

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

BANK OF NOVA SCOTIA

APPELLANT
(Appellant)

and

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

and

BUSINESS COUNCIL OF CANADA, CANADIAN CENTRE FOR TAX POLICY

INTERVENERS

**CONDENSED BOOK OF THE INTERVENER,
BUSINESS COUNCIL OF CANADA**
(Pursuant to Rule 45 of the *Rules of the Supreme Court of Canada*)

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Tab 1

Outline of Oral Argument of the Intervener, Business Council of Canada

1. The courts below have concluded that a taxpayer is liable for arrears interest on a debt that it ultimately does not owe and that accrues for the entirety of a period outside of its control. That outcome is not supported by the scheme of the *Income Tax Act* as it relates to the utilization of losses and the computation of arrears interest. It is also needlessly punitive and difficult to rationalize, given the commercial backdrop against which the *Act* was meant to apply.
2. The Crown maintains that commerciality has no part to play in the exercise of statutory interpretation. That argument runs counter to the jurisprudence of this Court, which recognizes that legislation in general, and the *Act* in particular, must be interpreted with reference to the broader context within which it operates. The consequences of any given interpretation are an important component of the modern approach to statutory interpretation, especially in a case that has the potential to impact a broad spectrum of taxpayers.
3. Arrears interest is intended to compensate the Crown for the time value of money which is *owing* when a tax debt exists. There is only ever *one* such debt for a tax year and the quantum of that debt is ultimately determined when it is fixed through the assessment or disputes process. In this case, that determination was made post audit, and the upward adjustment to income was retroactively offset through the application of a loss. As such, there was no tax debt.
4. Imposing an obligation to pay interest in the absence of any underlying debt is a clear departure from the ordinary and established role of interest. Such an obligation should be imposed only to the extent that it is irrefutably supported by the text, context and purpose of the deeming provision in issue. This provision is narrowly aimed at taxpayer-initiated claims as opposed to claims made in response to audit adjustments initiated by the Minister of National Revenue. It should not be interpreted in an expansive manner beyond its otherwise limited scope.
5. To assess arrears interest in this type of case on a notional amount owing—as though the offsetting loss did not exist or was not utilized—is contrary to commercial expectation and reality. It is also particularly prejudicial to businesses that experience recurrent losses and routinely face audits. Faced with competing interpretations of the relevant legislative text, this Court ought not to endorse an interpretation that produces such an outcome.

Tab 2

antenna) is not. Quebecor and Videotron submit that because it is impossible to operate 5G transmission lines without small cell antennas, the same access rights should apply to the entire network, i.e., to both the cables and the antennas. Likewise, Rogers submits that Parliament could not have intended to grant carriers a right of access to deploy the cables that connect to 5G small cell antennas, but not the antennas themselves.

[76] The consequences of a particular interpretation are a component of the modern approach to statutory interpretation. Consequences that are consistent with the purpose and scheme of the legislation are presumed to have been intended. Conversely, consequences that are absurd or otherwise unacceptable are presumed not to have been intended (*Rizzo*, at para. 27; *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101, 480 D.L.R. (4th) 1, at paras. 42-43; see also R. Sullivan, “Statutory Interpretation in a New Nutshell” (2003), 82 *Can. Bar Rev.* 51, at p. 64).

[77] I agree with the carriers that an access regime that applies to wireline equipment in a mobile wireless telecommunications network but not wireless equipment is not the regime most favourable to the deployment of 5G infrastructure, a regime that Parliament could have enacted. It will require them to negotiate with municipalities without recourse to the CRTC. That said, this does not mean the narrower interpretation leads to an absurd result; it is not unreasonable, illogical, incompatible with other provisions of the Act, does not defeat the purpose of the Act, nor does it render any part of the Act pointless or futile (*Rizzo*, at para. 27).

Tab 3

thermore, it is clear that Parliament did not wish to define exhaustively the scope of manufacturing or processing, words which do not have distinct legal meanings, but left it to the courts to interpret this language according to common commercial use. The language in *Hansard* is not helpful as to the meaning which Parliament intended to subscribe to the words “for sale or lease”. It neither dictates, nor precludes, the application of common law sale of goods distinctions.

Notwithstanding this absence of direction, the concepts of a sale or a lease have settled legal definitions. As noted in *Crown Tire* and *Hawboldt Hydraulics*, Parliament was cognizant of these meanings and the implication of using such language. It follows that the availability of the manufacturing and processing incentives at issue must be restricted to property utilized in the supply of goods for sale and not extended to property primarily utilized in the supply of goods through contracts for work and materials.

