Federal Court of Appeal | Cour d'appel fédérale

Date: 20251007

Docket: A-140-23

Citation: 2025 FCA 180

CORAM: **LASKIN J.A.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

PRIORITY FOUNDATION

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on June 24, 2024.

Judgment delivered at Ottawa, Ontario, on October 7, 2025.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

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

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REASONS FOR JUDGMENT

ROUSSEL J.A.

I. Overview

[1] Priority Foundation appeals to this Court, pursuant to paragraph 172(3)(a.1) of the *Income Tax Act*, R.S.C. 1985, c. 1, 5th Supp. (ITA), in respect of a notice of intention to revoke its registration as a charity. The notice was issued on November 10, 2022, by the Minister of National Revenue (or the Canada Revenue Agency (CRA) acting on the Minister's behalf)

pursuant to subsections 149.1(3) and 168(1) of the ITA. The revocation took effect on January 14, 2023, when a copy of the notice was published in the *Canada Gazette*.

[2] The Minister's decision to revoke Priority's status as a registered charity was based on the Minister's opinion that Priority failed to comply with the requirements of the ITA by making gifts to non-qualified donees. At issue are gifts made by Priority to charities in the United States.

[3] Priority submits that, by operation of article XXI(7) of the *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital*, September 26, 1980, Can. T.S. 1984 No. 15 (Tax Convention), a gift to a U.S. charity is to be treated, for the purposes of Canadian taxation, as a gift to a registered charity under the ITA (Gift Provision). Since a registered charity is a "qualified donee" under the ITA, the Minister had no grounds to revoke its charitable status.

[4] This is not the first time the interpretation of article XXI(7) of the Tax Convention has been raised in this Court (see *Prescient Foundation v. Canada (National Revenue)*, 2013 FCA 120 and *Public Television Association of Quebec v. Canada (National Revenue)*, 2015 FCA 170). However, in both cases, this Court was able to resolve the appeals without interpreting the Gift Provision in the Tax Convention.

[5] The parties agree that the interpretation of article XXI(7) of the Tax Convention will resolve the outstanding issues between them.

[6] For the reasons below, I would dismiss the appeal.

II. Background

[7] On August 6, 2008, Priority was incorporated as a corporation without share capital under Part II of the former *Canada Corporations Act*, R.S.C. 1970, c. C-32. According to its application, its stated objects are:

> a) to solicit and receive gifts, bequests, trusts, funds and property and beneficially, or as a trustee or agent, to hold, invest, develop, manage, accumulate and administer funds and property for the purpose of disbursing funds and property exclusively to registered charities and "qualified donees" under the provisions of the *Income Tax Act*; and
>
> b) to undertake activities ancillary and incidental to the attainment of the aforementioned charitable purposes.
>
> (Appeal Book at 41-42)

[8] Shortly thereafter, Priority applied for registration as a charity. On October 29, 2008, the Minister issued a notification of registration confirming that Priority qualified for tax-exempt status as a registered charity under paragraph 149(1)(f) of the ITA. The notification also stated that Priority had been designated as a public foundation "on the understanding that it will restrict its activities to receiving and managing funds for the exclusive purpose of making gifts to 'qualified donees' as defined in subsection 149.1(1) of the [ITA]" (Appeal Book at 61).

[9] By letter dated January 15, 2019, the CRA notified Priority that it had been selected for an audit for the fiscal periods ending July 31, 2015, July 31, 2016, and July 31, 2017, and requested certain information and documents relating to the audit period. The CRA explained

that the basis for the audit was that Priority appeared to be gifting funds to organizations that are not considered qualified donees as defined in the ITA (Appeal Book at 78-79). In response, Priority asserted that it had "not disbursed funds or property, other than to registered charities and qualified donees", with the understanding that, under the Tax Convention, gifts to U.S. charities are to be treated as gifts to a registered charity (Appeal Book at 82-83).

[10] By letter dated September 9, 2021, the CRA issued an administrative fairness letter to Priority, setting out three areas of non-compliance: (1) failure to devote resources to a charitable purpose, including making disbursements by way of gifts to non-qualified donees; (2) failure to meet the disbursement quota; and (3) failure to file an information return when required by the ITA and/or the *Income Tax Regulations*, C.R.C., c. 945.

[11] In response to Priority's argument regarding the application of the Tax Convention, the CRA noted that the Tax Convention "provides limited tax relief with respect to gifts made by Canadian residents to U.S. organizations". It explained that, pursuant to article XXI(7) of the Tax Convention, "gifts made by a resident of Canada to an organization that is resident in the U.S., that is generally exempt from U.S. tax, and that could qualify in Canada as a registered charity if it were created or established and resident in Canada, will be treated as gifts to a registered charity for the purposes of reducing the donor's tax liability in Canada with respect to their income from U.S. sources" (Appeal Book at 115).

[12] The CRA added that while it accepted that an entity that is exempt under section 501(c)(3) of the United States' *Internal Revenue Code*, U.S.C. 26 (U.S. 501(c)(3) entity or

entities) would qualify for the purposes of article XXI(7) of the Tax Convention, this recognition did not mean that the U.S. 501(c)(3) entity was also a "qualified donee" under the ITA for the purposes of allowing a Canadian registered charity to make disbursements by way of gifts to such entities. The CRA informed Priority that the Minister was proposing to revoke Priority's charitable status due to the serious nature of the non-compliance (Appeal Book at 115).

[13] Priority responded by letter dated December 22, 2021. It set out why it felt that the CRA's interpretation of article XXI(7) of the Tax Convention was erroneous and advised that it was prepared to take this matter to Court. In the absence of a response, Priority sent a follow-up letter to the CRA on February 23, 2022, and enclosed a 1994 letter from the Rulings Directorate. In its follow-up letter, Priority stated that "almost three decades ago [the] Rulings Directorate accepted that [a]rticle XXI 'merely treats a gift to a U.S. charity as a gift to a Canadian registered charity'" and that it was simply asking that the CRA do just that (Appeal Book at 134).

