Federal Court of Appeal | Cour d'appel fédérale

Date: 20250926

Docket: A-335-23

Citation: 2025 FCA 175

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

BETWEEN:

DIANNE L. STACKHOUSE

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Fredericton, New Brunswick, on June 17, 2025.

Judgment delivered at Ottawa, Ontario, on September 26, 2025.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

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

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] Generally, for income tax purposes, a taxpayer who incurs a loss from carrying on a business may deduct it against their income from another business, property or employment.

[2] However, a special rule—the farming loss restriction rule—applies where the loss is incurred in a farming business. That rule limits the deductible portion of a taxpayer's farming

loss unless the taxpayer's chief source of income is farming, or a combination of farming and another source.

[3] The appellant, Dianne Stackhouse, is a physician. She is also a farmer. However, the appellant has consistently incurred losses in her farming business and deducted them against the income from her medical practice.

[4] In 2007, the appellant successfully appealed assessments of her 1997 and 1998 taxation years to the Tax Court of Canada. Those assessments applied the farming loss restriction rule to the appellant. However, the Tax Court found that the appellant's chief source of income was a combination of farming and her medical practice and so the farming loss restriction rule, as it then read, did not apply to her: *Stackhouse v. The Queen*, 2007 TCC 146.

[5] However, the rule was amended with effect for taxation years ending after March 20, 2013. As amended, where the taxpayer's chief source of income is a combination of farming and another source, the farming loss restriction rule applies unless that other (non-farming) source is a subordinate source.

[6] The Minister of National Revenue determined that the amended farming loss restriction rule applied to the appellant in 2014 and 2015. Accordingly, the Minister assessed her on the basis she could deduct only $17,500 of her farming loss in each of those years. The appellant disagreed and objected to the assessments. After the Minister confirmed the assessments, the appellant appealed them to the Tax Court.

[7] The appeal gave the Tax Court its first opportunity to consider the amended farming loss restriction rule. The Tax Court concluded that farming was the appellant's subordinate source of income and, accordingly, the farming loss restriction rule applied. It therefore dismissed her appeal: *Stackhouse v. The King*, 2023 TCC 156 (*per* Owen J.).

[8] The appellant now appeals to this Court, submitting that the Tax Court erred in its interpretation of the amended farming loss restriction rule. She contends that, properly interpreted, that rule does not apply to her and that, given the time, effort and invested capital she has dedicated to farming, her medical practice is subordinate to farming.

[9] For the following reasons, I would dismiss the appeal.

I. Background

[10] For more than 70 years, the *Income Tax Act* has restricted the deduction of farming losses. Although the details have changed from time to time, one feature has not changed—a taxpayer with a farming loss may deduct it against income from other sources without restriction only where farming, either alone or in combination with another source of income, is the taxpayer's chief source of income.

[11] The farming loss restriction rule is currently found in section 31 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The portion of the rule relevant to this appeal provides as follows:

31(1) If a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income that is a subordinate source of income for the taxpayer, then for the purposes of sections 3 and 111 the taxpayer's loss, if any, for the year from all farming businesses carried on by the taxpayer is deemed to be the total of	**31(1)** Si le revenu d'un contribuable, pour une année d'imposition, ne provient principalement ni de l'agriculture ni d'une combinaison de l'agriculture et d'une autre source qui est une source secondaire de revenu pour lui, pour l'application des articles 3 et 111, ses pertes pour l'année, provenant de toutes les entreprises agricoles exploitées par lui, sont réputées correspondre au total des montants suivants :
…	[…]
(Emphasis added.)	(Soulignement ajouté.)

[12] The preamble is followed by a formula limiting the maximum farming loss that may be deducted. In 2014 and 2015, the maximum was $17,500. Prior to the 2013 amendment, the same portion of the rule provided as follows:

31(1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, for the purposes of sections 3 and 111 the taxpayer's loss, if any, for the year from all farming businesses carried on by the taxpayer shall be deemed to be the total of	**31(1)** Lorsque le revenu d'un contribuable, pour une année d'imposition, ne provient principalement ni de l'agriculture ni d'une combinaison de l'agriculture et de quelque autre source, pour l'application des articles 3 et 111, ses pertes pour l'année, provenant de toutes les entreprises agricoles exploitées par lui, sont réputées être le total des montants suivants :
…	[…]
(Emphasis added.)	(Soulignement ajouté.)

[13] Although written in the negative, in essence subsection 31(1) asks whether the taxpayer's chief source of income is farming or a combination of farming and some other source of income

or, as amended, farming and some other source of income that is subordinate. If the answer is no, the farming loss restriction rule applies.

[14] As is evident, until the 2013 amendment, the combination exception placed no express conditions on the sources that comprised the chief source of income except that one of them had to be farming. Under the amendment, unless the non-farming source in the combination is a subordinate source, the farming loss restriction rule applies, with one proviso. The proviso is found in subsection 31(2) of the *Income Tax Act*, added at the same time and with the same effective date as the amendment to subsection 31(1) at issue in the appeal.

[15] Subsection 31(2) provides that the farming loss restriction rule does not apply where the combination is comprised of farming and manufacturing or processing in Canada of goods for sale, and all or substantially all the output from the taxpayer's farming business is used in the manufacturing or processing business. In other words, in that circumstance, the combination exception is read as it was before the 2013 amendment—whether farming or the manufacturing or processing business is subordinate is not relevant.

