Docket: 2015-4080(IT)G

BETWEEN:

CANADIAN WESTERN TRUST COMPANY
AS TRUSTEE OF THE FAREED AHAMED TFSA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on December 12, 13, 14 and 15, 2022,
at Vancouver, British Columbia
Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant:	Timothy W. Clarke
Counsel for the Respondent:	Perry Derksen, Jamie Hansen and Heidi Lee

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JUDGMENT

The appeals for the Appellant's 2009, 2010, 2011, and 2012 taxation years are dismissed, with costs. If the parties cannot agree on costs, the Respondent may file written submissions not exceeding ten pages on or before April 11, 2023, the Appellant may file written submissions not exceeding ten pages on or before May 12, 2023, and the Respondent may file written submissions in response not exceeding five pages on or before May 31, 2023.

Signed at Ottawa, Canada, this 6th day of February 2023.

"David E. Spiro"

Spiro J.

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BETWEEN:

CANADIAN WESTERN TRUST COMPANY
AS TRUSTEE OF THE FAREED AHAMED TFSA,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] These appeals involve an issue of statutory interpretation, namely, whether a Tax-free Savings Account ("TFSA") trust remains exempt from tax if it carries on a business of trading qualified investments. The Appellant says it does while the Crown says it does not.

[2] The only provision at issue is subsection 146.2(6) of the *Income Tax Act* (the "Act")[1]:

146.2(6) No tax is payable under this Part by a trust that is governed by a TFSA on its taxable income for a taxation year, except that, if at any time in the taxation year, it carries on one or more businesses or holds one or more properties that are non-qualified investments (as defined in subsection 207.01(1)) for the trust, tax is payable under this Part by the	146.2(6) Aucun impôt n'est à payer en vertu de la présente partie par une fiducie régie par un compte d'épargne libre d'impôt sur son revenu imposable pour une année d'imposition. Toutefois, si, au cours de l'année, la fiducie exploite une ou plusieurs entreprises ou détient un ou plusieurs biens qui sont, pour elle, des placements non

trust on the amount that would be its taxable income for the taxation year if it had no incomes or losses from sources other than those businesses and properties, and no capital gains or capital losses other than from dispositions of those properties, . . .	admissibles, au sens du paragraphe 207.01(1), l'impôt prévu par la présente partie est à payer par la fiducie sur la somme qui correspondrait à son revenu imposable pour l'année si ses seules sources de revenu ou de perte étaient ces entreprises ou ces biens et ses seuls gains en capital ou pertes en capital découlaient de la disposition de ces biens. . . .

[3] The words at issue are italicized for emphasis:

146.2(6) No tax is payable under this Part by a trust that is governed by a TFSA on its taxable income for a taxation year, except that, if at any time in the taxation year, it *carries on one or more businesses* ... tax is payable under this Part by the trust . . . [emphasis added]	146.2(6) Aucun impôt n'est à payer en vertu de la présente partie par une fiducie régie par un compte d'épargne libre d'impôt sur son revenu imposable pour une année d'imposition. Toutefois, si, au cours de l'année, la fiducie *exploite une ou plusieurs entreprises* ... l'impôt prévu par la présente partie est à payer par la fiducie . . . [nous soulignons]

[4] In reassessing, the Minister of National Revenue (the "Minister") concluded that the Appellant "carried on a business through its trading activities" in 2009, 2010, 2011, and 2012.[2] On the contrary, the Appellant takes the position that "buying and selling qualified investments does not constitute carrying on a business for purposes of subsection 146.2(6)."[3] The parties do not differ on the facts. Neither party called any witnesses as they filed a Partial Agreed Statement of Facts setting out all relevant facts.

[5] In its recent decision in *Rogers Communications*, the Federal Court of Appeal concisely summarized the considerations and authorities relevant to the judicial exercise of statutory interpretation:

> [17] Whether the Competition Tribunal could consider the actual, real matter—the merger and divestiture rather than just the merger—comes down to what the

> *Competition Act* says. To decide that, we analyze the text, context and purpose of the relevant parts of the Act. We do this neutrally, dispassionately and objectively, as lawyers who happen to have a judicial commission, not as policymakers or politicians. Nor do we fiddle around with the authentic meaning of the legislation passed by our elected representatives—for example, by injecting our own preferred policies or personal preferences into the analysis to skew the result. See *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at paras. 41-50 and *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556, citing controlling authorities of the Supreme Court such as *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 and *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. See also the recent Supreme Court authorities to similar effect in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539 and *Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147.[4]

[6] Against this backdrop, the Appellant invited me to apply to a TFSA trust a provision of the Act specifically allowing a Registered Retirement Savings Plan (“RRSP”) to remain exempt from tax if it carries on a business of trading qualified investments.

[7] For the reasons described below under the heading “Textual, Contextual, and Purposive Analysis”, I decline the Appellant’s invitation to apply a provision that Parliament included in the statutory scheme governing RRSPs but chose not to include in the statutory scheme governing TFSA trusts.

[8] As a result of that analysis, I have concluded that income earned by a TFSA trust from carrying on any business, including a business of trading qualified investments, is taxable under subsection 146.2(6) of the Act. As the Appellant carried on a business of trading qualified investments during the years at issue, the appeals must be dismissed.

The Appellant

[9] The Appellant is Canadian Western Trust Company as Trustee of the Fareed Ahamed TFSA. Mr. Ahamed is a professional investor, and an investment advisor, in West Vancouver, British Columbia.[5]

[10] Mr. Ahamed opened a TFSA trust of which he was beneficiary and holder on January 2, 2009. Canadian Western Trust Company was trustee and issuer of the TFSA trust.[6] It was a self-directed TFSA trust, meaning that Mr. Ahamed directed all purchases and sales of securities.[7]

[11] All securities purchased and sold by the TFSA trust were "qualified investments" within the meaning of subsection 207.01(1) of the Act. Most were non-dividend paying and speculative in nature. The majority were penny stocks listed on the TSX Venture Exchange in the junior mining sector. The TFSA trust owned most of the shares for only a short period.[8]

[12] Mr. Ahamed capitalized the TFSA trust by making the maximum allowable contribution of $5,000 in early January 2009, 2010, and 2011.[9] Mr. Ahamed's contributions to the TFSA trust in 2009, 2010 and 2011, and the value of the TFSA trust at the end of each of these years, are shown in the table below:

Taxation Year	Annual contribution to the TFSA trust at the start of the year	Cumulative contributions to the TFSA trust	Value of the TFSA trust at year end
2009	$5,000	$5,000	$54,269.74[10]
2010	$5,000	$10,000	$420,965.14[11]
2011	$5,000	$15,000	$617,371.24[12]

[13] At the end of 2012 the total value of the TFSA trust was $564,482.90.[13] The TFSA trust sold its securities and transferred the proceeds of $547,788.83 to its holder, Mr. Ahamed, in January 2013.[14]

The Reassessments at Issue and Subsection 146.2(6) of the *Income Tax Act*

[14] The Minister reassessed tax to the Appellant for each of the Appellant's 2009, 2010, 2011, and 2012 taxation years.[15] The underlying theory of the reassessments is that the Appellant carried on a business of trading qualified investments in each of those years and, therefore, its income from carrying on that business during each of those years was subject to Part I tax under subsection 146.2(6) of the Act.