It is perhaps true, as Will-Kare submitted and as noted in *Halliburton*, *supra*, at p. 5338, that the use of sale of goods law distinctions sometimes yields the anomalous result that the provision of services in connection with manufactured and processed goods will disqualify property that would, but for the services, qualify for the incentives. Nevertheless, it remains that in drafting the manufacturing processing incentives to include reference to sale or lease, Parliament has chosen to use language that imports relatively fine private law distinctions. Indeed, the Act is replete with such distinctions. Absent express direction that an interpretation other than that ascribed by settled commercial law be applied, it would be inappropriate to do so.

To apply a “plain meaning” interpretation of the concept of a sale in the case at bar would assume that the Act operates in a vacuum, oblivious to the legal characterization of the broader commercial

manifeste que le législateur n’a pas voulu définir de manière exhaustive les activités de fabrication et de transformation, ces mots n’ayant aucun sens juridique particulier, mais a plutôt confié aux tribunaux la tâche d’interpréter ces termes conformément à l’usage commercial courant. Le langage employé dans le journal des débats ne permet pas de déterminer le sens que le législateur a voulu attribuer au terme «à vendre ou à louer». Ainsi, l’application des distinctions établies en common law relativement à la vente de marchandises n’est ni prescrite ni exclue.

Malgré cette absence de précision, vente et location ont un sens bien établi en droit. Comme il est signalé dans *Crown Tire* et *Hawboldt Hydraulics*, le législateur connaissait le sens de ces termes et était conscient des conséquences de leur emploi. Il s’ensuit que les stimulants fiscaux accordés pour la fabrication et la transformation ne visent que les biens utilisés pour la fourniture de marchandises à vendre, à l’exclusion des biens utilisés principalement pour la fourniture de marchandises en exécution de contrats de fourniture d’ouvrage et de matériaux.

Il se peut, comme l’a fait valoir Will-Kare et comme il est mentionné dans *Halliburton*, précité, à la p. 5338, que le recours aux distinctions établies en droit relativement à la vente de marchandises ait parfois pour conséquence anormale que la fourniture de services relativement aux marchandises fabriquées et transformées rende inadmissible un bien qui, sans les services, aurait donné droit aux stimulants. Il demeure toutefois que, en incluant les mentions de la vente ou de la location dans les dispositions prévoyant l’octroi de stimulants pour la fabrication ou la transformation, le législateur a opté pour un langage qui fait appel à des distinctions relativement subtiles issues du droit privé. La Loi est en fait truffée de telles distinctions. Sauf indication contraire expresse, il y a lieu de recourir à l’interprétation qui découle des règles bien établies du droit commercial.

Interpréter en l’espèce le mot vente selon son «sens ordinaire» supposerait que la Loi s’applique en vase clos sans tenir aucun compte de la qualification juridique des rapports commerciaux plus

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relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the Act, are well-defined. See *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298. See also P. W. Hogg, J. E. Magee and T. Cook, *Principles of Canadian Income Tax Law* (3rd ed. 1999), at p. 2, where the authors note:

The Income Tax Act relies implicitly on the general law, especially the law of contract and property. . . . Whether a person is an employee, independent contractor, partner, agent, beneficiary of a trust or shareholder of a corporation will usually have an effect on tax liability and will turn on concepts contained in the general law, usually provincial law.

32 Referring to the broader context of private commercial law in ascertaining the meaning to be ascribed to language used in the Act is also consistent with the modern purposive principle of statutory interpretation. As cited in E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The modern approach to statutory interpretation has been applied by this Court to the interpretation of tax legislation. See *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 5, *per* Bastarache J., and at para. 50, *per* Iacobucci J.; *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578.