[14] By letter dated November 10, 2022, the Director General of the Charities Directorate advised Priority of the Minister's intention to revoke Priority's registration, given the determination that Priority was not complying with the requirements set out in the ITA.

[15] In reasons articulated in an appendix to the letter, the CRA informed Priority that it remained its position that a Canadian resident lacking income from U.S. sources is not permitted to claim gifts made to U.S.-based 501(c)(3) entities for tax relief purposes against their non-U.S. income. Although Priority was a resident of Canada and could have U.S. income, it could not avail itself of this provision as it was not seeking tax relief against that income. Article XXI(7) of

the Tax Convention did "not operate to render a U.S. 501(c)(3) entity a 'qualified donee' under the [ITA] for the purposes of allowing a Canadian registered charity to make a disbursement by way of gift to such an entity" (Appeal Book at 15). Consequently, Priority was not operating exclusively for charitable purposes and no longer met the definition of a charitable foundation. Priority was informed that it could file a notice of objection with the CRA Appeals Branch within 90 days from the mailing of the notice of intention to revoke.

[16] On January 19, 2023, the Minister informed Priority that on January 14, 2023, she had published in the *Canada Gazette*, Part I, Vol. 157, No. 2, the notice revoking Priority's registration and that, effective on that date, Priority ceased to be a registered charity (Appeal Book at 32, 34).

[17] On February 6, 2023, Priority filed a notice of objection in which it argued that the CRA's interpretation of article XXI(7) of the Tax Convention was not in line with the rules of treaty interpretation. Priority reiterated its opinion that this provision permits a registered charity to make gifts to U.S. 501(c)(3) entities, which gifts should be considered qualifying disbursements. Priority also maintained that it was unreasonable for the CRA to revoke its registration prior to the period for objections or appeals being exhausted when the issue of the Tax Convention's interpretation had not been resolved by this Court (Appeal Book at 474-484).

[18] On February 17, 2023, the CRA acknowledged receipt of Priority's objection and advised that, based on its inventory of cases, it would be approximately 6 months before an appeals

officer would be contacting Priority "to review all the facts and discuss the objection" (Appeal Book at 485).

[19] Priority now appeals to this Court under paragraph 172(3)(a.1) of the ITA from the Minister's failure to confirm or vacate the notice of intention to revoke within 90 days of Priority having served its notice of objection. Priority submits that the Minister's interpretation of article XXI(7) of the Tax Convention is wrong in law.

III. Issues

[20] The issue in this appeal is whether the Minister erred in revoking Priority's charitable registration on the basis that Priority made gifts to non-qualified donees. The determination of this question involves the interpretation of article XXI(7) of the Tax Convention and its impact on the definition of "qualified donee" in subsection 149.1(1) of the ITA. Put differently, I must decide whether article XXI(7) of the Tax Convention permitted Priority to maintain its eligibility for charitable registration by making gifts to U.S. 501(c)(3) entities.

IV. Analysis

A. *Standard of review*

[21] Decisions that are subject to statutory appeals under paragraph 172(3)(a.1) of the ITA are to be reviewed on appellate standards. Questions of law, including questions of treaty interpretation, are reviewed on a standard of correctness. For questions of fact or mixed fact and

law where the legal principle is not readily extricable, the standard of review is palpable and overriding error (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para. 50; *Athletes 4 Athletes Foundation v. Canada (National Revenue)*, 2021 FCA 145 at para. 16).

[22] I agree with the parties that the issues raised in this appeal are reviewable on a standard of correctness.

B. *Legislative Framework*

[23] Before turning to the interpretation of article XXI(7) of the Tax Convention, I find it useful to provide a brief and high-level overview of the way in which the ITA applies to charitable gifts. Although some of the provisions of the ITA have been amended over the years at issue, except as otherwise noted, the changes are not relevant for the purposes of Priority's appeal.

[24] Generally, when a corporation makes a charitable gift to a qualified donee, the corporation is entitled to claim a deduction of the amount of the gift in computing its taxable income (paragraph 110.1(1)(a) of the ITA). An individual donor, on the other hand, is entitled to claim a tax credit in the computation of their tax payable for a taxation year (subsections 118.1(1) and (3) of the ITA). Eligible charitable gifts that may be claimed in a taxation year are generally limited to a percentage of the donor's net income for that taxation year. Unused eligible charitable gifts may be carried forward for up to 5 years.

[25] Throughout most of the audit period, subsection 149.1(1) of the ITA defined a "qualified donee" as follows:

qualified donee, at any time, means a person that is	***donataire reconnu*** Sont des donataires reconnus à un moment donné :
(a) registered by the Minister and that is	**a)** toute personne enregistrée à ce titre par le ministre qui est :
(i) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i) that has applied for registration,	**(i)** une société d'habitation résidant au Canada et exonérée de l'impôt prévu à la présente partie par l'effet de l'alinéa 149(1)i) qui a présenté une demande d'enregistrement,
(ii) a municipality in Canada,	**(ii)** une municipalité du Canada,
(iii) a municipal or public body performing a function of government in Canada that has applied for registration,	**(iii)** un organisme municipal ou public remplissant une fonction gouvernementale au Canada qui a présenté une demande d'enregistrement,
(iv) a university outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada, or	**(iv)** une université située à l'étranger, visée par règlement, qui compte d'ordinaire parmi ses étudiants des étudiants venant du Canada,
(v) a foreign charity that has applied to the Minister for registration under subsection (26),	**(v)** un organisme de bienfaisance étranger qui a présenté au ministre une demande d'enregistrement en vertu du paragraphe (26);
(b) a registered charity,	**b)** tout organisme de bienfaisance enregistré;
(c) a registered Canadian amateur athletic association, or	**c)** toute association canadienne enregistrée de sport amateur;
(d) Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations;	**d)** Sa Majesté du chef du Canada ou d'une province, l'Organisation des Nations Unies ou une institution reliée à cette dernière.