[15] The Minister reassessed Part I tax to the Appellant on the basis that its taxable income was $44,270 in 2009, $180,190 in 2010, $330,994[16] in 2011, and $14,027 in 2012.[17] These are the reassessments before the Court.

The Appellant's Argument

[16] The Appellant argues that the Court should use a textual, contextual, and purposive analysis[18] and must apply the "residual presumption" in favour of the taxpayer if a textual, contextual, and purposive analysis fails to produce a result.[19]

A. <u>An RRSP May Carry on Business Trading Qualified Investments</u>

[17] The Appellant relies heavily on the Registered Retirement Savings Plan ("RRSP") provisions of the Act and, in particular, paragraph 146(4)(b) which, during the years at issue, effectively exempted from Part I tax any income earned by an RRSP from carrying on a business of trading qualified investments:

> 146(4) . . . no tax is payable under this Part by a trust on the taxable income of the trust for a taxation year if, throughout the period in the year during which the trust was in existence, the trust was governed by a registered retirement savings plan, except that
>
> ***
>
> (b) . . . *if the trust has carried on any business or businesses in the year*, tax is payable under this Part by the trust on the amount, if any, by which
>
> (i) the amount that its taxable income for the year would be if it had no incomes or losses from sources other than from that business or those businesses, as the case may be,
>
> exceeds
>
> (ii) such portion of the amount determined under subparagraph 146(4)(b)(i) in respect of the trust for the year as can reasonably be considered to be *income from, or from the disposition of, qualified investments* for the trust; . . .
>
> [emphasis added]

[18] Under paragraph 146(4)(b) of the Act, an RRSP remains entirely tax-exempt even if it carried on a business of trading qualified investments.

B. Parliament's Only Purpose in Taxing Income From Carrying on Business is to Prevent Unfair Competition

[19] The Appellant argues that Parliament has enacted safeguards to prevent registered charities, non-profit organizations, and pension real estate corporations from competing unfairly with taxable entities. With respect to charities, Parliament has made them taxable on "unrelated business income". With respect to non-profit organizations, Parliament allows them to undertake significant business activities but only if the "preponderant purpose" of those activities is connected to the organization's non-profit activities. With respect to pension real estate corporations, Parliament requires them to hold real property as capital property and not inventory.

[20] The only issue Parliament is concerned with in such circumstances is unfair competition between exempt entities and taxable entities.

[21] There could have been no legislative purpose for making a TFSA trust taxable on the income from carrying on a business of trading qualified investments when an RRSP carrying on the very same business is not taxable. Why is that the case? First, RRSPs and TFSAs are "mirror images" of each other and offer identical after-tax rates of return.[20] Second, carrying on a business of trading qualified investments in an RRSP or a TFSA trust creates no competition at all with taxable entities carrying on the same business.

[22] The Appellant, therefore, contends there would have been no rational legislative purpose for Parliament to tax a TFSA trust carrying on a business of trading qualified investments while exempting an RRSP carrying on the very same business.

C. The Court Should Adopt a New Test for "Carrying on Business"

[23] The Appellant focuses on the traditional test used by the courts to distinguish between securities transactions on income account and those on capital account (the "traditional test")[21]. The elements of the traditional test include:

(a) frequency of transactions;

(b) period of ownership;

(c) knowledge of securities markets;

(d) security transactions forming part of the taxpayer’s ordinary business;

(e) time spent researching securities markets and potential purchases;

(f) the extent to which debt financing is used;

(g) advertising; and

(h) in the case of shares, whether they are speculative in nature or dividend-paying.

[24] The Appellant argues that the traditional test was not judicially created with a view to determining whether a non-taxable entity, such as a TFSA trust, was carrying on a business of trading qualified investments. This Court should, therefore, craft a new test recognizing that TFSA investors are obliged to follow a set of restrictions that do not apply to taxable investors:

Statutory restrictions on TFSA investors include:	**Taxable investors may undertake the following activities without any statutory restriction:**
(a) cannot contribute more than the TFSA dollar limit each year;	(a) may contribute as much as they can afford to invest each year;
(b) cannot deduct annual contributions in computing income;	(b) may deduct in computing income amounts borrowed to purchase investments;
(c) cannot borrow within the TFSA trust;	(c) may borrow as much as a lender will advance to purchase investments;
(d) cannot deduct interest on borrowed money used to contribute to a TFSA;	(d) may deduct interest on the money borrowed;
(e) cannot apply losses incurred in the TFSA trust against income realized outside of the TFSA trust;	(e) may apply investment losses against investment income;
(f) cannot invest in non-qualified investments;	(f) may invest in anything;
(g) cannot sell short; and	(g) may go long or sell short; and

Statutory restrictions on TFSA investors include:	Taxable investors may undertake the following activities without any statutory restriction:
(h) cannot enter into hedging transactions.	(h) may hedge their exposure to risk.

[25] The Appellant argues that an individual investing within a TFSA trust and an individual investing outside a TFSA trust would use different investment strategies. For example, a taxable investor may sell short in a bear market while a TFSA investor is precluded from doing the same. A taxable investor may undertake risky investments and hedge their downside risk while a TFSA investor is precluded from doing so. Accordingly, argues the Appellant, the investment strategy of a rational TFSA investor would include the following considerations:

1. Because income may be withdrawn free of tax from a TFSA trust, a TFSA investor would be inclined to assume more risk — with the prospect of greater reward — than a taxable investor.

2. Because income accrues free of tax within a TFSA trust, a TFSA investor would be more inclined to sell to realize gains earlier and more often than a taxable investor.

3. Because losses within a TFSA trust are not deductible from other income, a TFSA investor would be more inclined to sell to cut losses earlier and more often than a taxable investor.

[26] For those reasons, the Appellant argues that a rational TFSA investor would invest in riskier and more speculative securities with greater upside potential and would trade those securities more often than a taxable investor.[22] In light of these investment realities, the traditional test the courts have used to distinguish between gains and losses on income and capital account for securities transactions should not determine whether a TFSA trust is carrying on a business of trading in qualified securities.

[27] The traditional test fails because two of its most important elements — the number and frequency of transactions and the speculative nature of the investments — are stacked against the taxpayer. In addition, several other elements of the traditional test do not apply. For example, a TFSA trust cannot borrow, so that

element is inapplicable. A TFSA trust would not advertise, so that element is inapplicable as well.

[28] The only elements of the traditional test left standing are knowledge of the securities markets, whether investing is part of the holder's ordinary business, and time spent researching investments. In other words, whether the TFSA investor is experienced, knowledgeable, and well-informed. As the traditional test would make professional investors such as Mr. Ahamed taxable, those investors would never be able to reap the full benefits of investing in a TFSA trust. Discrimination against professional investors could not have been one of Parliament's purposes.

[29] To address the deficiencies of the traditional test in this context, the Appellant proposes a new test. The Appellant's proposed test asks three questions:[23]

1. Did the TFSA trust's business occupy the taxpayer's time, attention, and labour?

2. Did the TFSA trust incur liabilities in the course of its business?

3. Was the purpose of the TFSA trust to provide a livelihood to the taxpayer?

[30] For the Minister to prevail, all three questions must be answered in the affirmative. Admittedly, the TFSA trust occupied Mr. Ahamed's time, attention, and labour, but TFSA trusts cannot incur liabilities and the purpose of this TFSA trust was not to provide Mr. Ahamed's livelihood. Accordingly, the Court should find that the TFSA trust did not carry on a business of trading qualified investments during the taxation years in issue.