[16] Except to the extent that it provides context, this proviso is not relevant to this appeal. Accordingly, for simplicity, I proceed as if subsection 31(1) was the only provision concerned with the combination exception.

[17] The pre-2013 version of the combination exception was the source of significant debate and many disputes, including before this Court and the Supreme Court of Canada. The Supreme

Court considered the interpretation and application of the farming loss restriction rule in two cases: *Moldowan v. The Queen*, [1978] 1 S.C.R. 480, 15 N.R. 476 [*Moldowan*] and *Canada v. Craig*, 2012 SCC 43 [*Craig*].

[18] Both these decisions considered the same text in the farming loss restriction rule—"where [or if] a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income". However, *Craig* overruled *Moldowan*, leading to the 2013 amendment, the effect of which lies at the heart of this appeal. Therefore, it is useful to summarize these decisions, starting with *Moldowan*.

A. *1978: Moldowan*

[19] In *Moldowan*, the Supreme Court first considered what "chief source of income" meant. It observed that, because the farming loss restriction rule applied only when a taxpayer had a loss from farming, to give the provision meaning emphasis must be placed on the words "source of income": *Moldowan* at 485.

[20] The Supreme Court explained that "[w]hether a source of income is a taxpayer's 'chief source' of income is both a relative and objective test" but is "not a pure quantum measurement": *Moldowan* at 486. Rather, "[t]he distinguishing features of 'chief source' are the taxpayer's reasonable expectation of income from [their] various revenue sources and [their] ordinary mode and habit of work": *Moldowan* at 486. Those features could be tested by considering, in relation

to a source, such factors as the time spent, the capital committed and actual and potential profitability: *Moldowan* at 486.

[21] As for the combination test, the Supreme Court said it contemplated a person whose major preoccupation is farming but recognized that they may have income "from a side-line employment or business": *Moldowan* at 488. However, those "subsidiary interests" would not bring them within the farming loss restriction rule: *Moldowan* at 488. Whether the non-farming source was "auxiliary" also was both relative and objective and tested by employing the same criteria as those indicative of a chief source: *Moldowan* at 488.

[22] The Supreme Court concluded that the farming loss restriction rule did not apply to a person "for whom farming may reasonably be expected to provide the bulk of income or the centre of work routine"—what the Supreme Court called a class (1) farmer—but would apply to a person who "carries on farming as a sideline business" and "does not look to farming, or *to farming and some subordinate source of income*, for [their] livelihood"—a class (2) farmer: *Moldowan* at 487 (emphasis added). A class (3) farmer was one who did not have a farming business but farmed as a hobby and so had no ability to deduct losses.

B. *2012: Craig*

[23] In the following years, *Moldowan* was subject to "criticism from the judiciary, academics and members of the profession" because the effect of its interpretation of the combination

exception was “that the taxpayer’s chief source of income must be farming, the same as the [first exception]”: *Craig* at paras. 11-12, 29.

[24] Put another way, notwithstanding that the farming loss restriction rule contemplates two distinct exceptions—either farming is the chief source of income, or the chief source of income is a combination of farming and some other source— “*Moldowan* collapsed the second exception into the first”: *Craig* at para. 28. It did so “[b]y requiring that the [combination] exception apply only where the other source of income was subordinate to the farming source”: *Craig* at para. 28.

[25] In *Craig*, the Supreme Court was satisfied that the *Moldowan* approach to the combination test was incorrect, and the relevant considerations justified overruling it and considering the interpretation question afresh. At the same time, the Supreme Court cautioned that any substituted combination test could not render section 31 incapable of application: *Craig* at paras. 28-32.

[26] With that in mind, the Supreme Court made several points worthy of review in the context of this appeal.

[27] Contrary to *Moldowan*, under the combination exception as then formulated, neither source needed to be predominant: *Craig* at paras. 12, 39, 43. Nonetheless, *Craig* agreed with *Moldowan* that the exception did not contemplate a simple aggregation of income: *Craig* at para. 37; *Moldowan* at 487. Accordingly, it was insufficient to simply identify two or more sources of income and claim that together they comprise a chief source of income.

[28] Rather, for farming in combination with another source to constitute a taxpayer's chief source of income, the taxpayer must "devote significant time and resources to the farming business, even if he or she will also devote significant time and possibly resources to another business or employment": *Craig* at para. 41. The "fact that another source of income produces greater income than the farm does not mean that such a combination is not a chief source of income" provided "the taxpayer devotes considerable time and resources to the farming business": *Craig* at para. 41.

[29] Simply put, the Supreme Court concluded that each source in the combination that comprises the chief source must be a significant endeavour, a source on which the taxpayer places significant emphasis: *Craig* at paras. 42-43, 45.

[30] To test that, the Supreme Court said that factors such as "the capital invested in farming and the second source of income, the income from each of the two sources of income, the time spent on the two sources of income, and the taxpayer's ordinary mode of living, farming history, and future intentions and expectations" should be considered: *Craig* at paras. 42, 45. If these factors showed that the taxpayer placed significant emphasis on both their farming and non-farming sources of income, then that combination together would constitute a chief source of income.