[26] For the purposes of my analysis below, the relevant qualified donees include a registered charity, a university outside of Canada whose student body ordinarily includes students from Canada and that has been registered by the Minister, and a foreign charity that has successfully applied for registration to the Minister under subsection 149.1(26) of the ITA.

[27] A "registered charity" is defined in subsection 248(1) of the ITA. It includes a charitable organization, private foundation or public foundation, that is resident in Canada and was either created or established in Canada and that has applied to the Minister for registration and that is at that time registered as a charitable organization, private foundation or public foundation. Pursuant to paragraph 149(1)(f) of the ITA, a registered charity is exempt from paying tax on its income. The registered charity may also issue receipts to donors for the gifts it receives. Where a registered charity fails to comply with the requirements of the ITA, the Minister may revoke the registered charity's charitable registration, one effect of which will be the loss of its tax-exempt status (ITA, subsections 149.1 (2), (3), (4) and (4.1), paragraph 168(1)(b), and subsection 168(2)).

[28] Pursuant to subsection 149.1(1) of the ITA, a public foundation, like Priority, must be a charitable foundation, which is defined as a corporation or trust that is constituted and operated exclusively for "charitable purposes" and that is not a charitable organization. As this Court noted in *Prescient*, "[a]s a general rule, charitable organizations engage in charitable activities, while charitable foundations raise money for charitable purposes" (*Prescient* at para. 15).

[29] During the audit period, subsection 149.1(1) of the ITA defined "charitable purposes" as including "the disbursement of funds to a qualified donee…" [emphasis added].

[30] Given the residency and creation or establishment requirements in the subsection 248(1) definition of a "registered charity", a foreign charity such a U.S. 501(c)(3) entity does not meet the definition of a qualified donee under the ITA. As a result, having regard only to the provisions of the ITA, a gift made by a Canadian taxpayer to a foreign charity is ineligible for tax relief unless the Minister registers the foreign charity as a qualified donee.

[31] That said, there are situations that permit cross-border tax relief. One such situation is where a country has a bilateral agreement with another country to provide tax relief. The Tax Convention is one such agreement. Article XXI provides for limited reciprocal tax relief in certain circumstances where a resident of one country makes a gift to a tax-exempt organization that is a resident of the other country.

C. *The Tax Convention*

[32] The Tax Convention was signed in September 1980 and enacted into Canadian law by the *Canada-United States Tax Convention Act, 1984,* S.C. 1984, c. 20. It replaced the then existing tax convention between Canada and the United States dating back to 1942. Since its signature in 1980, the Tax Convention has been amended by the adoption of five protocols, the latest of which was signed in September 2007.

[33] Article XXI of the Tax Convention addresses the reciprocal recognition of tax-exempt status for certain types of organizations, as well as the treatment of cross-border gifts and contributions. At issue in this appeal is the interpretation of article XXI(7), which reads as follows:

7. For the purposes of Canadian taxation, gifts by a resident of Canada to an organization that is a resident of the United States, that is generally exempt from United States tax and that could qualify in Canada as a registered charity if it were a resident of Canada and created or established in Canada, shall be treated as gifts to a registered charity; however, no relief from taxation shall be available in any taxation year with respect to such gifts (other than such gifts to a college or university at which the resident or a member of the resident's family is or was enrolled) to the extent that such relief would exceed the amount of relief that would be available under the *Income Tax Act* if the only income of the resident for that year were the resident's income arising in the United States. The preceding sentence shall not be interpreted to allow in any taxation year relief from taxation for gifts to registered charities in excess of the amount of relief allowed under the percentage limitations of the laws of Canada in respect of relief for gifts to registered charities.	7. Aux fins de l'imposition canadienne, les dons versés par un résident du Canada à une organisation qui est un résident des États-Unis, qui est généralement exempt de l'impôt des États-Unis et qui, au Canada, pourrait avoir le statut d'organisme de charité enregistré si elle était un résident du Canada et si elle avait été créée ou établie au Canada, sont considérés comme dons versés à un organisme de charité enregistré; toutefois, aucun allégement fiscal n'est accordé au cours d'une année d'imposition quelconque pour des dons (autres que ceux versés à un collège ou à une université auxquels le résident ou un membre de sa famille est ou était inscrit) dans la mesure où un tel allégement serait supérieur au montant de l'allégement accordé en vertu de la *Loi de l'impôt sur le revenu* si le seul revenu du résident pour cette année d'imposition était le revenu du résident provenant des États-Unis. La phrase précédente n'est pas interprétée comme permettant, au cours d'une année d'imposition quelconque, un allégement fiscal pour des dons à des organismes de charité

[emphasis added]

enregistrés d'un montant qui excède celui accordé, en matière de plafond des pourcentages, en vertu de la législation du Canada à l'égard de l'allégement pour des dons à des organismes de charité enregistrés.

[je souligne]

D. *Principles of Treaty Interpretation*

[34] The interpretation of the Tax Convention is governed by the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (Vienna Convention). Article 31 of the Vienna Convention provides the general rule of interpretation: the treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

[35] As the Supreme Court of Canada noted in *Alta Energy Luxembourg S.A.R.L.* at paragraph 37:

> …the methodology prescribed [for interpreting treaties] is not radically different from the modern principle applicable to domestic statutes in Canada — that is, one must consider the ordinary meaning of the text in its context and in light of its purpose (art. 31(1) of the *Vienna Convention*; *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, at para. 43; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578). However, unlike statutes, treaties must be interpreted 'with a view to implementing the true intentions of the parties' (*J. N. Gladden Estate v. The Queen*, [1985] 1 C.T.C. 163 (F.C.T.D.), at p. 166, quoted approvingly in *Crown Forest*, at para. 43). The national self-interest of *each* contracting state must be reconciled in the interpretive process in order to give full effect to the bargain codified by the treaty…

[36] Tax treaties are to be given a liberal interpretation, and literal interpretations should be avoided where the object of the treaty may be defeated (*Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802 at para. 43; *Levett v. Canada (Attorney General)*, 2022 FCA 117 at para. 24).