D. *Obiter* from *Prochuk*

[31] In this Court's decision in *Prochuk*, it was held that the appellant's losses were on capital account and were, therefore, not deductible in computing income. In that case, the appellant lost $186,250 from investing in a fraudulent scheme.[24] He deducted the loss against his other income as a business loss.[25] He argued that the loss was deductible in computing his income because he was in the business of trading. He pointed to the level of trading activity within his own RRSP as evidence that he carried on such a business outside his RRSP.[26]

[32] In concluding that the appellant's loss was on capital account, this Court held that the level of trading activity within an RRSP cannot be considered in determining whether a taxpayer was in the business of trading outside his RRSP. This Court said:

> [48] …the Act treats an individual who trades within his RRSP differently than a taxpayer who is in the business of trading. For this reason, *trades within an RRSP are not relevant in deciding whether an individual is in the business of trading*.[27]
>
> [emphasis added]

[33] The Appellant argues that in *Prochuk*, this Court noted in *obiter* an "essential finding"[28] that trading qualified investments cannot constitute the "carrying on of a business" within an RRSP. In the course of its reasons, this Court made the following observations:

> [49] Counsel for the respondent pointed to the decision of Justice C. Miller of this Court in *Deep v. R.*, 2006 TCC 315, 2006 D.T.C. 3033 (Eng.) (T.C.C. [General Procedure]) in support of the proposition that trading within an RRSP does not amount to business income.
>
> [50] In *Deep*, there were a number of questions in issue, including whether Mr. Deep was engaged in the business of trading in stock and financial instruments. With respect to trading within an RRSP, Justice Miller stated as follows at paragraph 51:
>
>> ... He provided no evidence of any extensive trading activity during those years, nor do his tax returns reflect any level of activity that would constitute trading as a business. Even his own testimony was the trading he carried on was within his RRSP. This is not the carrying on of a business.

> [51] Accordingly, I am satisfied that *trading within an RRSP does not amount to carrying on the business of trading.*[29]
>
> [emphasis added]

[34] Although the statement at paragraph 51 of *Prochuk* was made in the RRSP context and was *obiter*, there is no reason why it should not apply in the TFSA context.

The Crown's Argument

[35] In interpreting the meaning of a statutory provision, the Court should read the words of the Act 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. Statutory interpretation reveals Parliament's legislative intent by examining the text, context and purpose of a statutory provision.[30]

A. Parliament's Primary Purpose

[36] The TFSA was introduced in the February 2008 Budget. The legislative framework for TFSAs is set out in section 146.2 of the Act and applies for 2009 and subsequent taxation years. A TFSA is a general-purpose savings account that allows individuals to contribute each year and withdraw funds at any time for any purpose. Generally, income (including capital gains) earned within a TFSA is not subject to tax and distributions from a TFSA are received tax-free.

[37] TFSA contributions are not deductible in computing an individual's income for a taxation year. Paragraph 149(1)(u.2) of the Act provides that the taxable income of a trust governed by a TFSA is exempt from Part I tax to the extent provided by section 146.2. The terms of that tax exemption are specifically set out in subsection 146.2(6) of the Act.

B. Parliament's Secondary Purposes

[38] Subsection 146.2(6) provides that a TFSA trust is exempt from tax on its taxable income for a taxation year, subject to two exceptions. The exemption is lost if, at any time in the taxation year, the trust (a) holds one or more properties that are non-qualified investments or (b) carries on one or more businesses.

[39] If either or both exceptions apply, tax is payable by the TFSA trust on the amount that would be its taxable income for the taxation year if it had no income or loss from sources other than those properties (i.e., properties that are non-qualified investments) or businesses, and no capital gains or capital losses other than from dispositions of those properties.

(1) Limiting Investments in a TFSA Trust to "Qualified Investments"

[40] Since a TFSA is liable for tax on any income from non-qualified investments, the rules distinguish between qualified and non-qualified investments. To remain exempt from tax, TFSAs must limit their investments to qualified investments. The definition of a "qualified investment" for a trust governed by a TFSA is set out in subsection 207.01(1) of the Act, which includes an investment that would be described by any of paragraphs (a) to (d), (f) and (g) of the definition of "qualified investment" in section 204. Investments prescribed in section 4900 of the *Income Tax Regulations* are included in the definition of a "qualified investment" in subsection 207.01(1) of the Act. By virtue of the applicable paragraphs of the definition of a "qualified investment" in section 204 of the Act, the following are qualified investments for a TFSA:

1. money – paragraph (a);

2. certain debt obligations – paragraphs (b), (c) and (c.1);

3. certain securities that are listed on a designated stock exchange – paragraph (d);

4. certain guaranteed investment certificates – paragraph (f); and

5. certain investment contracts – paragraph (g).

[41] Subsection 146.2(6) of the Act adopts the definition of "non-qualified investments" in subsection 207.01(1). Subsection 207.01(1) provides that a "non-qualified investment" for a trust governed by a TFSA means property that is not a qualified investment for the trust.

(2) Limiting Investment Activity in a TFSA Trust to Passive Investment

[42] The Act does not provide a general definition of a "business" but does include specific activities in the extended non-exhaustive definition of "business" in subsection 248(1). In particular, subsection 248(1) extends the meaning of "business" to include a profession, calling, trade, manufacture or undertaking of any kind whatever and an adventure or concern in the nature of trade. The traditional common law definition of the term "business" is "anything that occupies the time and attention and labour of a man for the purpose of profit".[31] No single factor is determinative. The quintessential characteristics of business are activity, enterprise, entrepreneurship, commercial risk and the pursuit of profit.

[43] The verb "carries on", in the phrase "carries on one or more business" in subsection 146.2(6), implies a level of activity. When Parliament passed section 146.2 of the TFSA legislation in 2008, it was already well-established that a taxpayer could carry on business by trading in securities, which would give rise to income from business. The established legal principles applicable to determining whether a taxpayer carries on business by trading in securities that gives rise to business income were entrenched in the jurisprudence by 2008. Indeed, by 1981, the case law was so clear that a taxpayer's transactions in securities could amount to carrying on business that the Department of National Revenue (the CRA's predecessor) issued Interpretation Bulletin IT-479R. Interpretation Bulletin IT-479R correctly states that depending on the taxpayer's entire course of conduct, transactions in securities could amount to carrying on business, any proceeds from which would be taxable on income account. In 1993, the Federal Court of Appeal in *Vancouver Art Metal Works Ltd.* emphasized that it is a question of fact whether trading securities amounted to carrying on a business and set out certain factors relevant to such a determination.[32] Those factors included the frequency of transactions, the duration of holdings, the intention to acquire for resale at a profit, the nature and quantity of the securities held, or the subject matter of the transaction, and the time spent on the activity.

[44] Parliament is presumed to know the legal context in which it legislates.[33] But even ignoring the presumption, given the overwhelming jurisprudence, it is inconceivable that Parliament was not aware that trading in securities could amount to the carrying on of a business when it passed the TFSA legislation in 2008.

C. The Text of Subsection 146.2(6) is Clear and Unambiguous

[45] Having regard to the well-established meaning of the words used in subsection 146.2(6), a TFSA that carries on business, including the business of trading in qualified investments, is not tax exempt. Apart from the narrow carve-out in section 253.1, the exception has no other conditions, qualifications or carve-outs (leaving aside the computational rules in paragraphs 146.2(6)(a) to (c) of the Act).

