Federal Court of Appeal | Cour d'appel fédérale

Date: 20241121

Docket: A-321-21

Citation: 2024 FCA 192

CORAM: **WOODS J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

THE BANK OF NOVA SCOTIA

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on October 30, 2023.

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

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: LASKIN J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

Introduction

[1] The Bank of Nova Scotia appeals to this Court from a decision of the Tax Court of Canada which confirmed a reassessment imposing interest for late payment of tax (the Decision, *per* Justice Wong, cited as 2021 TCC 70). The Bank's appeal concerns the calculation of interest

in circumstances where a reassessment has taken into account an audit adjustment and an offsetting loss carryback.

[2] In 2015, the Bank received a notice of reassessment for its 2006 taxation year, resulting in a small increase in tax. In making the reassessment, the Minister of National Revenue (the Minister) implemented an approximately $55 million audit adjustment, raising the Bank's 2006 income, and also took into account a loss carryback of $54 million, reflecting a 2008 non-capital loss. As a result, the reassessment increased the Bank's taxable income by about $1 million, and increased tax accordingly.

[3] Strikingly, the Minister also imposed interest resulting from the reassessment in the amount of $7,931,087.49. While interest on late payment of tax is generally calculated on the amount of tax owing (i.e., tax on $1 million in this case), a special provision applies if a loss carryback or other specified deduction has been taken: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA), s. 161(7). This provision requires that, for a specified period of time, interest is calculated by ignoring the loss carryback or other specified deduction. In this case, that means rather than calculating interest on tax imposed on $1 million as assessed, interest for a period of time is calculated on a notional amount of tax that would be payable if the loss carryback were ignored and the Bank's taxable income were $55 million instead.

[4] While the parties agree that subsection 161(7) of the ITA must be applied in this case, they disagree as to the period to which it applies. The Tax Court concluded that the loss carryback should be ignored for approximately eight years. The Bank appeals this decision,

arguing that the carryback should be ignored for only two years. As I will explain, I would dismiss the appeal.

Background

[5] The background facts are set out in the parties' agreed statement of facts, which reads in relevant part:

> **A. CRA Transfer Pricing Audit and Settlement Agreement**
>
> 1. On April 27, 2007, the Appellant, The Bank of Nova Scotia (the "Bank") filed its return for the taxation year ended October 31, 2006 (the "2006 Taxation Year"). The Bank reported net income of $1,941,328,290, reported taxable income of $800,246,606, and paid such taxes as it calculated to be owing in a timely manner.
>
> 2. On April 28, 2009, the Bank filed its return for the taxation year ended October 31, 2008 (the "2008 Taxation Year"). The Bank reported a non-capital loss of $3,972,885,321 including the impact of a section 110.5 designation of $528,000,000. Subsequent reassessments issued by the Minister of National Revenue ("Minister") up to June 9, 2014 reduced the non-capital loss by $667,754,539 (from $3,972,885,321 to $3,305,130,782).
>
> 3. In 2012, the Bank became aware of the Canada Revenue Agency's ("CRA") intention to audit the operations of one of the Bank's foreign subsidiaries, in respect of, *inter alia*, the Bank's 2006, 2007, 2008, 2009 and 2010 taxation years ended on October 31 (the "Transfer Pricing Audit").
>
> …
>
> 6. On February 12, 2015, the CRA issued a proposal letter with respect to the Transfer Pricing Audit for the 2006 Taxation Year (the "Proposal Letter").
>
> 7. Prior to the CRA issuing proposal letters for the 2007, 2008, 2009 and 2010 Taxation Years, the Bank entered into a settlement agreement with the Minister of National Revenue (the "Minister") in respect of the Transfer Pricing Audit dated March 13, 2015 (the "Settlement Agreement").

8. The Settlement Agreement provided for the Minister to reassess the Bank to include certain amounts in its income as transfer pricing adjustments in its 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 Taxation Years. In this regard, the Settlement Agreement was to result in an increase of the Bank's Part I income for the 2006 Taxation Year of $54,916,616 (the "Transfer Pricing Adjustment").

