# PC Bank v. the King: The phrase “in the course of” acquires expanded interpretation under the Excise Tax Act

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On Aug. 21, 2024, the Federal Court of Appeal (FCA) released a noteworthy decision in *President’s Choice Bank v. His Majesty the King*, 2024 FCA 135, allowing the PC Bank’s (PC Bank) appeal against reassessments by the Canada Revenue Agency (the CRA).

The FCA set aside the Tax Court of Canada’s (TCC) decision dismissing PC Bank’s appeal and, in doing so, overturned the denial of notional input tax credits (NITCs) for goods and services tax / harmonized sales tax (GST/HST) relating to certain reimbursement payments for discounts received by Loblaw’s customers when redeeming credit card points at Loblaws stores (Redemption Payments).

Interestingly, the FCA ruled that the Redemption Payments were made by PC Bank *in the course of* its commercial activity of “driving customers to Loblaws,” while concurrently acknowledging that such payments were also made in the course of its exempt financial service activities.

**This is an expanded interpretation of the phrase “in the course of,” which has generally been viewed as requiring a binary determination of whether the activities are commercial or non-commercial (exempt) in nature.** As “in the course of” is referenced numerous times throughout Part IX of the *Excise Tax Act* (the Act), such interpretation may have ramifications beyond the PC Bank decision.

## What you need to know

- Where applicable under the ETA, a payment can be made “in the course of” both a commercial and exempt activity, absent allocative language like “exclusively” or “primarily.”
- Although characterization of supplies remains critical for GST/HST compliance, there may be a secondary business purpose that entitles a person to certain benefits under the ETA, such as NITCs.

# Background

PC Bank and Loblaws Inc. (Loblaw) are related entities under the umbrella of Loblaw Companies Limited. Loblaw is the largest food retailer in Canada, often recognized by its “President’s Choice” brand. On the other hand, PC Bank provides various financial services and constitutes a financial institution for the purposes of the Act.

The supplies disputed in this case relate to PC Bank’s participation in a loyalty program (Loyalty Program), whereby it issues MasterCard credit cards (MasterCard) to customers. Points are accumulated by customers through use of the MasterCard (PCB Points), which can only be redeemed at Loblaw stores and result in discounts on purchases.

The Loyalty Program is administered pursuant to three different agreements between PC Bank, Loblaw and another related entity. As part of the Loyalty Program, PC Bank reimbursed Loblaw for every $1 worth of PCB Points redeemed by customers at a Loblaw store (namely, the Redemption Payments). In turn, PC Bank claimed NITCs as a means to recover the GST/HST applicable on the Redemption Payments by virtue of the Act.

PC Bank was subsequently reassessed by the CRA for the 2009, 2010, 2011 and 2012 years, and denied such NITCs. The CRA took the position that the Redemption Payments were not made in the course of commercial activities (that is, they were instead made via exempt activities) under the Act, such that PC Bank was prohibited from claiming the disputed NITCs. PC Bank then appealed to the TCC.

# Tax Court of Canada

The primary issue before the TCC was whether PC Bank made the Redemption Payments in the course of commercial activities, as required under subsection 181(5) of the Act, and therefore entitled to the NITCs.

- Applying PCB Points is analogous to a customer using a coupon and receiving a discount on a purchase, which for GST/HST purposes invokes the rules under section 181 of the Act. Put simply, a retailer (Loblaw) is deemed to have collected GST/HST on the full purchase price, despite the customer paying a discounted price. Loblaw then expects to be reimbursed for the amount of the discount. PC Bank pays this amount, and by virtue of subsection 181(5), is granted an NITC equal to the “tax fraction” of the value of the redeemed PCB Points (that is, the discount).

As is standard for most GST/HST determinations, the TCC began its analysis by characterizing the supply in which the Redemption Payments were linked to—being either an “exempt” or “taxable” supply (made in the course of a commercial activity). It found that the Redemption Payments were made by PC Bank in the course of its MasterCard activities, and such activities were the provision of exempt financial services under the ETA.

The TCC arrived at this determination on the basis that (a) the core business of PC Bank is to provide financial services; (b) it is contrary to normal commercial practices for

PC Bank's interchange fee revenue to far exceed those received from Loblaw, yet continuing to operate at a loss with respect to its involvement in the Loyalty Program; and (c) the Redemption Payment is consideration paid by PC Bank for having issued the PCB Points.

PC Bank appealed the decision to the FCA.

# Federal Court of Appeal

On appeal, the FCA set aside the TCC's judgment and referred the reassessments back to the CRA for reconsideration on the basis that PC Bank is entitled to the disputed NITCs.

Applying a textual, contextual and purposive analysis, the FCA opined that subsection 181(5) of the ETA does not contemplate an "either/or test"; rather, it permits an amount (such as the Redemption Amount) to be paid in the course of both a commercial activity *and* exempt activity.

**The FCA reasoned that the phrase "in the course of" broadly means "incidental" or "connected to," directly or indirectly.** Had Parliament intended to limit the scope of the phrase, it would have included allocative language that is used elsewhere in the ETA, such as "exclusively," "primarily," "substantially all," or "to the extent of."

As part of its contextual analysis, the FCA extrapolated to other sections of the ETA to exemplify that a payment is capable of being made in more than one activity—as it were, subsection 169(1) allows a registrant to claim an ITC for GST/HST paid on an input *to the extent* that the input is for use in the course of commercial activities. On the concept of ITCs, it also acknowledged the structure of the ETA and section 181 falling within a subdivision referred to as "Special Cases," suggesting that Parliament intended for ITCs on coupon redemptions to be handled in a separate and distinct manner.

In reviewing the purpose, the FCA highlighted that subsection 181(5) operates to prevent an over-remittance of GST/HST to the government, such that imposing an either/or threshold would restrict PC Bank from claiming NITCs, and in turn contravene the purpose of the provision. Similar to other provisions in the ETA, Parliament would have expressly precluded financial institutions (PC Bank) from claiming NITCs.

The FCA acknowledged that PC Bank makes the Redemption Payment in the course of its financial services activity but *also* in the course of its commercial activity of driving customers to Loblaws, which is sufficient for claiming NITCs under subsection 181(5) of the ETA.

## Dissenting Position

Justice Webb authored a robust dissent that was included in the FCA's final judgment, ultimately agreeing with the findings of the TCC. In opining that PC Bank should be precluded from claiming the NITCs, he emphasized that Parliament intended for subsection 181(5) to contemplate a "single payment transaction" that cannot be made 100 per cent in a commercial activity *and* an exempt activity; accordingly, one must assess whether, on a balance of probabilities (> 50 per cent likelihood), the payment

was made in commercial activities. In effect, Justice Webb simply recharacterized the "either/or test" with the "balance of probabilities" standard of proof for purposes of subsection 181(5).

## Takeaways

The FCA's decision in the PC Bank appeal provides an expanded interpretation of the phrase "in the course of a commercial activity" under the ETA, clarifying that a payment can be made in both a commercial and exempt activity where there is an absence of allocative and explicit language that indicates otherwise.

However, it is important to note that for persons operating in the exempt activity / supplies realm, a "commercial" activity or business should not be arbitrarily conceived. With respect to PC Bank, the FCA did note that the business of driving customers to Loblaws arose by virtue of PC Bank's participation in the Loyalty Program; in other words, there must be a basis for a commercial activity to exist in the first instance before attributes such as ITCs can be validly claimed.

## Contact us

If you have questions about the FCA's decision and its effect on NITCs claimed under the *Excise Tax Act*, reach out to the authors of this piece or any member of BLG's Tax Disputes and Commodity Tax groups.

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