[46] The Appellant's interpretation would require the Court to read into the text of subsection 146.2(6) further conditions or qualifications to find that the words "carries on one or more businesses" excludes a TFSA that carries on business by trading qualified investments. This would insert unexpressed exceptions into the provision, contrary to the directions of the Supreme Court of Canada in *Canada Trustco*.[34]

[47] Stated another way, accepting the Appellant's interpretation would require a judicial redrafting of subsection 146.2(6). But it is a basic principle of statutory interpretation that the Court should not accept an interpretation which requires it to add words where there is, as here, another acceptable interpretation that does not require any additional wording.[35] Moreover, a judicial amendment by re-writing the text of subsection 146.2(6) or reading words into the provision would usurp Parliament's role and disregard Parliament's intent.[36]

[48] The text of subsection 146.2(6) does not give rise to more than one reasonable interpretation. The ordinary meaning of the words of subsection 146.2(6) should play a dominant role in the interpretive process as the words are precise and unequivocal.[37] Even where the words of a provision are precise and unequivocal, the legislative context and purpose must be examined. But this is not a license to overlook the text or extend the meaning of a provision beyond what its words will allow.[38]

D. <u>A TFSA is Not an RRSP</u>

[49] The RRSP and RRIF provisions, like the TFSA provisions, are located in Division G of Part I of the Act, titled "Deferred and Other Special Income Arrangements". In addition to section 146.2, Division G establishes the legislative framework for:

a) registered retirement savings plans (RRSPs) in section 146;

b) registered retirement income plans (RRIFs) in section 146.3;

c) registered education savings plans (RESPs) in section 146.1;

d) registered disability savings plans (RDSPs) in section 146.4; and

e) pooled registered pension plans (PRPPs) in section 147.5 (effective December 14, 2012).

[50] The RRSP and RRIF rules provide that if an RRSP or RRIF has carried on any business or businesses in a taxation year, the portion of its taxable income that may reasonably be considered to be income from, or from the disposition of, qualified investments is exempt from tax. As such, if an RRSP or RRIF engages in business through active or “day trading” of various securities, the RRSP or RRIF would not be taxable on the income derived from that business provided that the trading activities are limited to buying and selling qualified investments.

[51] Parliament could have adopted, but chose not to adopt, the same statutory approach for TFSAs as it did for RRSPs and RRIFs. This further shows that Parliament did not intend to exempt business income from the disposition of qualified investments held in a TFSA from tax under Part I of the Act. The rules applicable to RRSPs differ somewhat from those applicable to TFSAs. Foremost is that contributions to an RRSP are deductible in computing the taxpayer’s income for a taxation year, subject to an annual RRSP deduction limit. The other key difference is that amounts withdrawn from an RRSP are included in computing the taxpayer’s income in the year of receipt.

[52] Under subsection 146(4) of the Act, and subject to certain exceptions, no tax is payable on the taxable income of a trust if, throughout the period in the year during which the trust was in existence, the trust was governed by an RRSP. Two exceptions, which are concerned with whether the trust has borrowed money or the annuitant of the RRSP has died, are not relevant here. The third exception in paragraph 146(4)(b) is key. Paragraph 146(4)(b) provides that if the RRSP trust has carried on any business or businesses in the year, it will be liable for Part I tax on the difference between:

(i) the amount that its taxable income for the year would be if it had no income or losses from sources other than from that business or those businesses;

and (minus)

(ii) such portion of the amount above for the year as can reasonably be considered to be income from, or from the disposition of, qualified investments for the trust.

[53] The effect of subparagraphs 146(4)(b)(i) and (ii) of the Act is that under the RRSP rules, an RRSP trust must pay tax under Part I on the amount that would be its taxable income for the year from carrying on a business, but excluding any business income that can reasonably be considered to be derived from, or from the disposition of, qualified investments.

[54] The Appellant seeks judicial approval of an interpretation of subsection 146.2(6) which is applicable to TFSA trusts and that accords with the text of subsection 146(4). But subsection 146(4) of the Act does not apply to TFSA trusts.

[55] Had Parliament intended to exempt from Part I tax the business income of a TFSA trading in qualified investments, it could have used the legislative framework found in subsection 146(4) of the Act. Parliament did not do so. This deliberate choice confirms the different meaning of subsection 146.2(6) arising from the different text. The use of different expressions in subsections 146.2(6) and 146(4) necessarily means that Parliament did not intend for the two expressions to be synonymous. There is no logical basis for giving the same meaning to the different words in subsections 146.2(6) and 146(4).

[56] The reason for Parliament's more permissive treatment of RRSPs is readily apparent; funds withdrawn from an RRSP are taxable as ordinary income. Thus, an RRSP provides only a deferral of tax. In contrast, funds withdrawn from a TFSA are permanently exempt from tax, unless the exception in subsection 146.2(6) applies. Moreover, the basis for the contextual distinction between the rules governing these different types of registered plans is made even more apparent by the legislative history of RRSPs. The RRSP rules did not always exempt the business income of an RRSP from, or from the disposition of, qualified investments, from Part I tax. From 1972 to 1993, the RRSP framework included an exception that was nearly identical to the TFSA exception at issue.

[57] In February 1993, the Minister of Finance released draft legislation and explanatory notes in respect of proposed changes to the RRSP rules. The proposed changes included an amendment to revise paragraph 146(4)(b) to its present form.[39] The explanatory notes stated:

> Subsection 146(4) of the Income Tax Act generally provides that no tax is payable by trusts governed by registered retirement savings plans (RRSPs) except in specified circumstances. Subsection 146.3(3) is a similar provision for trusts governed by registered retirement income funds (RRIFs). This exemption does not, however, extend to income from the carrying on of a business.
>
> Paragraphs 146(4)(b) and 146.3(3)(e) are amended so that this exemption extends to business income from, or from the disposition of, a qualified investment for RRSPs and RRIFs. The amendments recognize that business income may be allocated to units in limited partnerships that are held by RRSPs and RRIFs. The amendments also recognize that the disposition of qualified investments by RRSPs and RRIFs may, in some circumstances, result in business income. …[40]

[58] Following a change of government, the draft legislation was reintroduced and paragraph 146(4)(b) was amended. The explanatory notes released in May 1994 reflect the same purpose for the amendment. The legislative history of paragraph 146(4)(b) demonstrates that Parliament has carefully and deliberately chosen to exempt from Part I tax the income of an RRSP trust that carries on business, to the extent that the business income may reasonably be considered to be income from, or from the disposition of, qualified investments.

[59] Had Parliament also intended to exempt from tax a TFSA's income from carrying on a particular type of business — trading qualified investments — Parliament would have legislated accordingly, just as it had for RRSPs. The structural differences between the RRSP and TFSA rules show that income of an RRSP trust earned from carrying on a business of trading qualified investments will eventually be taxed as ordinary income when withdrawn from the RRSP. But because withdrawals from a TFSA are not taxed, income of the same nature would permanently escape taxation without the exception in subsection 146.2(6).

[60] A contextual analysis of subsection 146(4) and the provisions applicable to RRSPs support the conclusion that Parliament intentionally chose not to exempt income of a TFSA from tax if the TFSA carries on a business of trading qualified investments. TFSAs have a cost to the fisc in the form of foregone tax revenues. Parliament had to enact rules to protect the integrity of the tax system by limiting the tax exemptions for TFSAs through restrictions in subsection 146.2(6) and other anti-avoidance rules.