B. 2008 Loss Carryback

9. The Bank wrote to the Minister on March 12, 2015 (the "Letter of March 12") to carry back $54,000,000 of non-capital loss that arose in the Bank's taxation year ended October 31, 2008 to its 2006 Taxation Year in order to offset the pending $54,916,616 Transfer Pricing Adjustment (the "2008 Loss Carryback"). …

C. The Reassessment

10. On March 20, 2015, the Minister issued a notice of reassessment for the 2006 Taxation Year (the "Reassessment"). The Reassessment processed the following adjustments:

> (a) added $54,916,616 to the Bank's Part I income for the year in respect of the Transfer Pricing Adjustment, in accordance with the terms of the Settlement Agreement;
>
> (b) applied the 2008 Loss Carryback as a deduction to the Bank's taxable income of $54,000,000;
>
> (c) calculated interest using an effective date pursuant to paragraph 161(7)(b)(iv) of the *Act* of March 12, 2015; and
>
> (d) assessed arrears interest of $7,931,087.49 … based on an effective interest date of March 12, 2015.

…

[6] For clarity, the Bank's "Letter of March 12" referred to in paragraph 9 of the agreed statement of facts provides in relevant part: "As a consequence of the Canada Revenue Agency's

pending reassessment of the Bank to increase its income …, the Bank hereby requests a carryback …".

Applicable legislation

[7] As a general rule, interest on tax balances is based on the unpaid taxes payable for a given taxation year (ITA, s. 161(1)). The calculation period begins on the taxpayer's "balance-due day", as defined, and ends when the tax is fully paid. The "balance-due day" is a specified day which is generally not long after the end of the relevant taxation year (ITA, s. 248(1)).

[8] The current version of subsection 161(1) is set out below. It includes more recent amendments, but these are not material.

161 (1) Where at any time after a taxpayer's balance-due day for a taxation year	**161 (1)** Dans le cas où le total visé à l'alinéa a) excède le total visé à l'alinéa b) à un moment postérieur à la date d'exigibilité du solde qui est applicable à un contribuable pour une année d'imposition, le contribuable est tenu de verser au receveur général des intérêts sur l'excédent, calculés au taux prescrit pour la période au cours de laquelle cet excédent est impayé :
(a) the total of the taxpayer's taxes payable under this Part and Parts I.3, VI, VI.1 and VI.2 (determined in accordance with subsection 191.5(9)) for the year	**a)** le total des impôts payables par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI, VI.1 et VI.2 (calculé conformément au paragraphe 191.5(9));
exceeds	

(b) the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI, VI.1 or VI.2 for the year,	**b)** le total des montants représentant chacun un montant payé au plus tard à ce moment au titre de l'impôt payable par le contribuable et imputé par le ministre, à compter de ce moment, sur le montant dont le contribuable est redevable pour l'année en vertu de la présente partie ou des parties I.3, VI, VI.1 ou VI.2.

the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding.

[9] The term "tax payable" is defined by subsection 248(2) of the ITA as the tax fixed by assessment or reassessment, subject to variation on objection or appeal:

248 (2) In this Act, the tax payable by a taxpayer under any Part of this Act by or under which provision is made for the assessment of tax means the tax payable by the taxpayer as fixed by assessment or reassessment subject to variation on objection or on appeal, if any, in accordance with the provisions of that Part.	**248 (2)** Dans la présente loi, l'impôt payable par un contribuable, conformément à toute partie de la présente loi prévoyant une imposition, désigne l'impôt payable par lui, tel que le fixe une cotisation ou nouvelle cotisation, sous réserve éventuellement de changement consécutif à une opposition ou à un appel, d'après les dispositions de cette partie.

[10] The rate of interest, set by regulation, is generally the Government of Canada three month Treasury Bill rate plus four percent. The rate is determined quarterly, and compounded daily. (See *Income Tax Regulations*, C.R.C., c. 945, ss. 4300-4301; ITA, s. 248(11).)

[11] The general rule is modified by subsection 161(7) of the ITA, which applies if specified deductions or exclusions have been carried back to the relevant taxation year. One such deduction is a loss carryback that has been deducted pursuant to section 111 of the ITA (s. 161(7)(a)(iv)).

