of the total use of the property in the course of commercial activities and businesses of the person during that taxation year) to which the person used the property in the course of commercial activities of

169 (1) Sous réserve des autres dispositions de la présente partie, un crédit de taxe sur les intrants d'une personne, pour sa période de déclaration au cours de laquelle elle est un inscrit, relativement à un bien ou à un service qu'elle acquiert, importe ou transfère dans une province participante, correspond au résultat du calcul suivant si, au cours de cette période, la taxe relative à la fourniture, à l'importation ou au transfert devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable :

A × B

où :

A représente la taxe relative à la fourniture, à l'importation ou au transfert, selon le cas, qui, au cours de la période de déclaration, devient payable par la personne ou est payée par elle sans qu'elle soit devenue payable;

B :

a) dans le cas où la taxe est réputée, par le paragraphe 202(4), avoir été payée relativement au bien le dernier jour d'une année d'imposition de la personne, le pourcentage que représente l'utilisation que la personne faisait du bien dans le cadre de ses activités commerciales au cours de cette année par rapport à l'utilisation totale qu'elle en faisait alors dans le cadre de ses

the person during that taxation year,	activités commerciales et de ses entreprises;
(*b*) where the property or service is acquired, imported or brought into the province, as the case may be, by the person for use in improving capital property of the person, the extent (expressed as a percentage) to which the person was using the capital property in the course of commercial activities of the person immediately after the capital property or a portion thereof was last acquired or imported by the person, and	***b*)** dans le cas où le bien ou le service est acquis, importé ou transféré dans la province, selon le cas, par la personne pour utilisation dans le cadre d'améliorations apportées à une de ses immobilisations, le pourcentage qui représente la mesure dans laquelle la personne utilisait l'immobilisation dans le cadre de ses activités commerciales immédiatement après sa dernière acquisition ou importation de tout ou partie de l'immobilisation;
(*c*) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person.	***c*)** dans les autres cas, le pourcentage qui représente la mesure dans laquelle la personne a acquis ou importé le bien ou le service, ou l'a transféré dans la province, selon le cas, pour consommation, utilisation ou fourniture dans le cadre de ses activités commerciales.

Subsection 181(1) of the ETA:

181 (1) The definitions in this subsection apply in this section.	**181 (1)** Les définitions qui suivent s'appliquent au présent article.
coupon includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3).	***bon*** Sont compris parmi les bons les pièces justificatives, reçus, billets et autres pièces. En sont exclus les certificats-cadeaux et les unités de troc au sens de l'article 181.3.

tax fraction of a coupon value or of the discount or exchange value of a coupon means

(*a*) where the coupon is accepted in full or partial consideration for a supply made in a participating province, the fraction

A/B

where

A is the total of the rate set out in subsection 165(1) and the tax rate for that participating province, and

B is the total of 100% and the percentage determined for A; and

(*b*) in any other case, the fraction

C/D

where

C is the rate set out in subsection 165(1), and

D is the total of 100% and the percentage determined for C.

fraction de taxe Quant à la valeur ou la valeur de rabais ou d'échange d'un bon :

a) dans le cas où le bon est accepté en contrepartie, même partielle, d'une fourniture effectuée dans une province participante, le résultat du calcul suivant :

A/B

où :

A représente la somme du taux fixé au paragraphe 165(1) et du taux de taxe applicable à la province,

B la somme de 100 % et du pourcentage déterminé selon l'élément A;

b) dans les autres cas, le résultat du calcul suivant :

C/D

où :

C représente le taux fixé au paragraphe 165(1),

D la somme de 100 % et du pourcentage déterminé selon l'élément C.