[31] That said, the Supreme Court stated that the approach "must be flexible, recognizing that not each factor need be significant": *Craig* at para. 45. The determination is a fact-based one for the trial judge: *Craig* at paras. 38, 43.

C. *2013: The Government's Response*

[32] The *Craig* decision led Parliament to amend the text of the combination exception with effect for taxation years ending after March 20, 2013. The technical notes that accompanied the draft amendment explained that the objective was to codify *Moldowan*'s interpretation, substituting it for *Craig's* interpretation:

> Subsection 31(1) of the *Act* restricts the farming losses deductible by a taxpayer against income from other sources in a taxation year unless the taxpayer's chief source of income for the year is farming or a combination of farming and some other source of income. This restriction ensures that taxpayers for whom farming is not the principal occupation are limited in their ability to deduct from their non-farm income losses from farming…
>
> ...
>
> Subsection 31(1) is amended to codify the interpretation of subsection 31(1) set out in the Supreme Court of Canada's decision in *Moldowan v. The Queen*, [1978] 1 SCR 480. Specifically, the amendment clarifies that a taxpayer will be limited to the deduction in respect of farm losses set out in subsection 31(1) if the taxpayer does not look to farming, or to farming and some subordinate source of income, for their livelihood. This amendment replaces the interpretation placed on section 31 by the Supreme Court of Canada in its decision in *The Queen v. Craig*, 2012 SCC 43, and applies to taxation years that end after March 20, 2013.
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> Canada, Department of Finance, *Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and the Income Tax Regulations* (October 2013), Clause 14.

II. The Tax Court Decision

A. *The Tax Court Decides Farming is the Appellant's Subordinate Source of Income*

[33] I now turn to the Tax Court's decision that is the subject of this appeal.

[34] The Tax Court had no doubt that the appellant's farming activities were a source of business income: Tax Court reasons at para. 109. The Tax Court recognized that the question before it was whether that farming business was her chief source of income, either alone or in combination with a subordinate source of income: Tax Court reasons at para. 110.

[35] The Tax Court properly recognized that *Moldowan* was not "strictly speaking…a precedent for the interpretation of the amended version" of section 31: Tax Court reasons at para. 95. Nonetheless, the Tax Court devoted a significant part of its analysis to *Moldowan*.

[36] The Tax Court first said that "the adjective 'subordinate' is used in subsection 31(1) in the sense of 'secondary to some other (chief or principal) thing'": Tax Court reasons at para. 110. The Tax Court contrasted "subordinate" with "chief" which it said meant "'most important', 'principal' or 'greatest'": Tax Court reasons at para. 110.

[37] To determine which source in the combination is the subordinate source, the Tax Court concluded that the *Moldowan* principles should be applied to identify the predominate source: Tax Court reasons at paras. 115-121. As the Tax Court described it, "'[t]he general approach in *Moldowan* interpreted in the foregoing manner is consistent with the text, context and purpose of the [amended] version" of the farming loss restriction rule: Tax Court reasons at para. 121.

[38] The Tax Court then turned to the evidence, devoting several paragraphs to the appellant's work as a physician and her farming activities: Tax Court reasons at paras. 122-127, 129-131. It observed that, throughout her history of farming, the appellant practiced medicine full-time.

While she devoted similar hours to farming, those hours were before and after her work as a physician, and her farm activities "gave way to her medical practice if a medical issue arose that required [her] attention": Tax Court reasons at para. 129.

[39] The medical practice did not require any significant capital investment. The appellant rented space at a very modest cost from the municipality: Tax Court reasons at paras. 56, 64. While the Tax Court recognized that the appellant invested significant capital in the farm ("millions of dollars"), "all of [her] investment in the farm [was] funded by the net income from [her] medical practice and…the farm requires the financial support of that income to survive as a business": Tax Court reasons at para. 132.

[40] The appellant employed others to work in both businesses: Tax Court reasons at paras. 24 (partial agreed statement of facts), 54, 57.

[41] Except in 1993 and 1994, the appellant had claimed farm losses in every taxation year since 1987 and "restricted farm losses", as defined in the *Income Tax Act*, in the 1980 to 1982 and 1984 to 1986 taxation years: Tax Court reasons at para. 24 (partial agreed statement of facts).

[42] In 2014 and 2015, the appellant's revenues from farming were $176,433 and $31,128, while her expenses were $706,796 and $627,032, respectively: Tax Court reasons at paras. 3, 24 (partial agreed statement of facts), 125. Accordingly, she had significant net losses from farming. In contrast, the appellant's gross revenues and net professional income from her medical practice

were $805,321 and $648,605, respectively, in 2014, and $851,621 and $697,050, respectively, in 2015: Tax Court reasons at paras. 24 (partial agreed statement of facts), 65, 125.

[43] Moreover, from 2007 to 2015, the appellant earned aggregate revenues of $5,599,554 and aggregate net income of $4,145,580 from her medical practice and enjoyed increases in that income each year. In contrast, in the same period, she earned aggregate revenues of $290,244 and incurred aggregate losses exceeding $4,000,000 from her farming business: Tax Court reasons at paras. 67, 133.