[12] If the modified rule in subsection 161(7) applies, interest is computed until a specified date as if the deduction or exclusion was not applied (s. 161(7)(a)). Effectively, the deduction or exclusion is ignored for this period of time. When the period of time ends, interest is calculated thereafter under the general rule, which takes the deduction or exclusion into account.

[13] The modified rule ceases to apply 30 days after the latest of four end dates listed in subparagraphs 161(7)(b)(i)-(iv). Where the relevant deduction is a loss carryback, the first two end dates, listed in subparagraphs (i) and (ii), are days that are shortly after the end of the loss year. The remaining two end dates, listed in subparagraphs (iii) and (iv), are days on which the loss carryback is requested.

[14] The current version of subsection 161(7), which is not materially changed from the relevant taxation year, is set out in part below.

161 (7) For the purpose of computing interest under subsection 161(1) or 161(2) on tax or a part of an instalment of tax for a taxation year, and for the purpose of section 163.1,	**161 (7)** Pour le calcul des intérêts à verser en application des paragraphes (1) ou (2) sur l'impôt ou sur une partie d'un acompte provisionnel pour une année d'imposition et pour l'application de l'article 163.1:
(a) the tax payable under this Part and Parts I.3, VI and VI.1 by the	**a)** l'impôt payable par le contribuable pour l'année en vertu

taxpayer for the year is deemed to be the amount that it would be if the consequences of the deduction, reduction or exclusion of the following amounts were not taken into consideration:

de la présente partie et des parties I.3, VI et VI.1 est réputé être égal à la somme qui serait payable à ce titre si les conséquences de la déduction, de la réduction ou de l'exclusion des montants ci-après n'étaient pas prises en compte :

…

…

(iv) any amount deducted under section 118.1 in respect of a gift made in a subsequent taxation year or under section 111 in respect of a loss for a subsequent taxation year,

(iv) un montant déduit, en application de l'article 118.1, à l'égard d'un don fait au cours d'une année d'imposition ultérieure ou, en application de l'article 111, à l'égard d'une perte subie pour une année d'imposition ultérieure,

…

…

and

(b) the amount by which the tax payable under this Part and Parts I.3, VI and VI.1 by the taxpayer for the year is reduced as a consequence of the deduction or exclusion of amounts described in paragraph (a) is deemed to have been paid on account of the taxpayer's tax payable under this Part for the year on the day that is 30 days after the latest of

b) la somme qui est appliquée en réduction de l'impôt payable par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI et VI.1 par suite de la déduction ou de l'exclusion de montants visés à l'alinéa a) est réputée avoir été versée au titre de son impôt payable pour l'année en vertu de la présente partie le trentième jour suivant le dernier en date des jours suivants :

(i) the first day immediately following that subsequent taxation year,

(i) le premier jour qui suit cette année d'imposition ultérieure,

(ii) the day on which the taxpayer's or the taxpayer's legal representative's return of

(ii) le jour où la déclaration de revenu du contribuable ou de son représentant légal pour

income for that subsequent taxation year was filed,	cette année d'imposition ultérieure a été produite,
(iii) if an amended return of the taxpayer's income for the year or a prescribed form amending the taxpayer's return of income for the year was filed under subsection 49(4) or 152(6) or (6.1) or paragraph 164(6)(e), the day on which the amended return or prescribed form was filed, and	**(iii)** le jour où une déclaration de revenu modifiée du contribuable pour l'année a été produite ou un formulaire prescrit modifiant sa déclaration de revenu pour l'année a été présenté conformément au paragraphe 49(4) ou 152(6) ou (6.1) ou à l'alinéa 164(6)e), dans le cas où il y a une telle production ou présentation,
(iv) where, as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the deduction or exclusion, the day on which the request was made.	**(iv)** le jour de la demande écrite à la suite de laquelle le ministre établit une nouvelle cotisation concernant l'impôt du contribuable pour l'année et qui tient compte de la déduction ou de l'exclusion, dans le cas où il y a une telle nouvelle cotisation.