[37] In addition to the Vienna Convention, the *Canada-United States Tax Convention Act, 1984* further provides that where there is inconsistency between the provisions of the *Canada-United States Tax Convention Act, 1984*, or the Tax Convention, and the provisions of any other law, the provisions of the *Canada-United States Tax Convention Act, 1984* and the Tax Convention shall prevail to the extent of the inconsistency (*Canada-United States Tax Convention Act, 1984*, subsection 3(2)). However, in the event of any inconsistency between the provisions of the *Income Tax Conventions Interpretation Act*, R.S.C. 1985, c. I-4 and the provisions of the Tax Convention, the provisions of the *Income Tax Conventions Interpretation Act* shall prevail to the extent of the inconsistency (*Canada-United States Tax Convention Act, 1984*, subsection 3(2.1)).

[38] The following analysis will address the text, context, and purpose of article XXI(7), and the resulting implications for Priority's charitable registration. The following statement from *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68 at para. 16 is appropriate for the exercise at hand:

> The point of departure for interpreting a provision of a treaty is the plain meaning of the text. As the House of Lords put it in *Januzi v. Secretary of State for the Home Department*, [2006] UKHL 5, [2006] 2 A.C. 426, at para. 4: ". . . the starting point of the construction exercise must be the text of the Convention itself . . ., because it expresses what the parties to

> it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text . . .".

E. *Interpretation of Article XXI(7) of the Tax Convention*

(1) Ordinary Meaning

[39] Article XXI(7) of the Tax Convention provides that gifts made by a resident of Canada to an organization resident of the United States that is generally exempt from U.S. tax shall be treated for Canadian tax purposes as gifts to a registered charity, provided the U.S. organization could qualify in Canada as a registered charity if it were resident of Canada and created or established in Canada. Simply put, it allows a Canadian resident to claim tax relief for making gifts to U.S. charities. However, the relief from tax that the resident of Canada may claim for Canadian tax purposes is limited to the relief that would be available under the ITA if the only income of the resident were the resident's income from sources in the United States and only to the extent permitted under the percentage limitations under the ITA for gifts to registered charities.

[40] As an example, and broadly speaking, take the situation of a resident of Canada who has an overall net income of $1,000 of which $100 is derived from U.S. sources. The Canadian resident could not claim as eligible, for the purposes of sections 110.1 in the case of a corporate donor and 118.1 in the case of an individual donor, a gift to a U.S. charity in excess of $75 (75% of the donor's US income) (David Kerzner, Vitaly Timokhov, David Chodikoff, *The Tax Advisor's Guide to the Canada-US Tax Treaty*, (Toronto: Carswell, 2008) at 21-30).

[41] Pursuant to article XXI(6) of the Tax Convention, contributions by citizens or residents of the United States to Canadian charities enjoy reciprocal relief.

[42] The parties to this appeal do not dispute that charitable organizations in the United States are exempted from tax under section 501(c)(3) of the United States' *Internal Revenue Code*, or that Priority made gifts to U.S. 501(c)(3) entities. Nor does Priority appear to dispute this interpretation of article XXI(7) as it applies to individuals or corporations.

[43] The crux of Priority's position is that article XXI(7) of the Tax Convention should also be interpreted as treating gifts by a Canadian registered charity to U.S. 501(c)(3) entities as gifts to a registered charity, and so to a qualified donee, for the purposes of maintaining the charity's registration.

[44] In support of its proposed interpretation of article XXI(7) of the Tax Convention, Priority submits that the phrase "for the purposes of Canadian taxation" should be interpreted broadly, such that it applies to all sections of the ITA. In Priority's view, this phrase broadened the scope of its predecessor (the analogous provision of which read "in the computation of taxable income") and was meant to capture not only the various tax credits and deductions in respect to gifts in sections 110.1 and 118.1(3), but also to encompass the definitions of key terms in sections 149.1 and 248 of the ITA, the rules relating to disbursement quotas in section 149.1 of the ITA, and the grounds for revocation in section 168 of the ITA.

[45] Priority further maintains that it meets the definition of "resident of Canada" in respect of the phrase "gifts by a resident of Canada", having been incorporated under what is now the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23.

[46] Priority adds that the phrase "shall be treated as gifts to a registered charity" is a deeming provision since, in the absence of the Tax Convention, a U.S. charity would not qualify as a registered charity, as the latter must be resident in Canada. According to Priority, the heart of its dispute with the CRA lies in what it means to treat the gifts as "gifts to a registered charity". Priority adopts the definition of a "registered charity" under the ITA, which is one type of "qualified donee" (as the term is defined in subsection 149.1(1) of the ITA) and submits that it "follows that a gift that is treated as a gift to a registered charity is necessarily being treated as a gift to a qualified donee" (Priority's memorandum of fact and law at para. 40).

[47] As to the balance of article XXI(7) of the Tax Convention, Priority submits that the phrase "however, no relief from taxation shall be available … with respect to such gifts … to the extent that such relief would exceed the amount of relief that would be available under the [ITA]" is a qualification that does not limit the ambit of the first clause in the article. It is only "if a resident is seeking tax relief in respect of gifts to US charities, that relief cannot exceed what would be available under Canadian law" and that "[n]owhere does the Gift Provision say that residents must be seeking tax relief in respect of such gifts: it simply explains the limits of such tax relief, if it is sought" (Priority's memorandum of fact and law at para. 42).

[48] The Minister disagrees with Priority's interpretation of article XXI(7) of the Tax Convention and submits that article XXI(7) is focused on providing tax relief (deductions or credits) for Canadian residents (individuals and corporations) in respect of gifts made to U.S. charities. It does not deem or cause U.S. charities to be qualified donees under the ITA.