[44] While the Tax Court recognized that the appellant was committed to farming and dedicated significant time and capital to her farming business, it found "that the centre of [her] work routine was her medical practice" to which "she looked…for her livelihood": Tax Court reasons at paras. 131, 134. It concluded that her "chief source of income in 2014 and 2015 was her medical practice": Tax Court reasons at para. 135. In its words, her "farming business has always been subordinate to the medical practice as a source of income…and there is no evidence that that will change in the foreseeable future": Tax Court reasons at paras. 134, 136.

[45] Accordingly, the Tax Court dismissed the appellant's appeal.

B. *Preliminary Issue: Nomenclature*

[46] Before the Tax Court it appears that the parties agreed that the appellant's chief source of income comprised the combination of farming and her medical practice. This was certainly the appellant's position, as well as the Tax Court's conclusion in its 2007 decision.

[47] However, in assessing the appellant's 2014 and 2015 taxation years, the Minister assumed as a fact that her "*chief source of income* was from her practice as a medical doctor": Tax Court reasons at para. 3 (emphasis added). The Tax Court said that this was a conclusion of mixed fact and law, and not a proper factual assumption that placed any onus on the taxpayer: Tax Court reasons at paras. 22-23.

[48] In describing the respondent's position, the Tax Court said the respondent acknowledged the Tax Court's 2007 conclusion that farming and her medical practice in combination were the appellant's chief source of income. However, for 2014 and 2015, the respondent submitted that "[t]he evidence establishes that…farming was *subordinate* to the [a]ppellant's medical practice as a source of income. Consequently, [her] *chief source of income* was her medical practice as her *predominant source in combination* with farming as *a subordinate source*": Tax Court reasons at para. 83 (emphasis added).

[49] The Tax Court agreed. It contrasted "chief" as used in section 31 with "subordinate": Tax Court reasons at para. 110. It concluded that the appellant's "*chief source of income* in 2014 and

2015 was her medical practice and…[her] farming business was a *subordinate* source of income": Tax Court reasons at para. 135 (emphasis added).

[50] Despite these uses of "chief", I do not understand the respondent to have asserted, or the Tax Court to have concluded, that the appellant's chief source of income was not the combination of farming and her medical practice. Were the appellant's medical practice alone her chief source of income, there would be no need to describe farming as "subordinate". Yet both the respondent and the Tax Court did exactly that.

[51] As noted, the respondent's position, as described by the Tax Court, referred to "subordinate", "combination" and "predominant", as well as "chief". The Tax Court used "subordinate" to describe the appellant's farming business in its conclusion, going so far as to say "[t]he farming business has always been subordinate to the medical practice as a source of income": Tax Court reasons at para. 134.

[52] I suspect that the respondent used "chief", in the assumption underlying the assessments and in its submissions before the Tax Court, because the amendment's stated purpose was to restore the *Moldowan* interpretation. *Moldowan* repeatedly referred to "chief", including in the context of the combination exception. Having devoted several pages to *Moldowan* in its reasons, and having regard to the way the respondent framed the submissions, I suspect the Tax Court used "chief" for the same reason.

[53] Before us the parties agreed the combination exception is at issue. They confirmed that they understood the Tax Court to have concluded that the combination exception was the relevant exception.

[54] In light of the foregoing, I am satisfied that the Tax Court applied the combination exception but concluded that farming was the subordinate source in the combination.

[55] That said, given that the combination—not one of its components—must be the chief source of income, it is confusing to describe one of the components as the "subordinate source" and the other as "the chief source", as both the respondent and the Tax Court did. Accordingly, in these reasons, I use "chief" in the same manner as it is used in section 31, including in the combination exception. I use "subordinate" and "predominate" (or "predominant") to refer to the sources that together comprise the combination that is the chief source of income.

III. The Appeal

A. *The Appellant's Position*

[56] Before us the appellant submits that the Tax Court erred in interpreting amended section 31. She submits that the Tax Court applied the *Moldowan* interpretation and thus read out the combination test. That error in law led the Tax Court to incorrectly find that the appellant's farming business was subordinate to her medical practice.

[57] In the context of the combination exception, the appellant submits that where the farming source is producing negative financial results, priority should be given to time, effort, labour and capital invested to identify the predominant source. This interpretation, she submits, is consistent with the text and context of section 31 and supports what she claims is the purpose of the provision—that only less than fully-dedicated farmers be subject to the farming loss restriction rule.

[58] Applying this interpretation, the appellant says that her subordinate source of income is her medical practice.

B. *The Respondent's Position*

[59] The respondent submits that the Tax Court did not err. Rather, the amendment was intended "to restore the *Moldowan* test" but "directly addressed the [Supreme Court's] criticism of the *Moldowan* analysis in *Craig*": Respondent's Memorandum of Fact and Law at para. 27.

[60] The respondent contends that determining which source is subordinate is both relative and objective and requires consideration of various factors, including time spent, capital invested and both actual and potential profitability. However, the respondent asserts, the distinguishing features of the predominant source are the taxpayer's ordinary mode and habit of work and reasonable expectation of income from that source. (Parenthetically, I note that these are the same features *Moldowan* identified as distinguishing a chief source of income.)

[61] Applying that interpretation, the respondent says the Tax Court correctly determined that the appellant's predominant source of income is her medical practice.