[15] A loss carryback rule similar to subsection 161(7) was first enacted approximately 70 years ago (*Income Tax Act*, R.S.C. 1952, c. 148, s. 54(8)). According to the Senate debates from that time, the objective of this legislation was to discourage taxpayers from deciding not to pay tax that was reported because they anticipated having a subsequent loss that could be carried back to offset the income (*Debates of the Senate*, 22nd Parl., 1st Sess., vol. 1 (10 June 1954) at 594 (Hon. Salter Hayden)). Under the original provision, the interest calculation ignored a loss carryback until the end of the loss year. This is similar to subparagraph 161(7)(b)(i) in the current legislation.

[16] This appeal concerns a significant change made to subsection 161(7) in 1985. Notably, Parliament added the provision that is at issue in this appeal, subparagraph 161(7)(b)(iv).

Tax Court Decision

[17] The Tax Court considered whether the Minister was correct to apply subparagraph 161(7)(b)(iv). The Minister's calculation ignored the loss carryback until 2015 when the Minister's proposed transfer pricing reassessment prompted the Bank to request that its 2008 non-capital loss be carried back. If the Minister incorrectly concluded that subparagraph (b)(iv) applied, then subparagraph (b)(ii) would apply and the loss carryback restriction would end in 2009 when the Bank's return of income for the loss year was filed.

[18] The Bank submitted in the Tax Court that Parliament did not intend for a taxpayer to be subject to interest when a taxpayer has a loss carryback available but is unaware that it could be used until the audit is completed. The Bank noted that other discretionary deductions under the ITA are not subject to such restriction. The Bank also submitted that the text of subparagraph 161(7)(b)(iv) does not support the reassessment because it requires that the Minister reassess as a consequence of the carryback request. The Minister did not reassess for this reason, the Bank suggested, but to process the audit adjustment.

[19] The Tax Court rejected these submissions, primarily on the basis that the Bank's position was not supported by the unambiguous text of subparagraph (b)(iv), including the English and French versions (Decision at para. 31). The Court also found support in subsection 152(3) of the

ITA, which provides that liability for tax is not affected by an incorrect or incomplete assessment (Decision at para. 20).

The parties' positions

[20] In this Court, the Bank reiterates its Tax Court position that subparagraph 161(7)(b)(iv) is inapplicable because the reassessment was not made as a result of the carryback request. The Bank submits that this interpretation is consistent with the text, context, and purpose of subparagraph 161(7)(b)(iv).

[21] The Crown submits that the Decision is consistent with the clear wording of subparagraph (b)(iv), which is unambiguous. This, the Crown argues, is further supported by the fact that the Minister cannot apply a loss carryback unless the taxpayer requests it. The Crown says that subparagraph 161(7)(b)(iv) reflects this reality.

Analysis

Overview

[22] The Bank describes this appeal as concerning the time at which the "interest clock" stops running when tax arrears are offset by a loss carryback. In the present case, the question is whether interest with respect to the Bank's 2006 tax arrears stops running in 2009 when the tax return for the loss year was filed, or whether it stops in 2015 when the Bank requested the

carryback. The difference between these dates is significant. If interest stops running when the carryback was requested, an additional six years of interest will be imposed, from 2009 to 2015.

[23] The provision the Tax Court determined applicable, subparagraph 161(7)(b)(iv), applies only if, as a consequence of the Bank's request, the Minister reassesses to take the loss carryback into account. The issue before the Tax Court and this Court centres on the proper interpretation of this proviso.

Standard of review, principles of statutory interpretation, and scope

[24] The question to be decided is purely a matter of statutory interpretation. The standard of review is correctness, and no deference is to be given to the Decision (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[25] As for the applicable principles of statutory interpretation, these were concisely described by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*]:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose

> on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added.]

[26] *Canada Trustco* also clarified that "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities" (at para. 47). As a result, a textual, contextual and purposive analysis is usually required.

[27] Finally, a note on the scope of the analysis. Although the carryback rule in subsection 161(7) applies to several types of deductions and exclusions, I will focus only on carrybacks of losses. The other types of deductions and exclusions specified in subsection 161(7) were not addressed by the parties, and I assume they would not affect the analysis.