[61] The TFSA scheme was uniquely designed to allow Canadians to increase their savings by earning tax-free investment income[41] such as capital gains, interest and dividends, and not to enable the carrying on of business tax-free. As such, the

Appellant's argument is not supported by a purposive interpretation of subsection 146.2(6). The TFSA regime was introduced in the February 2008 Budget to "reduce the taxation of savings" and incentivize savings, not to incentivize the carrying on of businesses trading qualified investments.

[62] The 2008 Budget Supplementary Information states that TFSAs were proposed as a flexible registered savings account that would help Canadians with their different savings needs over their lifetime. The tax assistance provided by a TFSA was described as, in many ways, the mirror (i.e., reverse) image of that provided through RRSPs:

a) RRSP contributions are tax deductible, with both contributions and the investment earnings taxable upon withdrawal; and

b) TFSA contributions are made from after-tax income, with both the contributions and the investment earnings exempt from Part I tax upon withdrawal.

[63] Commentary released by the Department of Finance in respect of the 2008 Budget recognized that the TFSA would allow Canadian resident individuals to earn investment income, including interest, dividends and capital gains, on a tax-free basis. Parliament did not legislate the exceptions to the tax exemption in subsection 146.2(6) for no reason. When considered in light of the overall structure of the TFSA rules, the purpose of the exception in subsection 146.2(6) — which makes income from the carrying on of one or more businesses by a TFSA taxable — is to ensure that the tax exemption is restricted to the passive holding of qualified investments.

E. *Obiter* from *Prochuk*

[64] *Prochuk* does not support the Appellant's interpretation of subsection 146.2(6) of the Act. The issue in *Prochuk* was whether Mr. Prochuk was entitled to claim a business loss for the 2007 taxation year in respect of a failed investment in a foreign exchange currency fund. The Crown argued that Mr. Prochuk was not entitled to claim a business loss because he was not in the business of trading, and the investment was not an adventure in the nature of trade. Mr. Prochuk testified that, starting in 2000, he made his livelihood from gains made in his RRSP. He argued that he spent his life trading and since 2000 had run a business within his RRSP, with significant gains, showing that he was an active trader, all in support of the position that he was in the business of trading and should be allowed to deduct trading losses incurred outside his RRSP.

[65] This Court acknowledged that it was a question of fact whether Mr. Prochuk was a trader and, after considering the factors in *Vancouver Art Metal Works*, concluded that he was not a trader. The Court also concluded that trades within an RRSP are not relevant in deciding whether an individual (rather than the RRSP trust) is in the business of trading. In reaching this conclusion, this Court made an *obiter* statement that trading within an RRSP does not amount to carrying on the business of trading. To the extent that this statement is read as support for the Court's conclusion that trading within an RRSP trust does not amount to carrying on the business of trading outside the RRSP, the Crown takes no issue. But if this Court meant to say in *Prochuk* that trading within an RRSP cannot amount to the carrying on of business by the RRSP trust, the statement, respectfully, is *per incuriam*. There is no indication that the Court considered paragraph 146(4)(b) — which expressly contemplates an RRSP trust carrying on business trading in qualified investments — and the Crown did not bring that provision to the Court's attention.

Textual, Contextual, and Purposive Analysis

A. Text

[66] We begin with the relevant text from subsection 146.2(6) of the Act:

146.2(6) No tax is payable under this Part by a trust that is governed by a TFSA on its taxable income for a taxation year, except that, if at any time	146.2(6) Aucun impôt n'est à payer en vertu de la présente partie par une fiducie régie par un compte d'épargne libre d'impôt sur son revenu

in the taxation year, it *carries on one or more businesses* ... tax is payable under this Part by the trust ...	imposable pour une année d'imposition. Toutefois, si, au cours de l'année, la fiducie *exploite une ou plusieurs entreprises* ... l'impôt prévu par la présente partie est à payer par la fiducie …
[emphasis added]	[nous soulignons]

[67] The words "carries on one or more businesses" are broad enough to capture all businesses, including a business of trading qualified investments. Before considering context and purpose, it is important to reflect on the centrality of statutory language in interpreting the text. In a recent essay, Pooja Mihailovich notes that the Supreme Court of Canada consistently emphasizes the primacy of text. She observes that:

> . . . in considering the relative weight to be afforded to text, context, and purpose in the tax context, the court has emphasized the primacy of text. For instance, in *Alta Energy*, a majority of the Supreme Court clarified that where tax provisions are drafted with "particularity and detail," a largely textual interpretation is appropriate. Similarly, in *Loblaw Financial*, the court unanimously held that in applying the unified approach, courts should focus carefully on the text and context in assessing the purpose of the relevant statutory scheme, especially if it is detailed and the provisions in issue are otherwise precise and unequivocal.[42]

B. Context

[68] Context includes both internal and external context. Internal context includes (a) the words in the context of the provision in which they are situated and (b) the provision in the context of the Act in which it is situated.[43]

[69] Subsection 146.2(6) forms part of Division G of Part I of the Act. Division G, as it stood in early 2009 included 13 sections:

> DIVISION G - Deferred and Other Special Income Arrangements
> 144 Employees Profit Sharing Plans
> 145 Registered Supplementary Unemployment Benefit Plans
> 146 Registered Retirement Savings Plans
> 146.01 Home Buyers' Plan
> 146.02 Lifelong Learning Plan
> 146.1 Registered Education Savings Plans
> 146.2 Tax-free Savings Accounts

146.3 Registered Retirement Income Funds
146.4 Registered Disability Savings Plan
147 Deferred Profit Sharing Plans
147.1 Registered Pension Plans
148 Life Insurance Policies
148.1 Eligible Funeral Arrangements

[70] Each of these sections constitutes a separate statutory scheme. Each has its own definition section and its own set of detailed provisions reflecting its legislative purposes. Absent statutory direction to the contrary, their components are not interchangeable.

[71] The RRSP regime set out in section 146 is a statutory scheme separate from the TFSA trust regime set out in section 146.2. This is apparent from the differences between the two schemes:

1. There is no minimum age to contribute to an RRSP[44] while an individual must be 18 or older to contribute to a TFSA.[45]

2. One's last opportunity to contribute to their RRSP is the end of the year in which they turn 71[46] while there is no maximum age to contribute to a TFSA.[47]

3. Contributions to an RRSP are fixed in accordance with an individual's "earned income" for the previous year up to the RRSP dollar limit (18% of earned income in the previous year to a maximum of $30,780 for 2023)[48] while contributions to a TFSA are fixed at the same inflation-adjusted dollar amount for everyone ($6,500 for 2023)[49] regardless of whether they had any earned income in the previous year.[50]

4. The deadline to contribute to an RRSP in respect of the previous year is the first 60 days of the following year[51] while there is no contribution deadline for a TFSA. Rather, individuals can contribute to their TFSA at any time, as long as they have unused TFSA contribution room. Additional contribution room for a TFSA accrues on January 1 each year.[52]

5. Contributions to an RRSP are deductible in computing income (subject to an annual deduction limit)[53] while contributions to a TFSA are not.[54]

6. The holder of an RRSP may benefit by contributing to their spouse's RRSP[55] while there is no provision allowing a TFSA holder to contribute to their spouse's TFSA.[56]

7. Income within an RRSP accrues on a tax-deferred basis[57] while income within a TFSA accrues on a tax-free basis.[58]

8. There is no provision allowing withdrawals from an RRSP to be re-contributed[59] while withdrawals from a TFSA may be re-contributed the following year.[60]