IV. Analysis

A. *Issue and Standard of Review*

[62] This appeal turns on the proper interpretation of the amended combination exception to the farming loss restriction rule. Because statutory interpretation is a question of law, we must be satisfied that the interpretation is correct: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[63] The principles of statutory interpretation are well-known: legislation is interpreted having regard to the text, context and purpose. The Supreme Court recently reminded us that:

> …"…a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms" (…). At the same time, "just as the text must be considered in light of the context and object, the object of a statute and that of a provision must be considered with close attention always being paid to the text of the statute, which remains the anchor of the interpretative exercise" (citations omitted).
>
> *Piekut v. Canada (National Revenue)*, 2025 SCC 13 at para. 45.

[64] In this appeal, we have the benefit of two Supreme Court decisions interpreting the farming loss restriction rule before it was amended. The only change relevant to this appeal is the addition of the requirement that the non-farming source in the combination be subordinate.

Thus, the question we face is, given that addition, how the farming loss restriction rule should be interpreted.

[65] In answering that question, we must have regard to both *Moldowan* and *Craig*. This is because *Craig* explained what it meant to have a combination of sources that together comprise a chief source: each must be a significant endeavour on which the taxpayer places significant emphasis. The amendment had no effect on that aspect of *Craig*. Thus, the amended combination exception continues to require that each source in the combination satisfy that "significant endeavour" standard.

[66] Moreover, *Craig* overruled *Moldowan* only to the extent that the latter collapsed the combination exception into the chief source exception by concluding that, in a combination, farming had to be predominant. Importantly, in determining whether a particular source is a significant endeavour—and thus a source that may be included in the combination that comprises the chief source—*Craig* adopted the same factors as *Moldowan* did for identifying a chief source of income.

[67] With that background, I turn now to the interpretation of the amended farming loss restriction rule found in subsection 31(1) of the *Income Tax Act*.

B. *Interpretation of the Combination Exception*

(1) Bilingual Legislation

[68] Because the *Income Tax Act* is enacted in both English and French, both are equally authoritative expressions of the law: *R. v. Quesnelle*, 2014 SCC 46 at para. 53; *R. v. Wolfe*, 2024 SCC 34 at para. 58. Thus, to interpret bilingual legislation we first search for a shared meaning between the English and French versions: *R. v. S.A.C.*, 2008 SCC 47 at para. 14.

[69] The Tax Court observed that neither *Moldowan* nor *Craig* considered the French version of the farming loss restriction rule. Nonetheless, the Tax Court limited its analysis of the French version to one aspect.

[70] The Tax Court observed that the French version also "is phrased as a negative (i.e., the taxpayer's income is neither from farming, nor from etc.)" but does not use the expression "chief source of income": Tax Court reasons at para. 112. Rather, it asks whether the taxpayer's income for the taxation year "is neither derived mainly (or primarily or chiefly) from farming, nor from a combination of farming and another source": Tax Court reasons at para. 112. In that sense, the Tax Court said, the French version raises the same issue as that raised in *Moldowan* because the provision "comes into play only when the taxpayer has had a farming loss": Tax Court reasons at paras. 111-113.

[71] From this, I understand the Tax Court to have concluded that one must focus on the source of income, rather than the income itself, to make sense of the provision in French, as well as English. I agree with the Tax Court on this point.

[72] The French version uses “principalement” as the equivalent of “chief”. The former translates to “chiefly” or “principally”. Read in context, asking whether a person derives their income “principally” (or chiefly) from farming, or farming in combination with another source, is the same as asking whether the person’s chief source of income is farming or farming in combination with another source.

[73] Turning to the text of the combination exception, it now refers to “a combination of farming and some other source of income that is a subordinate source of income” or “d’une combinaison de l’agriculture et d’une autre source qui est une source secondaire de revenu” in French. The word used for “subordinate” in the French version is “secondaire”. “Secondaire” translates to “secondary”, a word the Tax Court used when describing the French text: Tax Court reasons at para. 112. Secondary can mean “not chief or principal; of minor importance, *subordinate*”: *Oxford English Dictionary* (online) (emphasis added).

[74] Accordingly, I am satisfied that there is no difference between the French and English text insofar as they describe the exceptions to the farming loss restriction rule in subsection 31(1). Given this, I can focus my analysis on the English text.

(2) The Text

[75] I first observe that the combination exception is premised on two sources of income together constituting the taxpayer's chief source of income.

[76] I accept that by saying that farming could be combined with "other pecuniary *interests*…such as income from investments, or income from a side-line employment or business", *Moldowan* might be considered to have suggested the combination could include more than two sources: *Moldowan* at 488 (emphasis added). However, I am not convinced that is so.

[77] The combination exception has always been written in the singular—"farming and some other source" rather than "farming and some other source or sources". Consistent with this language, invariably the focus of the jurisprudence considering the farming loss restriction rule has been on farming and one other source of income.

[78] In *Gunn v. Canada*, 2006 FCA 281 [*Gunn*], this Court said the combination exception is concerned with farming and a "second source of income": at para. 83. The Supreme Court used similar language in *Craig*: see for example, paras. 37, 42, 45 ("two sources of income"). Even *Moldowan* said the combination cannot mean "the simple addition of two sources of income": at 487.