Textual analysis

[28] The carryback rule in subsection 161(7) is an exception to the general calculation of interest for late payment of tax set out in subsection 161(1) of the ITA. As described above, the general rule provides that interest starts running from the balance-due day for the relevant taxation year and ends when the outstanding balance is fully paid. The balance at a particular time is calculated as the taxes payable for the year less the taxes that have been paid. The taxes payable for a year generally mean taxes assessed or reassessed (ITA, s. 248(2)).

[29] Subsection 161(7) applies where a loss carryback has been deducted for a taxation year. Where it applies, interest is calculated in the same manner as in the general rule set out in

subsection 161(1), except that the calculation ignores the loss carryback until a day specified in paragraph 161(7)(b). The specified day is 30 days after the latest of four dates.

[30] The issue in this case is whether subparagraph (b)(iv) applies. If it does not apply, the applicable provision is subparagraph (b)(ii). Subparagraph (b)(iv) reads in part:

(iv) where, as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the deduction or exclusion, the day on which the request was made.	**(iv)** le jour de la demande écrite à la suite de laquelle le ministre établit une nouvelle cotisation concernant l'impôt du contribuable pour l'année et qui tient compte de la déduction ou de l'exclusion, dans le cas où il y a une telle nouvelle cotisation.

[31] This appeal centres on the proper interpretation of the proviso, above. In English, the focus is on the words: "as a consequence of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the deduction or exclusion." Two questions are raised. First, does the proviso contain a causal element, or is it merely temporal? Second, if there is a causal element, how is it to be applied? To answer these questions, both official versions need to be considered.

[32] As for the first question, in my view both the English and French versions of the proviso imply a causal element. Beginning with the English, the phrase "as a consequence of" clearly imports a causal element.

[33] Similarly, the French version has a causal element by virtue of the corresponding phrase "à la suite de laquelle", which can be translated as "by reason of" (*Le Petit Robert de la langue*

française (Paris: Dictionnaires Le Robert, 2022)). I note that the Tax Court found the French version to mean "following which", a translation that lacks a clear causal connotation (Decision at para. 24). Although "following which" is an accepted translation in French dictionaries, the French phrase also has the broader meaning of "by reason of", as mentioned.

[34] The proper approach is to determine, if possible, a meaning which is shared between the English and French versions (*R. v. S.A.C.*, 2008 SCC 47, [2008] 2 S.C.R. 675 at paras. 14-16). In the phrase at issue, the causal element reflects the shared meaning, and it is the meaning to be adopted.

[35] The parties agree that subparagraph (b)(iv) encompasses a causal aspect. However, they disagree on the second question above which asks how the causal element is applied. The Bank submits that the causal element was intended to exclude the present circumstances because the 2015 reassessment was not made as a consequence of its carryback request. Rather, the reassessment was made in order to process the audit adjustment.

[36] In contrast, the Crown suggests that the causal element is satisfied because the Minister did not implement the loss carryback of her own accord, but took the carryback into account as a result of the Bank's request. The text is clear and the Minister is not able to process a loss carryback without a request from the taxpayer. It was, therefore, the Bank's request, regardless of the motive behind it, that triggered the Minister's application of the loss carryback, satisfying the proviso in subparagraph (b)(iv).

[37] In my view, the parties' disagreement stems in part from the text not being as clear as it could be. The causal element is clearly satisfied if the reassessment only addresses the carryback request. This is because in such circumstances it is obvious that the request, and no other cause, has led the Minister to reassess to implement the loss carryback. However, it is less clear that the proviso is satisfied if the Minister reassesses to make other adjustments as well, as in this case. I conclude that the text, read in isolation, is ambiguous; accordingly, contextual and purposive factors should be considered.

Contextual and purposive analysis

[38] The Bank submits that contextual and purposive factors support its position. The general thrust of its submissions is that it is implausible that Parliament intended such a harsh result as to impose interest during a period that a taxpayer had a loss carryback available but had not yet claimed the carryback because it did not know the results of the Minister's audit.