33 The technical nature of the Act does not lend itself to broadening the principle of plain meaning to embrace popular meaning. The word sale has an established and accepted legal meaning.

généraux qu'elle vise. Il ne s'agit pas d'un code du commerce qui s'ajoute à une loi fiscale. Notre Cour a tenu pour acquis, dans des arrêts antérieurs, qu'il faut s'en remettre aux règles plus générales du droit commercial pour attribuer un sens à des mots qui, indépendamment de la Loi, sont bien définis. Voir *Continental Bank Leasing Corp. c. Canada*, [1998] 2 R.C.S. 298. Voir également P. W. Hogg, J. E. Magee et T. Cook, *Principles of Canadian Income Tax Law* (3^e éd. 1999), à la p. 2, où les auteurs signalent:

[TRADUCTION] La Loi de l'impôt sur le revenu se fonde implicitement sur le droit commun et plus particulièrement sur le droit des contrats et le droit des biens [. . .] Le fait qu'une personne soit un employé, un entrepreneur indépendant, un associé, un mandataire, le bénéficiaire d'une fiducie ou l'actionnaire d'une société par actions a généralement une incidence sur l'obligation fiscale et dépend de notions du droit commun, soit généralement du droit provincial.

Il est également conforme au principe moderne de l'interprétation des lois en fonction de leur objet de s'en remettre au contexte plus large du droit commercial pour déterminer le sens à donner aux termes employés dans la Loi. Comme le dit E. A. Driedger dans *Construction of Statutes* (2^e éd. 1983), à la p. 87:

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Voir *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 21. Pour l'interprétation des lois fiscales, notre Cour a appliqué la méthode moderne. Voir *65302 British Columbia Ltd. c. Canada*, [1999] 3 R.C.S. 804, au par. 5, le juge Bastarache, et au par. 50, le juge Iacobucci; *Stuart Investments Ltd. c. La Reine*, [1984] 1 R.C.S. 536, à la p. 578.

La nature technique de la Loi ne permet pas d'élargir le principe du sens ordinaire de manière à englober le sens courant. Le mot vente a un sens juridique bien établi et reconnu.

Tab 4

[95] I therefore disagree with the view of the Newfoundland and Labrador Court of Appeal in *Collins*, that “[t]here is nothing in s. 178 to indicate that Parliament was concerned with the nature of activities the student was undertaking during the referenced seven years, including additional studies” (para. 13). Parliament was in fact acutely concerned that the borrower would capitalize on their education and repay their student loans.

[96] The single-date approach ensures borrowers are provided with reasonable time after finishing their studies to capitalize on all their education to repay their student loans and deters opportunistic bankruptcies better than the multiple-date approach. The single-date approach thus better promotes these purposes or policy goals of s. 178(1)(g) (see *N.P.*, at para. 51; *Mallory*, at paras. 74-75 and 85-86).

(b) *The Multiple-Date Approach Produces Absurd Consequences*

[97] The multiple-date approach to s. 178(1)(g)(ii) also produces absurd consequences. In some instances, the multiple-date approach would allow borrowers to obtain a discharge from their student loans even before the government has had any opportunity to recover the student loan debt.

[98] Courts should interpret legislation under the presumption that a legislature does not intend to produce absurd consequences. An interpretation of a statutory provision produces absurd consequences if, for example, it frustrates the purpose of the legislation; creates irrational distinctions; leads to ridiculous or futile consequences; is

extremely unreasonable or unfair; leads to incoherence, contradiction, anomaly, or disproportionate or pointless hardship; undermines the efficient administration of justice; or violates established legal norms such as the rule of law (*Rizzo*, at para. 27; *La Presse*, at para. 54; *R. v. Basque*, 2023 SCC 18, at para. 73; *Downes*, at para. 51; Sullivan, at §§ 10.02-10.03; Côté and Devinat, at paras. 1514-19).

[99] I agree with the Quebec Court of Appeal in *N.P.* that the multiple-date approach can readily lead to absurd consequences (para. 45). For example, a borrower could obtain a first degree funded by student loans, take a short break from their studies, resume their studies for a second degree for seven continuous years, declare bankruptcy shortly after obtaining their second degree, and obtain the discharge from the loans associated with their first degree — even though the borrower made little or no effort to capitalize on their education, and even though the government had no reasonable opportunity to recover the debt. This would defeat the purpose of s. 178(1)(g).

[100] The British Columbia Supreme Court in *Mallory* agreed with the reasoning of the Quebec Court of Appeal in *N.P.*, noting that the multiple-date approach “would mean any break in studies, however short, would trigger the start of the seven year period under s. 178(1)(g)(ii) . . . thwart[ing] the purpose of the section and Parliament’s intent in passing the legislation” (paras. 68 and 75). I agree that Parliament cannot have intended this absurd result.

[101] This absurdity motivated the registrar in bankruptcy in the New Brunswick Court of Queen’s Bench decision of *Cunningham (Bankrupt), Re*, 2012 NBQB 352,