9. Withdrawals from an RRSP are taxable in the year of withdrawal[61] while withdrawals from a TFSA are not taxable at all.[62]

10. Withdrawals from an RRSP may affect the holder's entitlement to federal income-tested benefits and tax credits[63] while withdrawals from a TFSA do not.[64]

[72] As to external context, subsection 146.2(6) incorporates by reference the well-established judicial test for "carrying on business". The nature of that test would have been abundantly clear when Parliament passed subsection 146.2(6) of the Act in 2008 and included it as part of the TFSA regime.[65]

C. Purpose

[73] We begin the purposive analysis by ascertaining the primary purpose of the TFSA legislation. In *Louie*, this Court noted that the TFSA was designed to encourage Canadians to save and invest:

> [32] The general purpose of tax-free savings accounts is to encourage households to invest. In the 2008 budget introducing the tax-free savings accounts, the Department of Finance explained the tax savings that could be realized supposing a 5.5% rate of return on investments generating diversified income (40% interest, 30% dividends and 30% capital gains). The plan was that tax-free savings accounts would improve incentives for people with low and modest incomes to save … [66]

[74] In dismissing the taxpayer's appeal and allowing the Crown's cross-appeal in *Louie*, the Federal Court of Appeal restated the purpose of the TFSA:

> [1] Tax Free Savings Accounts were designed to allow Canadians to increase their savings by earning tax-free investment income. While contributions to a TFSA are

> not tax-deductible, gains earned within a TFSA are generally not taxed. There are exceptions to this general principle.[67]

[75] Finally, in *Hunt*, this Court reiterated that the purpose of the TFSA regime is to encourage savings:

> [59] The TFSA regime is a benefit-conferring structure introduced to encourage personal savings by taxpayers by exempting tax from the income otherwise earned on savings. …[68]

[76] How did Parliament intend to achieve this primary purpose? To answer that question, we must consider the limits that Parliament chose in order to achieve its overall objective in a fiscally responsible way.[69] As Professor Sullivan notes, the "legislature never pursues a goal single-mindedly, without qualification, and at all costs. There are always additional or competing factors to be taken into account."[70] As Martin J. stated for the majority of the Supreme Court of Canada in *Rafilovich*:

> [29] I accept that Parliament had several objectives in mind when it enacted this comprehensive proceeds of crime regime: what Professor Sullivan refers to as "the desired mix of goals" (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 409).
>
> [30] When interpreting a complex scheme such as this one, it is necessary to avoid fixating on one objective to the exclusion of others. As Professor Sullivan explains, secondary purposes must be given an active role in the statutory interpretation analysis:
>
>> While legislation may be enacted to promote a primary policy or principle, the primary goals of legislation are almost never pursued single-mindedly or whole-heartedly; various secondary principles and policies are inevitably included in a way that qualifies or modifies the pursuit of the primary goals. Observing the principles of fairness or natural justice, for example, may preclude adopting the most efficient and cost-effective means of pursuing a policy like national security . . . .
>>
>> Secondary purposes are not often mentioned in the preamble to legislation or in formal purpose statements. It is through analysis of the legislative scheme, and more particularly through analysis of the relation of each provision to the others in the Act, that these secondary purposes are revealed. [Footnotes omitted in original; p 271.][71]

[77] In *Sun Indalex Finance, LLC v United Steelworkers*, Cromwell J. cautioned that primary legislative purposes, however important, "are not pursued at all costs and are clearly intended to be balanced with other important interests within the context of a carefully calibrated scheme".[72]

[78] As we have already seen, Parliament's primary purpose for creating the TFSA was to encourage savings. Its secondary purposes were to achieve that objective within certain limits, including a limit on the type of income that could accumulate tax-free within a TFSA. Whatever one may think of the merits of the policy behind such a limitation, Parliament has described that limitation in the words of subsection 146.2(6) of the Act.

[79] In subsection 146.2(6) of the Act, Parliament provided that income from a TFSA trust carrying on one or more businesses will be taxable under Part I of the Act. So long as the business is one that may be "carried on" (i.e., not an "adventure in the nature of trade")[73] all businesses — without statutory exception — fall within the scope of subsection 146.2(6) of the Act, including a business of trading qualified investments.

[80] Had one of Parliament's purposes been to extend the scope of the tax exemption to TFSA trusts carrying on a business of trading qualified investments, Parliament would have said so. It had already done so in the context of a different statutory scheme when it amended the RRSP legislation in 1993 to make such an exception for RRSPs. Parliament simply chose not to provide such an exception for TFSAs.[74]

D. <u>Applying Subsection 146.2(6) to the Agreed Facts</u>

[81] Applying the law to the facts, the Appellant's income from carrying on a business of trading qualified investments is subject to tax under subsection 146.2(6) for each of the taxation years reassessed by the Minister. As directed by Mr. Ahamed, the Appellant traded frequently, had an extensive history of buying and selling shares that were mostly speculative in nature, and owned the shares for short periods. In light of Mr. Ahamed's knowledge and experience in the securities market as a professional investment advisor, and the considerable time he spent researching securities markets, there can be no doubt that the Appellant carried on a business of trading qualified investments for each of the taxation years at issue.

<u>Ruling on the "Pook Letter"</u>

[82] Before the hearing began, the Appellant made a motion asking me to consider a letter from one federal government department to another as an "extrinsic aid" in interpreting subsection 146.2(6) of the Act.[75] The Crown opposed the Appellant's motion. I heard submissions from both parties and ruled that I would not consider what the Appellant called the "Pook Letter" as an extrinsic aid. I promised to give my reasons later. I do so now.

[83] By way of background, the Pook Letter is a copy of a letter sent in 1969 from David R. Pook, Director of the Policy and Legislation Division at Revenue Canada (predecessor to the Canada Revenue Agency) to J.R. Brown, Senior Tax Adviser at the Department of Finance, expressing certain concerns of Revenue Canada with respect to the RRSP regime as it stood at the time. The letter was sent on the eve of tax reform.

[84] One of the changes made to the RRSP regime in 1972 as part of tax reform was a limitation on RRSPs carrying on a business. If they did so, the income from such a business would be taxable.

[85] Appellant's counsel argued that I should consider the Pook Letter an "extrinsic aid" in interpreting the text of subsection 146.2(6) of the Act. Counsel submitted that it was the Pook Letter that caused the Department of Finance to propose, and Parliament to pass, legislation in the early 1970s making the income of an RRSP from carrying on a business taxable. In particular, counsel for the Appellant relies on excerpts from the Pook Letter reflecting Revenue Canada's concern that some RRSPs were carrying on business in competition with taxable entities. Counsel contends, based on the Pook Letter, that preventing unfair competition was Parliament's only purpose in passing the legislation taxing RRSPs that carried on business.

[86] Appellant's counsel argued, based on the Pook Letter, that because preventing unfair competition was Parliament's only purpose in the early 1970s for taxing RRSPs that carried on business, preventing unfair competition must have been Parliament's sole purpose in passing the 2008 TFSA legislation taxing TFSAs that carried on business.

[87] Accordingly, says the Appellant, as a TFSA trust that carries on business trading qualified investments does not compete with anyone, the limitation in subsection 146.2(6) of the Act should only apply to businesses that compete unfairly with other businesses, namely, any business other than a business of trading in qualified investments.