(a) Lack of specificity

[39] I would mention first a contextual factor that is strongly against the Bank's position. It is well established that Parliament seeks certainty, predictability and fairness in tax legislation (*Canada Trustco* at para. 61). If Parliament did not intend to impose interest when a loss carryback is claimed as a result of an audit adjustment, it is likely that Parliament would have provided for this with explicit language. But the language used is not explicit and does not reference audit adjustments at all. The Bank's position is problematic for this reason.

(b) Technical note

[40] Second, the Bank suggests that its position is supported by the relevant Department of Finance technical note that accompanied the enactment of the legislative provision at issue. The note explains that subparagraph (b)(iv) applies if "the Minister of National Revenue later accedes to the taxpayer's written request to reassess the earlier year": Canada, Minister of Finance, *Technical Notes to a Notice of Ways and Means Motion Relating to Income Tax*, (Ottawa: Department of Finance, 9 September 1985) at 92 [emphasis added].

[41] According to the Bank, the use of the term "accedes" in the technical note reinforces that subparagraph (b)(iv) does not apply where the Minister proposes to reassess for her own reasons (i.e., an audit adjustment). The argument is that the Minister has no ability to refuse the carryback request in these circumstances because a taxpayer has a statutory right to claim a loss carryback by virtue of paragraph 111(1)(a). However, where the Minister does not propose to reassess for her own reasons, the Bank submits that the term "accedes" is appropriate because a taxpayer generally does not have the right to require the Minister to reassess after an original assessment that follows the filing of the return. In those circumstances, the Minister has the discretion not to accede to a carryback request if this would require a new reassessment. The Bank suggests, therefore, that the use of the term "accedes" in the technical note supports its position.

[42] I disagree with this argument. The Minister has the right to reject a taxpayer's request for a loss carryback. The point was made in *Greene v. Minister of National Revenue* (1995), 95

D.T.C. 5684, 1995 CarswellNat 1841 (F.C. App. Div.) that the Minister only has to consider a request, not necessarily issue a reassessment granting the request.

[43] Indeed, read alongside the legislation, it becomes clear that the essence of the technical note is that subparagraph (b)(iv) applies if the Minister reassesses to accede to the taxpayer's request for a loss carryback. This favours the Crown's position.

(c) Anomalous consequences

[44] It is also worth noting that the Bank's position appears to lead to potentially anomalous results. A hypothetical example given by the Crown in the Tax Court involved a situation in which the Minister implements the audit adjustment and the loss carryback in two separate reassessments rather than one (as occurred in this case). This example appears to lead to different interest calculations if the interpretation suggested by the Bank is accepted: the single reassessment scenario would see the "interest clock" stop when the return for the loss year was filed, but the two reassessment scenario would see the "interest clock" continue until the loss carryback was requested, potentially many years later. There is no principled reason why the issuance of one or two reassessments should lead to diverse outcomes and I agree with the Crown that Parliament likely did not intend this result.

[45] The Bank responds to this argument in a couple of ways. First, it suggests that interest is calculated in the same manner regardless of whether there are one or two reassessments because all the reassessments stem from the audit adjustment. In effect, the Bank suggests that Parliament

envisaged that there would be an inquiry as to the ultimate cause of a reassessment. In my view, this interpretation is highly unlikely as it brings more uncertainty into the application of subparagraph (b)(iv). If anything, this argument illustrates a weakness with the Bank's position.

[46] Second, the Bank briefly submitted in oral argument that the hypothetical example may be an unlikely scenario because a separate reassessment could be statute barred. This argument was not fully fleshed out and was too brief to merit a considered response. In any event, even if unlikely, the possibility of anomalous results is a factor weighing against the Bank's interpretation.

[47] In sum, the hypothetical example illustrates that the Bank's suggested interpretation may well give rise to anomalous results. In my view, this is another strong factor in favour of the Crown's position.

(d) Punitive aspect

[48] The Bank submits that the Crown's position does not reflect Parliament's intent because it flies in the face of the general theory of interest, which is to compensate for the use of funds. The result is harsh, the Bank suggests, because it did not have use of the funds once the loss was incurred. Put another way, the Bank suggests that the Crown's position results in a penalty being imposed, which is not the purpose of the interest provisions. The Bank also suggests that Parliament recognizes that the ITA is complex, and there can be differences of opinion that reflect honestly held views.