[49] During the hearing, Priority argued that it was not its position that article XXI(7) of the Tax Convention deemed U.S. 501(c)(3) entities to be qualified donees under the ITA, only that the gifts made to them must be treated as though they were made to qualified donees for the purposes of Canadian taxation.

[50] With all due respect, I fail to see the purpose of making such a distinction.

[51] Priority's position is clearly articulated in paragraph 43 of its memorandum of fact and law:

> It follows that Priority, a "resident" under the Treaty, can make gifts to US charities and have those gifts be "treated as" gifts to a registered charity "for the purposes of Canadian taxation." As applied to a charity (rather than an individual or corporation), this means that such gifts constitute qualifying disbursements and are permissible under Canadian tax law. This is in line with the fact that Canadian public foundations frequently make gifts to registered charities.

[52] It is important to recall that Priority's charitable registration was revoked on the basis that it was not complying with the requirements of the ITA. Paragraph 149.1(3)(b) required that Priority's disbursements be made to qualified donees to maintain its registration. The only way in which Priority can successfully argue that the Minister erred in revoking its charitable

registration is by demonstrating that article XXI(7) of the Tax Convention deems U.S. 501(c)(3) entities to be qualified donees.

[53] I agree with the Minister that there is nothing in the plain wording of article XXI(7) to support Priority's submission that the first clause of the Gift Provision can stand alone for the purposes of maintaining its charitable registration and that the qualification that follows it only applies if the resident of Canada is seeking tax relief in respect of such gifts. On the contrary, the use of the semicolon at the end of the first clause suggests that what follows is closely related to the first clause. Likewise, the use of the word "however" that follows the semi-colon suggests that it is a qualifier of the first clause and is being used in the sense of "but". Furthermore, this Court has in the past rejected an argument that "semicolons detach or unhook" two parts of a sentence (*Neptune Wellness Solutions v. Canada (Border Services Agency)*, 2020 FCA 151 at paras. 30-32).

[54] In my view, the words "[f]or the purposes of Canadian taxation" must be construed with the rest of the provision and there is nothing in the wording of article XXI(7) that leads to the conclusion that U.S. 501(c)(3) entities are deemed to be qualified donees for the purposes of maintaining one's charitable registration. The Gift Provision explicitly states that it is the gift that is to be treated as a gift to a registered charity. It does not mean that the gift is in fact a gift to a qualified donee or that the organization to which the gift was made is deemed a registered charity or a qualified donee. Moreover, the French version of the introductory wording of article XXI(7), "[a]ux fins de l'imposition canadienne" ("[f]or the purposes of Canadian taxation")

reinforces the interpretation that article XXI(7) relates to the imposition of taxes rather than the maintenance of charitable registration.

[55] Finally, I find that the words "that could qualify in Canada as a registered charity if it were a resident of Canada" in the first clause of article XXI(7) of the Tax Convention support the interpretation that article XXI(7) does not extend to the requirements for maintaining charitable registration. These words demonstrate that Canada intended to retain control over the types of organizations that could benefit from the application of the provision. In other words, if the organization could not qualify in Canada as a registered charity, then presumably the deduction or credit would not be allowed.

(2) Context

[56] Priority submits that it is clear from article XXI that it was meant to deal comprehensively with cross-border taxation issues relating to tax-exempt entities. Entities that are tax-exempt in one country are meant to be tax-exempt in the other country. Paragraph 1 ensures that they remain tax-exempt and articles XXI(6) and (7), through their broad introductory statements, address the remaining issues. Priority points out that since article XXI addresses all cross-border tax charity issues, it would be odd to interpret article XXI as not addressing what kind of gifts charitable foundations can make.

[57] Priority also submits that since article XXI(6) of the Tax Convention provides reciprocal relief for charitable contributions made by citizens or residents of the United States to Canadian charities, the practice in the United States regarding donations to Canadian charities is relevant.

Priority claims that U.S. charities are free to make gifts to Canadian charities (Priority's memorandum of fact and law at para. 48).

[58] Priority further finds instructive the change in wording from prior versions of the Tax Convention. First, it submits that the 1956 version had a narrower scope than the current version of the Gift Provision. It began with the phrase "[i]n the computation of taxable income for any taxation year under the income tax laws of Canada", in contrast with the current version which begins with "[f]or the purposes of Canadian taxation." Second, the 1956 version specified that gifts to U.S. charities would be allowed as a deduction, as opposed to treating the gift as a gift to a registered charity. Third, while the 1956 version was unclear about to whom it applied, the updated version clearly stipulates that it applies to "residents", a term defined in the Tax Convention as including a not-for-profit organization. Priority submits that these updates demonstrate an intention to broaden the applicability of article XXI(7) beyond tax relief.

[59] Finally, Priority submits that while the preamble of the Tax Convention is part of its context, it is not particularly helpful in this case other than to confirm the purpose is "to allocate and limit taxing powers of the Contracting States" (Priority's memorandum of fact and law at para. 53, citing *Coblentz v. Canada*, [1997] 1 F.C. 368 at para. 17).

[60] I agree that the context of article XXI(7) is important in interpreting its meaning.

[61] The Vienna Convention specifically permits consideration of the preamble when interpreting a treaty. In this case, the preamble of the Tax Convention states that Canada and the

United States "[desire] to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital" (Tax Convention, preamble; see also *Coblentz* at para. 17). The preamble demonstrates that the focus of the parties with respect to the Tax Convention was on taxing powers, and imposing taxes on income and capital.

[62] Moreover, article II(1) of the Tax Convention provides that it "shall apply to taxes on income and on capital imposed on behalf of each Contracting State, irrespective of the manner in which they are levied." Article II(2)(a) further specifies that the taxes to which the Tax Convention shall apply are, in the case of Canada, the taxes imposed by the Government of Canada under the ITA. Again, this demonstrates that the Tax Convention was intended to target taxes that are imposed.