Subsection 181(2) of the ETA:

(2) For the purposes of this Part, other than subsection 223(1), where at any time a registrant accepts, in full or partial consideration for a

(2) Pour l'application de la présente partie, sauf le paragraphe 223(1), lorsqu'un inscrit accepte, en contrepartie, même partielle, de la

taxable supply of property or a service (other than a zero-rated supply), a coupon that entitles the recipient of the supply to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this subsection referred to as the "coupon value") and the registrant can reasonably expect to be paid an amount for the redemption of the coupon by another person, the following rules apply:

fourniture taxable d'un bien ou d'un service, sauf une fourniture détaxée, un bon qui permet à l'acquéreur de bénéficier d'une réduction du prix du bien ou du service égale au montant fixe indiqué sur le bon (appelé « valeur du bon » au présent paragraphe) et que l'inscrit peut raisonnablement s'attendre à recevoir un montant pour le rachat du bon, les présomptions suivantes s'appliquent :

(*a*) the tax collectible by the registrant in respect of the supply shall be deemed to be the tax that would be collectible if the coupon were not accepted;

***a*)** la taxe percevable par l'inscrit relativement à la fourniture est réputée égale à celle qui serait percevable s'il n'acceptait pas le bon;

(*b*) the registrant shall be deemed to have collected, at that time, a portion of the tax collectible equal to the tax fraction of the coupon value; and

***b*)** l'inscrit est réputé avoir perçu, au moment de l'acceptation du bon, la partie de la taxe percevable qui correspond à la fraction de taxe de la valeur du bon;

(*c*) the tax payable by the recipient in respect of the supply shall be deemed to be the amount determined by the formula

***c*)** la taxe payable par l'acquéreur relativement à la fourniture est réputée égale au montant calculé selon la formule suivante :

A - B

A - B

where

où :

A is the tax collectible by the registrant in respect of the supply, and

A représente la taxe percevable par l'inscrit relativement à la fourniture,

B is the tax fraction of the coupon value.

B la fraction de taxe de la valeur du bon.

<u>Subsection 181(5) of the ETA</u>:

(5) For the purposes of this Part, where, in full or partial consideration for a taxable supply of property or a service, a supplier who is a registrant accepts a coupon that may be exchanged for the property or service or that entitles the recipient of the supply to a reduction of, or a discount on, the price of the property or service and a particular person at any time pays, in the course of a commercial activity of the particular person, an amount to the supplier for the redemption of the coupon, the following rules apply:

(*a*) the amount shall be deemed not to be consideration for a supply;

(*b*) the payment and receipt of the amount shall be deemed not to be a financial service; and

(*c*) if the supply is not a zero-rated supply and the coupon entitled the recipient to a reduction of the price of the property or service equal to a fixed dollar amount specified in the coupon (in this paragraph referred to as the "coupon value"), the particular person, if a registrant (other than a registrant who is a prescribed registrant for the purposes of subsection 188(5)) at that time, may claim an input tax credit for the reporting period of the particular person that includes that time equal to the tax fraction of the coupon value, unless all or part of that coupon value is an amount of an adjustment, refund or credit to which subsection 232(3) applies.

(5) Pour l'application de la présente partie, lorsqu'un fournisseur qui est un inscrit accepte, en contrepartie, même partielle, de la fourniture taxable d'un bien ou d'un service, un bon qui est échangeable contre le bien ou le service ou qui permet à l'acquéreur de bénéficier d'une réduction ou d'un rabais sur le prix du bien ou du service, et qu'une autre personne verse dans le cadre de ses activités commerciales un montant au fournisseur pour racheter le bon, les règles suivantes s'appliquent :

***a*)** le montant est réputé ne pas être la contrepartie d'une fourniture;

***b*)** le versement et la réception du montant sont réputés ne pas être des services financiers;

***c*)** lorsque la fourniture n'est pas une fourniture détaxée et que le bon permet à l'acquéreur de bénéficier d'une réduction sur le prix du bien ou du service égale au montant fixe indiqué sur le bon (appelé « valeur du bon » au présent alinéa), l'autre personne, si elle est un inscrit (sauf un inscrit visé par règlement pour l'application du paragraphe 188(5)) au moment du versement, peut demander, pour sa période de déclaration qui comprend ce moment, un crédit de taxe sur les intrants égal à la fraction de taxe de la valeur du bon, sauf si tout ou partie de cette valeur représente le montant d'un redressement, d'un remboursement ou d'un crédit auquel s'applique le paragraphe 232(3).

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