[49] The Bank's argument that the Crown's position ascribes a punitive aspect to subparagraph (b)(iv) appears to be reinforced by the Crown's written submissions in this appeal which underscore the tax avoidance element of the provision: "The Minister's audit power is an essential tool that works in addition to self-reporting, to prevent taxpayers from avoiding their full share of taxes. … The fact that [the Bank's] income was detected through an audit instead of having been reported is no reason to relieve [it] from the effect of subparagraph 161(7)(b)(iv)."

[50] However, contrary to the Bank's argument, Parliament must have been aware that a loss carryback might well be requested as a result of an audit adjustment. I agree with the Crown that this scenario is not obscure. It is, therefore, likely that Parliament knew that subparagraph (b)(iv) could function in a manner similar to a penalty. It is also likely that Parliament knew that substantial interest could accrue under subparagraph (b)(iv) if the carryback request resulted from an audit. Despite the Bank's forceful arguments, I conclude there is no reason to think that Parliament did not intend this result. Had Parliament wished to avoid this outcome, it would have spoken more clearly.

(e) Lack of harmony

[51] The Bank suggests that the Tax Court decision results in similarly-situated taxpayers being treated differently. It explains that "where taxpayers have discretionary deductions other than loss carrybacks available and claim those discretionary deductions to offset audit adjustments, the Act does not impose interest. … It is difficult to imagine that Parliament would treat such similarly situated taxpayers so differently." In support, the Bank cites a technical

interpretation letter of the Canada Revenue Agency dated May 11, 2023 (No. 2022-093670), and an article by Ian Crosbie, "Amended Returns, Refunds, and Interest" (2012) *Tax Dispute Resolution, Compliance, and Administration Conference Report* (Canadian Tax Foundation) 27:1 at 27:22.

[52] I am not satisfied that these authorities support the broad principle stated by the Bank. With respect to loss carryforwards in particular, typically the authorities above cite administrative positions on facts that are materially different from those in this appeal. Often, the facts involve a taxpayer that reports a capital gain and applies a deduction to offset it. After an audit, the capital gain is changed to income, and the taxpayer then substitutes the previous offsetting deduction with a non-capital loss carryforward. The Canada Revenue Agency position is that arrears interest is not imposed in these circumstances. The facts in the present case are quite different in that nothing was originally reported by the Bank.

[53] Although the Bank may have overstated the administrative position, I acknowledge the Crown's position may result in different treatment between loss carrybacks and certain other deductions such as loss carryforwards. I also acknowledge that the Court must presume that Parliament intended the ITA to work as a harmonious scheme. However, the provisions of the ITA work against that presumption and suggest that Parliament did not intend a harmonious scheme for the calculation of interest in these circumstances. For example, Parliament enacted a specific provision dealing with loss carrybacks, and it chose not to adopt an analogous provision for loss carryforwards. There could be many reasons for this, and there is no point in speculating

why this is so. It certainly was Parliament's prerogative to treat other types of deductions more favourably.

(f) 1954 Senate debates

[54] The Bank also submits that its suggested interpretation satisfies the purpose of subsection 161(7). Noting the Senate debates from 1954 referred to above, the Bank suggests that subsection 161(7) was enacted to discourage taxpayers from ignoring an obligation to pay tax in anticipation that they will incur a loss in a subsequent year that could be carried back. The Bank suggests that its interpretation satisfies this objective because it requires the Bank to pay interest for the two-year period before the loss was incurred.

[55] In my view, this general comment from the Senate debates in 1954, which concerns a different legislative provision, is not instructive as to Parliament's intent in enacting subparagraph (b)(iv) 30 years later.

[56] Accordingly, for all the reasons above, the contextual and purposive factors are overwhelmingly in favour of the Crown's position.

Judicial authorities

[57] This section considers two judicial decisions relied on by the parties: *Connaught Laboratories Ltd. v. Canada* (1994), 94 D.T.C. 6697, [1995] 1 C.T.C. 216 (F.C.T.D.)