[63] I do not find persuasive Priority's argument that they are entitled to the benefit of a broad interpretation of article XXI(7) because they meet the definition of resident under article IV(1) of the Tax Convention. Although article IV(1) provides that the term "resident" is understood to include a not-for-profit organization that by its nature is generally exempt from income taxation, it also states that "[f]or the purposes of this Convention, the term 'resident' of a Contracting State means any person that, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence…." [emphasis added]. This link made in article IV(1) between the person's residence and their liability to tax suggests that the Tax Convention applies to the imposition of taxes, rather than to the requirements of charitable registration.

[64] As to article XXI of the Tax Convention, it is entitled "Exempt Organizations" and generally provides relief from taxation on income earned in one country by certain tax-exempt organizations resident in the other country. In particular, article XXI(1) of the Tax Convention provides that "income derived by a religious, scientific, literary, educational or charitable organization shall be exempt from tax in a Contracting State if it is resident in the other Contracting State, but only to the extent that such income is exempt from tax in that other State." In other words, a Canadian registered charity with U.S.-source income would not be subject to tax in the U.S., since the Canadian registered charity would likewise be exempt from Canadian tax pursuant to subsection 149(1)(f) of the ITA.

[65] It is important to recall that pursuant to subsection 149(1) of the ITA, a registered charity (that is resident in Canada and was either created or established in Canada as per paragraph 248(1)(a) of the ITA) is generally exempt from the tax imposed under Part 1 of the ITA. In the absence of relief under a tax treaty, a foreign tax-exempt organization with Canadian-source income would be subject to Canadian tax, pursuant to the rules dealing with taxation of non-resident persons. Article XXI(1) of the Tax Convention has the effect of providing tax relief to the listed foreign tax-exempt organizations which are resident of one country on income derived in the other country.

[66] I again note that under article XXI(1), reciprocity exists only if the organization is exempt from tax in the contracting state where the organization resides. The initial determination of exemption lies with the resident state. In my view, this again demonstrates the contracting

parties' intention that the state where the organization is resident retains its authority over the conditions the organization must satisfy to maintain its charitable registration.

[67] Given the foregoing, I find that the Tax Convention's emphasis on providing relief from income and capital taxes does not support Priority's claim that the Tax Convention extends to the requirements Canadian charities must satisfy to maintain their charitable registration. The phrase "[f]or the purposes of Canadian taxation" that appears in article XXI(7), and the inverse phrase, "for the purposes of United States taxation" in article XXI(6), must be construed in light of preamble, article II, article IV(1) and article XXI(1) of the Tax Convention, that is to provide tax relief in respect of gifts made by taxpayers (individuals or corporations) who have income arising in the country in which the recipient charity is resident which income would otherwise be taxed in the taxpayers' country of residence.

[68] That said, I do agree with Priority that the broadening of article XXI(7) in 1984 from the 1956 version could not have been solely for the purpose of including tax credits, as the Minister suggested. The Minister presented no evidence to support this position. It is my understanding that tax credits were introduced in relation to charitable gifts in 1988, while the amendment to article XXI(7) occurred in 1984. In any event, regardless of the timing of the introduction of tax credits, I am not persuaded that the phrase "for the purposes of Canadian taxation" was intended to be all-encompassing, such that it would impact the requirements for ongoing charitable registration under the ITA for Canadian registered charities.

[69] In addition to looking at article XXI(7) in the context of the other surrounding provisions of the Tax Convention, I find it is also important to consider some of the history relating to the requirement that disbursements be made to qualified donees as well as the broader context of the domestic charitable taxation scheme.

[70] In an application commenced in the Ontario Superior Court of Justice (*The Wolfe and Millie Goodman Foundation v. The Queen*, court file 08-06199), the concerned private foundation sought confirmation that a grant to a foreign charity met the foundation's charitable purposes and therefore counted towards the foundation meeting its disbursement quota. In settling the dispute, the CRA conceded that a gift to a foreign charity had a charitable purpose at common law and confirmed that, insofar as its "disbursement quota" was met, the private foundation could make disbursements to non-qualified donees meeting the definition of "charitable" at common law until such time as the ITA could be amended (*Prescient* at paras. 27-28).

[71] The ITA was eventually amended in response to the *Wolfe and Millie Goodman Foundation* settlement to allow the Minister to revoke the registration of a charitable organization (subparagraph 149.1(2)(c)(ii)), a public foundation (subparagraph 149.1(3)(b.1)(ii)) or a private foundation (subparagraph 149.1(4)(b.1)(ii)), which made disbursements by way of gift, other than to a qualified donee (*Prescient* at para. 29). The legislative amendments in question made to the ITA were enacted in 2013 as part of the *Technical Tax Amendments Act, 2012*, S.C. 2013, c. 34, and were made effective retroactively to gifts made after December 20, 2002.

[72] With respect to the broader context, I agree with the Minister's submission that if article XXI(7) deemed a U.S. 501(c)(3) entity to be a registered charity and therefore, a qualified donee, under the ITA, the U.S. 501(c)(3) entity would be subject to the record and bookkeeping requirements provided in subsection 230(2) of the ITA. As such, they would be required to keep, at an address in Canada, records and books of account containing: (a) information in such form as to enable the Minister to determine whether there are any grounds to revoke its registration under the ITA, (b) a duplicate of each receipt containing prescribed information for a donation received by it, and (c) other information in such form as to enable the Minister to verify the donations to it for which a deduction or tax credit is available under the ITA. In my view, it would be highly unusual that the Minister's powers of revocation mentioned in paragraph 230(2)(a) of the ITA would extend to U.S. 501(c)(3) entities.

[73] Furthermore, as it appears from the definition of a qualified donee above, the ITA already sets out specific instances whereby foreign charitable entities are considered to be qualified donees.