[79] That is not to say a taxpayer may not have many sources of income. The appellant had property source income as well as income from farming and her medical practice. However, applying the teachings from *Craig*, it is difficult to imagine a circumstance in which a taxpayer could have more than two sources of income each characterized as a significant endeavour on which the taxpayer places significant emphasis.

[80] That said, were there any ambiguity about whether more than two sources could be combined as a chief source, about which I have significant doubt, the amendment has resolved it. Prior to the amendment, the combination exception referred to "farming and some other source"; it now refers to "farming and some other source of income that is a subordinate source". This text clearly invites a comparison of the two sources that comprise the chief source—the farming source and the non-farming source. In particular, the combination exception asks whether the non-farming source is a subordinate source.

[81] "Subordinate" has several meanings. However, in the context of a comparison, its meanings include "dependent upon, subservient to, or secondary to some other (chief or principal) thing" and "of lesser importance, not principal or predominant": *Oxford English Dictionary* (online). While I consider these expressions to be substantially the same, I observe that "not predominant" is among them. In other words, "subordinate" can be seen as an antonym of "predominant".

[82] This view is consistent with the question posed by the combination exception—accepting that the taxpayer's chief source of income comprises a combination of farming and another (non-farming) source, is the non-farming source the subordinate source?

[83] Accordingly, I do not see any ambiguity in the text.

(3) Context

[84] In interpreting the combination exception, *Moldowan* placed little emphasis on context.

[85] In *Craig*, the Supreme Court said nothing in the context supported the proposition that farming must be the predominant source in the combination: *Craig* at para. 39. At the same time, it said that the farming loss restriction rule could not be limited to "'hobby' or 'gentleman' farmers—class (3) farmers in the *Moldowan* classification—because, for a loss to be deductible at all, farming must be a source of income": *Craig* at para. 39.

[86] Ultimately, the Supreme Court concluded that the combination exception contemplated that the taxpayer would devote significant time and resources to the farming business: *Craig* at para. 41. The Supreme Court considered this interpretation "consistent with the general policy of the *Income Tax Act* that, subject to specific exceptions, taxpayers may offset losses from one business or source of income against profits from another without limitation": *Craig* at para. 43.

[87] It also observed that, while section 31 is concerned with farming losses, it places no limitation on their use where farming alone is the chief source of income, which in turn implies the investment of significant time and money. The same features would characterize farming in the combination: *Craig* at para. 41.

[88] *Gunn* addressed context in greater detail: at paras. 19-44. There, this Court observed that the relevant statutory context includes both the regime governing the determination of business income and losses, and the special rules applicable to farming businesses for that purpose. This Court noted that those special rules include provisions permitting cash-based rather than accrual-based accounting, the cost of inventory to be treated as an expense (subject to certain limits), and certain costs that, in a non-farming business, would be characterized as capital expenditures to be deducted on a current basis. (The first two of these also apply to fishing businesses.)

[89] In addition to the *Gunn* list of special rules in the *Income Tax Act* applicable to farmers, I add several provisions that relieve, sometimes with conditions, farmers (and fishers) from rules applicable to taxpayers carrying on other businesses, or are more generous for farmers (and fishers):

(i) the ability to defer recognition of accrued capital gains on capital property transferred to children: ss. 70(9.2)-(9.31), 73(4), (4.1);

(ii) a ten year reserve on the sale of capital property to children: ss. 40(1)(a)(iii), (1.1), 44(1)(e)(iii), (1.1);

(iii) an enhanced capital gains exemption for gains arising on the sale of real property, marketing quota, shares of a family farm corporation and interests in a family farm partnership: ss. 110.6(1), (1.3), (2.2);

(iv) the ability to defer capital gain recognition on capital property previously transferred to a child who makes a testamentary transfer of the property to parents: s.70(9.6);

(v) exemptions from the limited partnership "at-risk" rules: s. 96(2.1); and

(vi) special rules regarding the principal residence exemption for dwellings on a farm: s. 40(2)(c).

[90] In *Gunn*, after reviewing the legislative history of the farming loss restriction rule from its inception, this Court concluded that that history "demonstrates little more than this: originally, the determination of whether a farmer was subject to a loss limitation was a matter of unfettered ministerial discretion, but it is now a statutory test with no explicit statutory guidelines": *Gunn* at para. 43.

[91] I agree.

[92] Many of the special rules permit farmers to defer income recognition or accelerate the deduction of expenses. Thus, they permit farmers to suppress their income or create or increase losses. Clearly this is a choice Parliament made to support Canada's farmers. However, except for the farming loss restriction rule, none of the special rules described above is restricted to a

taxpayer for whom farming, alone or in combination with some other source, is their chief source of income.

[93] This context indicates that Parliament also made a deliberate choice to impose the farming loss restriction rule on all taxpayers for whom farming is neither itself the chief source of income, nor the predominant source within a combination that constitutes the chief source. As described in paragraph 15, the "farming is predominant" requirement is inapplicable only where the taxpayer's farming business provides substantially all its output to the taxpayer's "predominant" manufacturing or processing business.

(4) Purpose

[94] In *Gunn*, this Court said that it was unable to find anything that provides a satisfactory explanation for the farming loss restriction rule: at para. 54. I am in the same position.