[88] I ruled against the Appellant on the motion as its submissions reflected an unduly narrow view of Parliamentary purposes in passing a carefully calibrated statutory scheme such as the TFSA regime. Rather than taking into account a range of purposes, as the law requires, the Appellant invited me to find that the Pook Letter tells us everything we need to know about Parliament's purpose in passing subsection 146.2(6) of the Act.

[89] The Appellant's submissions on this point are incorrect in law because an unexpressed policy (i.e., preventing unfair competition) cannot override clear legislative text.[76] A purported statutory purpose gleaned from interdepartmental correspondence in the context of one statutory scheme cannot override the clear words of a provision passed by Parliament some 40 years later in the context of another statutory scheme. As Pooja Mihailovich points out, statutory purpose "is inferred from text and is not a freestanding licence to override text".[77] She correctly observes that:

> . . . in the context of conducting statutory interpretation, the purpose of a provision is determined according to what the legislature concluded the purpose was and by the words the legislature used to represent that conclusion, not what a court divines the purpose to be.[78]
>
> ***
>
> . . . the text of a provision is almost always the best evidence of its purpose. It is certainly more reliable than unexpressed intentions or abstract, tangential purposes that must be discerned by an uncharted exploration into legislative history and other extrinsic aids, with no rules guiding the proper use of such material.[79]

[90] The text of subsection 146.2(6) of the Act tells us that any business carried on by a TFSA renders the TFSA's income from that source taxable. There is no basis within the text of that provision, or elsewhere in the Act, to restrict the scope of the words "carries on one or more businesses" in subsection 146.2(6) to businesses that compete unfairly with other businesses.

Conclusion

[91] In 2008, Parliament chose to adopt a legislative scheme for TFSA trusts that was less permissive than the legislative scheme it chose when it amended the RRSP regime in 1993. The Appellant asks the Court to interpret the words used by Parliament in the TFSA provisions as though they were the same words used by Parliament in amending the RRSP regime in 1993.

[92] This Court has no power to redraft Parliament's TFSA legislation to incorporate (a) policies inferred from interdepartmental correspondence relating to a different statutory scheme, (b) policies transplanted from a different statutory scheme, or (c) *obiter dicta* found in reasons for judgment dealing with a different statutory scheme (i.e., *Prochuk*).

[93] The appeals for the Appellant's 2009, 2010, 2011, and 2012 taxation years are dismissed, with costs. If the parties cannot agree on costs, the Respondent may file written submissions not exceeding ten pages on or before April 11, 2023, the Appellant may file written submissions not exceeding ten pages on or before May 12, 2023, and the Respondent may file written submissions in response not exceeding five pages on or before May 31, 2023.

Signed at Ottawa, Canada, this 6th day of February 2023.

"David E. Spiro"

Spiro J.

CITATION:	2023 TCC 17
COURT FILE NO.:	2015-4080(IT)G
STYLE OF CAUSE:	CANADIAN WESTERN TRUST COMPANY AS TRUSTEE OF THE FAREED AHAMED TFSA AND HIS MAJESTY THE KING
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 12, 13, 14 and 15, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Spiro
DATE OF JUDGMENT:	February 6, 2023

APPEARANCES:

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Counsel for the Respondent:	Perry Derksen, Jamie Hansen and Heidi Lee

COUNSEL OF RECORD:

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For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada

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[1] *Income Tax Act*, (RSC, 1985, c 1 (5th Supp)) [the *Act*].
[2] Reply at para 11(t).
[3] Amended Notice of Appeal at para 1.
[4] *Canada (Commissioner of Competition) v Rogers Communications Inc.*, 2023 FCA 16 at para 17 [*Rogers Communications*].
[5] Partial Agreed Statement of Facts, marked as Exhibit J-1, at paras 1-2 [PASF].
[6] PASF at para 7.
[7] PASF at paras 10, 13.
[8] For the timing of trades, see PASF at paras 20-27.
[9] PASF at paras 11-12.
[10] PASF at 45.
[11] PASF at 74.
[12] PASF at 120.
[13] PASF at 150.
[14] PASF at para 26.
[15] The Minister also assessed the 2013 taxation year in which the TFSA trust realized a loss of $67,718. As the Minister reassessed to carry that loss back to the 2011 taxation year as requested by the Appellant, the reassessment for the 2013 taxation year was a nil reassessment and is, therefore, not before the Court.
[16] Taxable income assessed for 2011 was $398,712. After applying the loss carry-back from 2013, the amount reassessed as taxable income was $330,712.
[17] PASF at para 31.
[18] *Canada Trustco Mortgage Co. v The Queen*, 2005 SCC 54 at paras 10-11 [*Canada Trustco*].
[19] *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20 at para 24.
[20] See Annex 4 to the 2008 Budget Papers for the "mirror image" quote relied upon by the Appellant and for a chart reflecting identical after-tax rates of return in an RRSP and a TFSA trust (Department of Finance, *The Budget Plan 2008 - Responsible Leadership* (the 2008 Federal Budget tabled in the House of Commons by the Honourable James M. Flaherty, PC, MP, Minister of Finance), 26 February 2008 at 277 [2008 Budget Papers]).
[21] IT-479R accurately reflects the elements of the traditional test: Canada Revenue Agency, Interpretation Bulletin IT-479R, "ARCHIVED - Transactions in securities" (29 February 1984).
[22] The Appellant offered no evidence, by way of fact or opinion, in support of its submissions on this alleged "rational investment strategy".
[23] The test proposed by the Appellant is derived from *Re Pszon*, [1946] 2 DLR 507, 1946 CanLII 107 (CA).
[24] *Prochuk v The Queen*, 2014 TCC 17 at paras 1-3 [*Prochuk*].
[25] *Ibid* at para 4.
[26] *Ibid* at paras 23-29, 40.
[27] *Ibid* at para 48.
[28] The notion that a judicial statement made in *obiter* can also be an "essential finding" is a *non sequitur*, but I merely restate the Appellant's argument. See Appellant's written submissions at page 2.
[29] *Prochuk*, *supra* note 24 paras 49-51.
[30] *Canada Trustco*, *supra* note 18 at para 10.