[74] Subparagraph 149.1(1)(a)(v) and subsection 149.1(26) allow a foreign charity to be registered as a qualified donee for a 24-month period if the foreign charity has received a gift from His Majesty in right of Canada and is carrying on activities relating to urgent humanitarian or disaster relief or activities in the national interest of Canada. The definition of qualified donee also includes, under subparagraph 149.1(1)(a)(iv) of the ITA, a university outside Canada of which the student body ordinarily includes students from Canada and that is registered by the Minister.

[75] Article XXI(7) must be read in this context. Canada could not have intended for this provision to deem U.S. 501(c)(3) entities to be qualified donees for the purposes of maintaining a public foundation's charitable registration. The drafters of the Tax Convention could have easily said that for the purposes of Canadian taxation, the organization (U.S. charity) is deemed to be a Canadian registered charity, and so a qualified donee. They did not do so.

[76] Incidentally, I note that effective on June 23, 2022, the definition of "charitable purposes" in section 149.1 of the ITA was amended to replace "includes the disbursement of funds to a qualified donee" by "includes making qualifying disbursements". Paragraph 149.1(3)(b.1) of the ITA was also amended to provide that the registration of a public foundation may be revoked if it makes a disbursement, other than a qualifying disbursement (ITA, subparagraph 149.1(3)(b.1)(ii)). A qualifying disbursement is defined as meaning a "disbursement by a charity [charitable organization or charitable foundation], by way of a gift or otherwise making resources available, …to a qualified donee or …to a grantee organization" that meets certain prescribed accountability requirements. One such requirement is that the disbursement is in furtherance of a charitable purpose of the granting charity. While the issue of whether the amendment permits a grantee organization to be a foreign charity is not before this Court, the amendment supports the view that the requirements for maintaining charitable registration in Canada are found in the ITA and not article XXI(7) of the Convention. In any event, during the relevant fiscal period under audit, the only permissible way for Priority to operate was to make gifts to qualified donees, by virtue of the ITA and Priority's constituting documents and notification of registration letter.

[77] As to Priority's claim that U.S. charities are free to make gifts to Canadian charities, I find that I have not been provided sufficient evidence to conclude that this is in fact the situation. Moreover, even if U.S. charities are permitted to do so without jeopardizing their charitable registration in the United States, I do not know whether this is the result of internal U.S. law or policies. I have not been provided sufficient evidence on how the United States governs its charitable sector.

(3) Purpose

[78] Priority submits that determining the purpose of a treaty provision requires, first, defining the purpose of the treaty as a whole, and second, defining the purpose and place of the provision within that scheme.

[79] It does not appear to be disputed by Priority that the overall purpose of the Tax Convention is to facilitate cross-border trade and investment, to provide relief from double taxation and to set out the respective taxing powers of the state parties in the cross-border tax context. The Tax Convention addresses a variety of issues such as residence (art. IV); real property income (art. VI); business profits (art. VII); cross-border family arrangements (art. IX); dividends and interest (arts. X and XI); gains from property (art. XIII); employment income (art. XV); pensions and annuities (art. XVIII); exempt organizations (art. XXI); other income (art. XXII); capital (art. XXIII); elimination of double taxation (art. XXIV); and non-discrimination (art. XXV) (Priority's memorandum of fact and law at paras. 55-56).

[80] As for article XXI(7) and its counterpart, article XXI(6), Priority submits that the intention of the parties was to recognize the status of the other's charities and to provide mirroring tax benefits for gifts made to the other's charitable sector. In its view, the Tax Convention reflects the confidence that Canada and the United States have in each other's administration of their respective charitable sectors. In other words, Priority argues that article XXI(7) is a deeming provision that the contracting states intended to govern the registered status of charities.

[81] In reviewing the intention of the drafters of the Tax Convention and its purpose, the Supreme Court of Canada wrote the following in *Crown Forest* at paragraphs 46, 47 of its reasons:

> 46. At this point in the analysis, it is important to take a step backwards and isolate exactly whom the Convention was intended to benefit. The target group are Canadians working in the United States (or vice versa) and Canadian companies operating in the United States (again, or vice versa). It was deemed important, in order to promote international trade between Canada and the U.S., to spare such individuals and corporations double taxation (consequently promoting the equitable allocation of profits of enterprises doing business in both countries): see Preamble to the Convention; see also *Utah Mines Ltd. v. The Queen*, 92 D.T.C. 6194 (F.C.A.), and U.S. Senate (Foreign Relations Committee), *Tax Convention and Proposed Protocols with Canada*, at p. 2: "The principal purposes of the proposed income tax treaty between the United States and Canada are to reduce or eliminate double taxation of income earned by citizens and residents of either country from sources within the other country, and to prevent avoidance or evasion of income taxes of the two countries." An ancillary goal would also be to mitigate the administrative complexities occasioned by having to file simultaneously income tax returns in two unco-ordinated taxation systems.
>
> 47. I note that states have the jurisdiction to tax income arising from all commercial transactions, whether these be domestic or international in nature. Where money flows from a domestic to a foreign party, and the income received by the foreign party is outside the jurisdiction of the state, the state exercises its jurisdiction over the transaction by requiring

> the domestic party to withhold a certain amount from the foreign party. This amount is what is termed a "withholding tax"; it is this type of tax that constitutes the subject matter of the appeal at bar. Withholding taxes creates immediate problems, since it gives rise to the possibility that the taxpayer shall be vulnerable to double taxation on all foreign transactions. The root of this double liability emanates from the fact that, upon one transaction, a withholding tax may be imposed by the payor's government and, at the same time, an income tax may be imposed by the recipient's government. So, theoretically, international transactions could be subject to twice the tax exposure of domestic transactions. This, in turn, creates a potential deterrent to foreign trade and transboundary transactions.