[95] It is undesirable to speculate about section 31's purpose. While the special regime available to farming businesses, including the provisions that permit income to be suppressed and that may accelerate losses, may offer an explanation, it does not suggest a purpose. Notably, many of the provisions described in paragraphs 88 and 89 are equally available to fishers, but they are not subject to a similar restriction on their losses.

[96] Put another way, it is evident that Parliament wanted to limit the deduction of farming losses by taxpayers for whom farming is neither the chief source of income nor the predominant

of two significant endeavours that together comprise a chief source. However, *why* it wanted to limit it in the way it did is far from clear.

[97] That said, both parties agree that the impetus for the 2013 amendment was the *Craig* decision. The technical notes suggest the purpose of the amendment was to codify *Moldowan*.

[98] Yet, despite what the technical notes say, the amended version of section 31 cannot be interpreted as simply "restoring *Moldowan*". That would effectively "read the combination [exception] out of the provision" which "is not consistent with the words used by Parliament": *Craig* at paras. 28, 30.

[99] Rather, there "are two separate exceptions to the loss deduction limitation and each must be given meaning", "[h]aving regard to the words of the provision": *Craig* at para. 28. Thus, the proper interpretation must give a meaning to the combination exception that is meaningfully different from the chief source of income test. The problem with *Moldowan* is that it did not do so. Therefore, I reject the respondent's suggestion that the amendment restored the *Moldowan* test while directly addressing *Craig*'s criticism of the *Moldowan* analysis.

[100] Both *Craig* and *Moldowan* remain relevant.

[101] On the one hand, *Moldowan* interpreted the combination test as requiring farming to be the predominant source—or "the chief source" as the Supreme Court unfortunately described it—in the combination, and the other source to be "subordinate", "auxiliary" or "sideline": at

487-488. The terms “auxiliary” and “sideline” suggest something that supports, is helpful to, or is a by-product of something else. *Moldowan* also used “subordinate” which, as noted above, can have a similar meaning—“dependent on or subservient to”.

[102] On the other hand, *Craig* teaches that *Moldowan* was wrong to include “subordinate” as a modifier to describe the non-farming source and to require that farming be predominant. However, *Craig* also teaches that a source must be a significant endeavour on which the taxpayer places significant emphasis to be included in the combination.

[103] Thus, the difference between *Craig* and *Moldowan* is that the latter not only decided that farming had to be the predominant source, but that the other source in the combination had to be subordinate or, as *Moldowan* also described it, an auxiliary or sideline activity. Under *Craig*, an auxiliary or sideline activity could not be included in the combination.

[104] The combination exception recognizes that neither farming nor some other source alone can be characterized as the taxpayer’s chief source of income. This is so because the taxpayer has two significant endeavours on which they place significant emphasis, as demonstrated by considering the factors identified in both *Moldowan* and *Craig*. In those circumstances, the two sources together comprise the taxpayer’s chief source of income.

[105] As amended, the combination exception asks which of those two sources is subordinate, and implicitly which is predominant. In that context, “subordinate” must be interpreted to mean

"of lesser importance, not principal or predominant" (*Oxford English Dictionary* (online)) *in comparison* to the other source in the combination.

(5) Conclusion on the Interpretation of the Combination Exception

[106] To summarize, the combination exception recognizes that a taxpayer may have two significant endeavours—sources that together comprise their chief source of income—rather than a single source that is their chief source. What that exception now requires is that those two sources be compared to one another to determine which of them is subordinate. If farming is the subordinate source, the farming loss restriction rule applies. If the non-farming source is subordinate, the rule does not apply.

[107] I turn now to explain how that comparison should be undertaken.

C. *Identifying the Subordinate Source in the Combination*

[108] Here, the Tax Court found that farming was the subordinate source in the combination: Tax Court reasons at para. 135.

[109] In making that finding, the Tax Court focused on the *Moldowan* factors: "the taxpayer's reasonable expectation of income from various revenue sources and the taxpayer's ordinary mode and habit of work": Tax Court reasons at para. 115. It explained that, to test those, one

considers “among other things, the time spent, the capital committed and the actual and potential profitability of the source”: Tax Court reasons at para. 115.

[110] The Tax Court emphasized that *Moldowan* contemplated a “relative and objective” assessment in which a quantum measurement of income is relevant but not decisive: Tax Court reasons at para. 114, citing *Moldowan*. Thus, among the factors to be considered is “an objective assessment of the income generating history and income generating potential of the sources of income”: Tax Court reasons at para. 118.

[111] Nonetheless, the Tax Court cautioned that *Moldowan*’s list of factors “is not exhaustive”, but rather “all the facts and circumstances must be considered” because “the objective facts and circumstances will dictate the characterization of each source of income”: Tax Court reasons at paras. 115, 117.

[112] As noted above in paragraph 66, *Craig* endorsed essentially the same factors for determining whether a source can be included in the combination: “the capital invested in farming and the second source of income, the income from each of the two sources of income, the time spent on the two sources of income, and the taxpayer’s ordinary mode of living, farming history, and future intentions and expectations”: at para. 42.

[113] Taken together, the Supreme Court tells us that factors considered to identify a single chief source of income (*Moldowan*) and to identify two sources that qualify as significant endeavours eligible to be combined to comprise a chief source of income (*Craig*) are the same.