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[31] *Stewart v Canada*, 2002 SCC 46 at paras 38, 51; *Canada v Paletta*, 2022 FCA 86 at paras 34, 38.
[32] *Vancouver Art Metal Works Ltd. v Canada*, [1993] 2 FC 179 (FCA) at para 13 [*Vancouver Art Metal Works*].
[33] *R v Summers*, 2014 SCC 26 at para 55.
[34] *Canada Trustco*, *supra* note 18 at para 12.
[35] *Markevich v Canada*, 2003 SCC 9 at para 15.
[36] See generally *R v McIntosh*, [1995] 1 SCR 686 at para 26, 1995 CanLII 124 (SCC).
[37] *Louie v Canada*, 2019 FCA 255 at para 49 [*Louie* FCA].
[38] *Hillier v Canada*, 2019 FCA 44 at paras 24-25 [*Hillier*].
[39] Parliament amended paragraph 146(4)(b) by adding subparagraphs 146(4)(b)(i) and 146(4)(b)(ii) to the Act.
[40] Canada, Department of Finance, *Amendments to the Income Tax Act and Related Statutes*, (draft legislation and explanatory notes), (August 1993) at 124,133.
[41] *Louie* FCA, *supra* note 37 at para 1.
[42] Pooja Mihailovich, "Words Matter: The Limits of Purposive Interpretation" in Pooja Mihailovich & John Sorensen, eds, *Tax Disputes in Canada: The Path Forward* (Canadian Tax Foundation, 2022) 3 at 6 [Mihailovich].
[43] *Symes v R*, [1993] 4 SCR 695 at paras 36-58, 98, 110 DLR (4th) 470; *Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 at paras 59, 139-150 [*Alta Energy*]; *Maritime Electric Co. v Prince Edward Island (Island Regulatory & Appeals Commission)*, 2011 PECA 13 at paras 120-122. Courts may also consider legislation outside the statute at issue as part of the contextual analysis.
[44] Subsection 146(1) of the Act, "retirement savings plan" does not include a condition pertaining to the age of the RRSP holder.
[45] Subsection 146.2(1) of the Act, "qualifying arrangement" at paragraph (a).
[46] Paragraph 146(2)(b.4) of the Act.
[47] Subsection 146.2(5) describes when a TFSA ceases to be a TFSA, and the age of the TFSA holder is not a consideration; the definition of "qualifying arrangement" in subsection 146.2(1) also does not include an upper limit with respect to the age of a TFSA holder.
[48] Subsection 146(1) of the Act, "RRSP deduction limit".
[49] Subsection 207.01(1) of the Act, "TFSA dollar limit".
[50] There may be additional complexities depending on the amount of unused RRSP or TFSA contribution room and the amount of withdrawals made in the previous year from a TFSA. Those complexities are not relevant to this analysis.
[51] Paragraph 146(5)(a) of the Act.
[52] Subsection 207.01(1) of the Act, "unused TFSA contribution room".
[53] Subsection 146(5) of the Act.
[54] TFSA contributions come from after-tax income and withdrawals of contributions and investment earnings are exempt from Part I tax.
[55] Subsection 146(5.1) of the Act.
[56] Paragraph 146.2(2)(c) of the Act.
[57] Subsections 146(4) and 146(8) of the Act.
[58] Subsection 146.2(6) of the Act.
[59] Subsection 146(1) of the Act, "unused deduction room" does not include a re-contribution amount for prior withdrawals from an RRSP.

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[60] Subsection 207.01(1) of the Act, "unused TFSA contribution room" includes a re-contribution amount for prior withdrawals from a TFSA.
[61] Subsection 146(8) of the Act.
[62] TFSA contributions come from after-tax income and withdrawals of contributions and investment earnings are exempt from Part I tax.
[63] For example, withdrawals from an individual's RRSP may affect an individual's GST/HST Credit and Canada Workers Benefit (see subsections 142(8) and 122.5(1) "adjusted income" and subsection 122.5(3) of the Act). Withdrawals from an RRSP may also affect an individual's Canada Workers Benefit (see subsections 142(8) and 122.7(1) "adjusted income" and 122.7(2) of the Act).
[64] Withdrawals from a TFSA are not included in computing a taxpayer's income for the year, and thus do not affect income-tested benefits.
[65] By the time the TFSA regime was passed by Parliament, the test for "carrying on business" was deeply entrenched in Canadian tax law not only in the context of the "capital versus income" issue but in the partnership and non-resident contexts as well. In Canadian tax law, a partnership is a relationship that subsists between persons carrying on a business in common with a view to profit (see *Continental Bank of Canada v R*, [1998] 2 SCR 298, 163 DLR (4th) 385; *Backman v Canada*, 2001 SCC 10; and *Spire Freezers Ltd. v Canada*, 2001 SCC 11). For an early discussion of how the "carrying on business" test applied to non-residents of Canada, see H H Stikeman, "Carrying on Business in Canada in Dominion Income Tax Law" (1942) 20:2 Can Bar Rev 77. The "carrying on business" test is reflected in Canada's tax treaties which all include a provision along the lines of Article 7 of the OECD Model Tax Convention. That article begins by providing that "Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein." See OECD (2019), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris. Contrary to the Appellant's submission, this Court cannot – and need not – create an entirely new "carrying on business" test strictly for purposes of subsection 146.2(6) of the Act.
[66] *Louie v The Queen*, 2018 TCC 225 at para 32; rev'd in part *Louie* FCA, *supra* note 37.
[67] *Louie* FCA, *supra* note 37 at para 1.
[68] *Hunt v The Queen*, 2022 TCC 67 at para 59, under appeal to the Federal Court of Appeal (A-140-22).
[69] See Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 186-187, where the author observes that the legislature expresses its "secondary purposes" by "words of restriction, qualification, or exception that limit the reach or effectiveness of the main goals." [Sullivan].
[70] Sullivan at 186, as quoted in Mihailovich at 20.
[71] *R v Rafilovich*, 2019 SCC 51 at paras 29-30.
[72] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 174.
[73] *Tara Exploration and Development Co. v MNR*, 70 DTC 6370 (Ex Ct) at para 22, [1970] CTC 557; aff'd on different grounds [1974] SCR 1057.
[74] Before the 1994 amendments, paragraph 146(4)(b) of the Act read:

> 146(4) Except as provided in subsection (10.1), no tax is payable under this Part by a trust on the taxable income of the trust for a taxation year if, throughout the period

in the year during which the trust was in existence, the trust was governed by a registered retirement savings plan, except that

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(b) in any case not described in paragraph (a), if the trust has carried on any business or businesses in the year, tax is payable under this Part by the trust on the amount that its taxable income for the year would be if it had no income or losses from sources other than from that business or those businesses; …

After the 1993 amendments, the provision read:

146(4) Except as provided in subsection (10.1), no tax is payable under this Part by a trust on the taxable income of the trust for a taxation year if, throughout the period in the year during which the trust was in existence, the trust was governed by a registered retirement savings plan, except that

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(b) in any case not described in paragraph (a), if the trust has carried on any business or businesses in the year, tax is payable under this Part by the trust on the amount, if any, by which

(i) the amount that its taxable income for the year would be if it had no incomes or losses from sources other than from that business or those businesses, as the case may be,

exceeds

(ii) such portion of the amount determined under subparagraph 146(i) in respect of the trust for the year as can reasonably be considered to be income from, or from the disposition of, qualified investments for the trust; …

[75] The Appellant's Motion Record was marked for identification as M-1. As no facts were in issue in these appeals, the letter was inadmissible as evidence as it would have failed the threshold test of relevance. See Sydney Lederman, Michelle Fuerst & Hamish C Stewart, *The Law of Evidence in Canada*, 6th ed (LexisNexis Canada, 2022) at ¶2.55, ¶2.61:

¶2.55 The first step in determining what is relevant is to identify the facts that are in issue in the case. It is the substantive law relating to the particular charge or cause of action that forms the basis for this identification exercise. …

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> ¶2.61 While, in practice, much latitude is allowed, especially in cases tried by judges alone, evidence which is completely unrelated to the issues as disclosed in the pleadings will nevertheless be rejected. …

[76] The Supreme Court of Canada has repeatedly warned against relying on unexpressed policy when interpreting statutory provisions. See, for example *Alta Energy*, *supra* note 43 at paras 58, 96; *Loblaw Financial Holdings Inc. v Canada*, 2021 SCC 51 at paras 57, 60; *TELUS Communications Inc. v Wellman*, 2019 SCC 19 at paras 78-79.
[77] Mihailovich at 27.
[78] Mihailovich at 27.
[79] Mihailovich at 31.