[82] The Technical Explanation prepared by the United States Treasury Department when the Tax Convention was signed provides guidance on the parties' views of the purpose of article XXI and in particular, articles XXI(6) and (7) of the Tax Convention, which at the time were numbered XXI(5) and XXI(6), respectively:

> Paragraph 5 provides that contributions by a citizen or resident of the United States to an organization which is resident in Canada and is generally exempt from Canadian tax are treated as charitable contributions, but only if the organization could qualify in the United States to receive deductible contributions if it were resident in (i.e., organized in) the United States. Paragraph 5 generally limits the amount of contributions made deductible by the Convention to the income of the U.S. citizen or resident arising in Canada, as determined under the Convention. In the case of contributions to a college or university at which the U.S. citizen or resident or a member of his family is or was enrolled, the special limitation to income arising in Canada is not required. The percentage limitations of Code section 170 in respect of the deductibility of charitable contributions apply after the limitations established by the Convention. Any amounts treated as charitable contributions by paragraph 5 which are in excess of amounts deductible in a taxable year pursuant to paragraph 5 may be carried over and deducted in subsequent taxable years, subject to the limitations of paragraph 5.
>
> Paragraph 6 provides rules for purposes of Canadian taxation with respect to the deductibility of gifts to a U.S. resident organization by a resident of Canada. The rules of paragraph 6 parallel the rules of paragraph 5. The current limitations in Canadian law provide that deductions for gifts to charitable organizations may not exceed 20

> percent of income. Excess deductions may be carried forward for one year.
>
> Treasury Department Technical Explanation of the Convention between the United States of America and Canada with respect to Taxes on Income and On Capital signed at Washington, D.C. on September 26, 1980, as amended by the Protocol signed at Ottawa on June 14, 1983 and The Protocol signed at Washington on March 28, 1984 (Joint Book of Authorities at 2244)

[83] Also relevant is the "Guidance Notice Relating to Article XXI of the Tax Convention" (Notice 99-47) issued by the U.S. Internal Revenue Service, which took the view that article XXI of the Tax Convention was "generally [to provide] for deduction of cross-border charitable contributions, and reciprocal recognition of exemption for religious, scientific, literary, educational, or charitable organizations". It explained:

> Under the terms of the agreement, recognized religious, scientific, literary, educational, or charitable organizations that are organized under the laws of either the U.S. or Canada will automatically receive recognition of exemption without application in the other country. U.S. organizations must be recognized as exempt under section 501(c)(3) of the Code in order to qualify for this treatment. Similarly, Revenue Canada must recognize Canadian organizations as Canadian registered charities. Moreover, recognized charitable organizations resident in one country will be eligible to receive deductible charitable contributions from residents of the other country. However, in the case of a contribution (or contributions) by a resident or citizen of the United States (other than a contribution to a college or university at which the citizen or resident or a member of his family is or was enrolled), U.S. law requires that the amount of deductions in the aggregate for a taxable year may not exceed a certain percentage of the donor's Canadian source income. Any excess contribution that is not deductible as a result of this limitation may be earned over and deducted in subsequent taxable years, subject to the same limitations…. Under the agreement, recognition of exemption by the U.S. of a Canadian registered charity will remain in effect until the U.S. determines that the organization fails to satisfy the requirements for exempt status under U.S. law.
>
> (Joint Book of Authorities at 2237)

[84] In my view, these excerpts support the interpretation that it was the intention of Canada and of the United States to provide reciprocal recognition of exemption for religious, scientific, literary, education, or charitable organizations and to provide tax relief for gifts made by a resident of a contracting state to a tax-exempt organization resident of the other contracting state, providing the taxpayer has income in the other contracting state. I am not persuaded that the drafters of the Tax Convention envisaged that it would go as far as interfering with each country's authority to determine the statutory requirements a registered charity must meet to maintain its charitable registration. In short, they support the view that the purpose of the treaty was to provide relief from the imposition of taxes and not to regulate the conditions an organization must satisfy to maintain its charitable registration in the organization's resident state.

[85] Beyond the purpose of article XXI(7), it is important to consider, at least at a conceptual level, that one of the goals of a charitable registration system is to regulate the gifts made to organizations for charitable purposes. The requirement that charitable public foundations, such as Priority, make gifts to "qualified donees" (or when applicable, to grantee organizations that meet the requirements set out in the ITA) enables the government to monitor the destination of funds, with the goal of preventing gifts from being used, for example, for nefarious purposes, such as money laundering and supporting terrorism.

[86] Moreover, as previously discussed, the ITA has created a statutory scheme to award credits or deductions for charitable gifts to Canadian registered charities and, in limited circumstances, foreign universities and approved foreign charities (*i.e.*, qualified donees) that are

registered by the Minister. In the case of gifts to tax-exempt organizations that are resident of the United States, tax relief may only be claimed against the Canadian resident's U.S.-source income pursuant to article XXI(7) of the Tax Convention. Interpreting article XXI(7) of the Tax Convention in the way proposed by Priority – that U.S. 501(c)(3) entities are deemed to be qualified donees for the purposes of Priority maintaining its charitable registration – would lead to an unusual result. The Canadian resident individual or corporate taxpayer with no U.S. income wishing to donate to a specific U.S. charity to whom Priority made gifts could have circumvented the U.S. income limitation by making the gift to Priority. In doing so, the Canadian resident taxpayer would then have been able to claim a credit or deduction against their Canadian income, thus allowing the taxpayer to do indirectly what they could not do directly within the ordinary meaning of the article XXI(7). This could not have been the result intended by the contracting states.

[87] For all of the above reasons, Priority has failed to persuade me that its interpretation of article XXI(7) is correct. Given the outcome of the appeal and my finding that the Minister properly revoked Priority's charitable registration for making gifts to non-qualified donees, it is not necessary for me to address Priority's argument that the Minister should have exercised her discretion to delay revocation until obtaining a ruling from this Court. Accordingly, I would dismiss the appeal with costs.

"Sylvie E. Roussel"
J.A.

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

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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