The combination exception now asks that the two sources that so qualify be compared to identify which is the subordinate.

[114] I conclude that the only rational way to do so is based on the same factors that qualified the two sources to be a part of the combined chief source of income.

[115] That said, the factors that led to one source being included in the combination may not be the same as the factors that led to the other source being included. The purpose served by the factors in that context is establishing whether each source is a significant endeavour. That purpose does not necessarily require a comparison between the two sources.

[116] However, once the combination is established, the two sources must be compared. Given the objective of that exercise is to identify the subordinate source, differences and similarities in the relevant factors as between the two sources, and the weight to be given to them in the comparison exercise, may not be the same as it is at the "significant endeavour" stage of the analysis. In all cases, the assessment is for the Tax Court having regard to the evidence before it.

[117] The appellant suggests that in determining which of the two sources is subordinate, priority should be given to time, attention (energy) and capital invested, and not actual or potential profitability. She says this approach is more consistent with the farming loss restriction rule applying only to taxpayers who are not fully dedicated to farming.

[118] I cannot agree.

[119] First, I see nothing in the text, context or purpose that supports such an approach. Nothing suggests that only certain factors, or that anything other than the same factors, should be considered in the comparison exercise.

[120] Second, depending on the circumstances, some of the factors that the appellant prioritizes may favour farming while one or more of the other factors favour the other source, or are neutral. For example, farming tends to be a capital-intensive activity, so one would invariably expect capital invested to favour farming. This could lead to capital invested being determinative. I see no basis for that.

[121] Finally, had Parliament intended to limit or specify the relevant factors, it could have done so. The *Income Tax Act* includes many provisions requiring determinations to be made "having regard to" specified matters. This includes the definition of "qualified farm or fishing property", relevant to the capital gains exemption, which imposes a "gross revenue from the farming or fishing business" condition: *Income Tax Act*, s. 110.5(1.3). Yet, the amendment—prompted by *Craig* and said to be intended to restore *Moldowan*—did not introduce any guidance on the relevant factors notwithstanding that, in both decisions, the Supreme Court provided guidance on factors it considered relevant. This suggests Parliament was satisfied with that aspect of those decisions.

[122] The appellant also submits that the Tax Court erred because it imposed a reasonable expectation of profit test, which is inconsistent with *Stewart v. The Queen*, [1977] 2 S.C.R. 748, 12 N. R. 201 [*Stewart*].

[123] Again, I disagree.

[124] The Tax Court not only expressly stated that section 31 does not impose a reasonable expectation of profit requirement but also acknowledged that the income-producing history and potential of the farming business is not determinative. However, at the same time, the Tax Court said neither could they be ignored: Tax Court reasons at paras. 119-120.

[125] I agree. Both *Moldowan* and *Craig* tell us that is so.

[126] Notably, while the Tax Court considered the circumstances in the taxation years at issue, as it must, it did not limit itself to that. Rather, the Tax Court recognized that a predominant source may have existed for a long period of time and be a well-established or new source of income: Tax Court reasons at para. 116. It considered the appellant's entire history of farming and of her medical practice, as well as her future expectations and plans for the farming business. It considered not only income, but revenues as well.

[127] While the Tax Court accepted that the appellant expected higher revenues from farming in the future, "the objective facts" indicated that "substantial expenditures" were "needed to bring any such expectations to fruition". The appellant provided "no objective evidence that as of 2015 the farm would become a self-sustaining business in the foreseeable future notwithstanding [her] best efforts": Tax Court reasons at para. 128.

[128] Moreover, *Stewart* concerns the existence of a business, not the farming loss rules. It establishes that a reasonable expectation of profit is not a prerequisite to establishing a business as a source of income. No one questioned that the appellant's farming activity was a source of income.

[129] In contrast, the combination exception is in play only if farming is a business. Examining the income producing history and potential in that context serves an entirely different purpose—comparison of two sources of income.

[130] To conclude, I agree with the Tax Court: "all the facts and circumstances must be considered", including, as appropriate, "the income producing history and potential of the farming business": Tax Court reasons at paras. 115, 120. However, that factor is not the only one. No one factor is determinative.

[131] Adapting the language of *Craig*, the determination of which source in the combination is subordinate is a "factual one for the trial judge"; and "[t]he approach must be flexible, recognizing that not each factor need be significant": at paras. 38, 42, 45.

V. The Appellant's Subordinate Source of Income

[132] The appellant submits that the Tax Court made a palpable and overriding error in concluding that farming was subordinate to her medical practice.

[133] However, as described above in paragraphs 38 to 44, the Tax Court considered the evidence having regard to relevant factors, including the appellant's "ordinary mode of living, farming history, and expectations": *Craig* at para. 42. Having done so, it concluded that farming was subordinate to the appellant's medical practice. I see no grounds for interfering with that conclusion of mixed fact and law.

[134] Accordingly, I would dismiss the appeal with costs.

"K.A. Siobhan Monaghan"
J.A.

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

"I agree.
Peter G. Pamel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-335-23
STYLE OF CAUSE:	DIANNE L. STACKHOUSE v. HIS MAJESTY THE KING
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	JUNE 17, 2025
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LASKIN J.A. PAMEL J.A.
DATED:	SEPTEMBER 26, 2025

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