[*Connaught*] and *Alberta (Provincial Treasurer) v. Methanex Corporation*, 2004 ABCA 304 [*Methanex*]. The Tax Court concluded that the present case is "more akin" to *Connaught* than *Methanex* (Decision at para. 26).

[58] The Crown relies on *Connaught*. In that case, the Federal Court – Trial Division considered whether interest was determined under the carryback rule as it read prior to the introduction of s. 161(7)(b)(iv) in 1985. The Court determined that the carryback rule applied. Factually, *Connaught* is similar to this case. The Minister reassessed Connaught Laboratories in 1985 to include an unreported capital gain in income for its 1981 taxation year. The same reassessment included a carryback of a 1982 capital loss to 1981.

[59] Connaught Laboratories argued that the carryback rule did not apply because the taxpayer had other deductions that it could have used instead of the carryback. However, citing the well-established principle that tax is determined by what a taxpayer does, and not what it could have done, the Court rejected this argument and confirmed the reassessment. The result was that interest was calculated in accordance with subsection 161(7), as it then read.

[60] The Court in *Connaught* commented that subsection 161(7) was unambiguous and the Minister's interpretation did not offend the purpose or objectives of the ITA. The Crown suggests that these comments are helpful in the present case. I do not agree because the provision at issue in this appeal is not at all similar to the relevant provision in *Connaught*. The decision is simply not relevant.

[61] The *Methanex* decision is relied upon by the Bank. The Tax Court concluded that *Methanex* is either distinguishable or wrongly decided (Decision at para. 29).

[62] *Methanex* concerned a provision in a provincial taxation statute that is equivalent to subparagraph 161(7)(b)(iv) of the ITA: *Alberta Corporate Income Tax Act*, R.S.A. 1980, c. A-17, s. 39(3)(b)(iv).

[63] In 1994, the federal government reassessed Methanex Corporation for its 1988 taxation year to reclassify a capital gain as income. Methanex Corporation reduced the resulting tax by carrying back losses. Corresponding reassessments were made for Alberta tax purposes. The question was whether the Alberta equivalent of subparagraph 161(7)(b)(iv) of the ITA applied in computing Methanex Corporation's liability for interest on its Alberta tax liability.

[64] In a decision from the bench, the Court of Appeal for Alberta concluded that the chambers judge did not err by finding that the provincial equivalent of subparagraph 161(7)(b)(iv) did not apply. The basis for the Court of Appeal's decision is set out at paragraph 16 of its reasons:

> [16] The chambers judge determined that a verbal request had been made for the third reassessment (by that time the section had been amended to remove the requirement for a request in writing). He concluded the reassessment was brought about partly because of that request, but also because a Notice of Objection filed by Methanex remained outstanding and the Provincial Treasurer was required, under s. 48(4)(b) of the *Act*, to reconsider the disputed amount: at para. 28-29. The chambers judge understood that "the defining feature" for determining whether s. 39(3)(b)(iv) applied was "what ultimately caused the reassessment to occur": *id*. We conclude that he was not satisfied the requisite strong causal connection existed between Methanex's request and the reassessment. Given the

> Provincial Treasurer's statutory obligation to reconsider under s. 48(4)(b), we do not disagree.
>
> [Emphasis added.]

[65] In *Methanex*, the issue the Alberta Court of Appeal was grappling with was what caused the loss carryback to be applied. It found that there were not sufficient facts to conclude that it was the taxpayer's request. Accordingly, the decision was specific to the facts and arguments in that case and is distinguishable for that reason.

[66] In my view, neither *Connaught* nor *Methanex* is relevant.

Conclusion and disposition

[67] In light of the factors considered above, I conclude that the Crown's position is to be preferred. While the text connotes both a temporal and causal element, the text leaves the application of the causal element ambiguous. The context and purpose, however, strongly favour the Crown's position. In my view, the Tax Court did not err in dismissing the Bank's appeal.

[68] I would dismiss this appeal with costs.

"Judith Woods"
J.A.

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

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Al Meghji Gerald Grenon Amanda Heale	FOR THE APPELLANT
Carla Lamash Alexander Millman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP Toronto, Ontario	FOR THE APPELLANT
Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT