SCC File No. 41643

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

FACTUM OF THE INTERVENER, BUSINESS COUNCIL OF CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview

1. The *Income Tax Act* operates as more than a mere tool to collect taxes. It plays a central and economically significant role in Canada's commercial landscape. For the Act to function as intended, it must be interpreted in a manner that is attuned to the realities facing Canadian businesses and with a view to achieving commercially reasonable consequences.

2. The taxpayer in this case applied a loss against an income adjustment made by the Minister of National Revenue after an audit spanning several years. Applying the loss instantly nullified any tax liability that would have arisen from the adjustment. Nevertheless, the Minister sought to collect arrears interest on the full amount of the tax debt that would otherwise have been owing, as if the loss had not been applied, and for the entire audit period.

3. From an interpretative and commercial standpoint, this outcome does not withstand scrutiny. The Act is specifically designed to ensure that taxpayers are not disadvantaged by being taxed on income realized in one year, while having sustained losses in another. When a loss offsets an increase to income, there is no tax debt to begin with and no amount on which arrears interest can accrue. Yet, this is precisely the outcome produced by the lower court decisions.

4. Arrears interest serves to compensate the Crown for a delay in paying an outstanding tax debt. It is not meant to be punitive. Imposing interest for the full duration of an audit where a loss was available, and timely claimed, penalizes the taxpayer for not utilizing the loss earlier than was possible and failing to pay a debt that never existed.

5. Taxpayers operate today in an environment where lengthy audits are the norm and audit adjustments are inevitable. In this environment, flexibility in loss utilization is a competitive advantage, particularly for cyclical businesses more significantly exposed to recurrent losses.

6. It is against this commercial context that the relevant statutory text must be interpreted. Faced with competing interpretative positions, this Court ought not adopt a position that ignores the fundamental design of the Act relating to loss utilization, much less one that penalizes taxpayers without reason and counteracts the advantages they are otherwise afforded.

B. Statement of Facts

7. In 2015, after a lengthy transfer pricing audit, the Minister proposed to reassess the taxpayer for 2006. In agreeing to this resolution of the audit, the taxpayer requested that a specified amount of a business loss sustained in 2008 be applied in computing taxable income for 2006. Both the income adjustment and loss carry-back were incorporated in the reassessment as issued. Nonetheless, in reliance on subparagraph 161(7)(b)(*iv*), the Minister assessed the taxpayer for arrears interest from 2006 to 2015 as if the 2008 loss was not carried back at all.[1]

PART II - STATEMENT OF ISSUE

8. The Federal Court of Appeal concluded that subparagraph 161(7)(b)(*iv*) imposed arrears interest for the full extent of the audit period, including the years where the loss was available to be applied. The question is whether it erred in concluding that this provision was applicable.

PART III - STATEMENT OF ARGUMENT

A. The Act Must Be Interpreted in its Commercial Context

9. Tax law does not operate in a commercial vacuum and is not itself a complete code.[2] All legislation, including the Act, is drafted with reference to an external context, which consists of the "realities" that inform the legislation and the circumstances specifically addressed by it.[3]

10. Commercial realities and legal principles are essential elements of the external context informing the interpretation of the Act.[4] The concept of *set-off* is one such element.

11. Under the Act, this concept is reflected in the netting of losses against income. It is key to ascertaining the amount on which tax is assessed and, by extension, in determining whether a tax debt arises on which arrears interest may be imposed.

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1 *Bank of Nova Scotia v Canada*, 2024 FCA 192 at para 3.
2 *Will-Kare Paving & Contracting Ltd. v Canada*, 2000 SCC 36 at para 31. *Markevich v Canada*, 2003 SCC 9 at para 14.
3 Ruth Sullivan, Sullivan on the Construction of Statutes, 7th ed (Toronto: LexisNexis Canada Inc, 2022) section 1.05[4].
4 *Will-Kare Paving & Contracting Ltd. v Canada*, 2000 SCC 36 at para 31.

12. The foundational provisions of the Act start with a determination of a taxpayer's income or loss for a tax year. The next step is to compute *taxable* income by deducting available losses, including those that may be carried over from other years. The statutory purpose served by allowing loss carryovers "has always been to more accurately measure income and provide relief to the … taxpayer, accounting for fluctuating income over a period of multiple years."[5]

13. Contrary to what the Crown asserts, loss carry-backs and carry-forwards are not fundamentally different.[6] Both arise under the same provision and definition ("non-capital loss" in section 111). Also, as this Court has recognized, both are aimed at the same concern:[7]

> Without such a loss carryover rule, a taxpayer who earns high income in one year and suffers a loss in the next would face financial hardship as a result of paying tax in the first year without relief in the second ...

14. If the Minister proposes after an audit to assess additional income that is either in whole or in part offset by a loss—*whether carried forward or back*—the resulting tax liability is reduced or eliminated. In the case of a carry-back, the deduction has retroactive effect: it applies *ab initio* to extinguish the underlying liability.[8] The effect is akin to an assessment being vacated. Arrears interest does not accrue for the period the "debt" was outstanding before it was reversed.

15. Subsection 161(7) is a special deeming provision of limited scope. It imposes arrears interest even where tax is not otherwise owing because of a loss carried back. It does so by creating a legal fiction and deeming an essentially "phantom" debt to exist, but only for the specific purpose of calculating arrears interest where a taxpayer does not pay tax otherwise owing, in anticipation of future losses.[9] As with any deeming rule, subsection 161(7) must be "limited to what is clearly expressed" because it cannot otherwise modify "the actual situation."[10]

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5 *Deans Knight Income Corp. v Canada*, 2023 SCC 16, at para 87.

6 Respondent's Factum at para 86.

7 *Deans Knight Income Corp. v Canada*, 2023 SCC 16, at para 86. See also Canada, House of Commons Debates, 19-5, vol 4 (26 June 1944) at 4181 (Hon James L Ilsley).

8 *Methanex Corp. v Alberta (Provincial Treasurer)*, 2003 ABQB 157 at para 9 (aff'd 2004 ABCA 304 at para 13). *Canada Revenue Agency v Slau Limited*, 2009 FCA 270 at para 12.

9 Canada, Senate Debates, 22-1, vol 1 (10 June 1954) at 594 (Hon Salter A Hayden). See also *Connaught Laboratories Ltd v Canada*, [1995] 1 CTC 216 (FC) at 219.

10 *Survivance v Canada*, 2006 FCA 129 at para 55. See also *Canada v Dow Chemical Canada Inc.*, 2008 FCA 231, at para 30.

16. Under the Act, a final determination as to the exact amount of tax owing (if any) occurs after a claim is made for losses to be applied in computing taxable income. Taxpayers are accordingly responsible for tracking and claiming losses and must pay tax and arrears interest for any period where losses are not available to reduce taxable income (in this case, 2006-2008). However, a taxpayer should not be liable to pay arrears interest for the period where an amount is available and applied against an adjustment that is only identified following an audit.

17. The reason the taxpayer here made its loss carry-back request in 2015 was because there was no basis on which it could do so any sooner. Until the conclusion of the audit and the crystallization of the audit adjustment in 2015, it had no reason to— and could not— request that its 2008 loss be carried back to 2006.

18. The Crown takes the position that this context is irrelevant to interpreting subsection 161(7). Instead, it says that the "two most important contextual factors" are the way this provision gives effect to "the broader scheme for interest under the Act" and how it "aligns with the fundamental principles of Canada's self-reporting tax system."[11]

19. Under the reassessment issued after the settlement, the adjustment to the taxpayer's income for 2006 was offset to the extent of the loss carried back from 2008 and the notional tax liability arising from the income adjustment was retroactively nullified. As a result, no tax debt arose on which arrears interest could accrue.

20. Subsection 161(7) treats a tax debt as existing if a loss carry-back is claimed, but only for a stipulated period, which takes into consideration the circumstances in which the claim is made. That period ended in this case when the tax return for the loss year was filed, and no later.

21. Given the larger objective served by loss carryovers, subsection 161(7) must be interpreted to confine the legal fiction it creates to the precise situation in which it is intended to apply. Despite what the Crown urges, this provision should not be interpreted beyond its limit. Doing so neither aligns with our self-reporting system, nor supports any broader statutory scheme. Rather, it compromises the more fundamental purpose served by loss carryovers.

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[11] Respondent's Factum at para 90.

B. The Act Must Be Administered in a Commercially Reasonable Manner

22. The Act is "one of the most detailed, complex, and comprehensive statutes in our legislative inventory."[12] It cannot, however, address every factual scenario that might arise in the commercial world.

23. For this reason, Parliament has empowered the Minister to *administer* the Act. The Minister, in turn, is supported by a specialized body—the Canada Revenue Agency (**CRA**)—whose technical expertise and institutional experience are indispensable to the proper administration of the tax system.

24. In addition, this Court has established key principles for the Minister to follow in administering the Act. These cornerstone principles have provided Canadian businesses with a reliable framework for understanding their tax obligations and satisfying them: tax provisions are to be interpreted with a view to achieving certainty, predictability and fairness *for taxpayers*.[13]

25. This Court has also recently confirmed that "the consequences of a particular interpretation are a component of the modern approach to statutory interpretation."[14] Consequences that are absurd or otherwise unacceptable, including from a commercial standpoint, are presumed not to have been intended and should not be preferred.

26. The principles of commercial reasonableness and fairness thus inform the interpretation and administration of tax law. The Minister must adhere to these principles and take a pragmatic approach to administering the Act, particularly in situations that are not specifically addressed and where the statutory text is open to interpretation. Contrary to what the Federal Court of Appeal found, the lack of specificity does not militate against a taxpayer in such situations.[15]

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12 *65302 British Columbia Ltd. v Canada*, [1999] 3 SCR 804 at para 51. See also *Guindon v Canada*, 2013 FCA 153 at paras 38-40.

13 *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 at para 61. *Canada v Loblaw Financial Holdings Inc*., 2021 SCC 51 at para 41.

14 *Telus Communications Inc. v Federation of Canadian Municipalities*, 2025 SCC 15 at para 76.

15 *Bank of Nova Scotia v Canada*, 2024 FCA 192 at para 39.

27. From the date of enactment, and for decades thereafter, the Minister had a practice of administering subsection 161(7) reasonably. The provision was amended in 1985 to include subparagraph (b)(*iv*), among other "technical" changes. Yet, this amendment, which now grounds the Crown's case, caused no change in administration.

28. As late as 2009, the Minister confirmed that the "intent of subsection 161(7) … is to cover situations where a taxpayer ignores payment of taxes, anticipating the application of subsequent losses to wipe out the liability."[16] That is not what the taxpayer did here. But, by 2015, the Minister had changed his position, culminating in the outcome under appeal.

29. The Federal Court of Appeal found that the statutory text in question was ambiguous. It went on to hold that interest should be imposed on a non-existent tax debt because "if Parliament did not intend to impose interest when a loss carry-back is claimed as a result of an audit adjustment, it is likely that Parliament would have provided for this with explicit language."[17]

30. This approach inverts the very basis on which statutory interpretation is conducted. Parliament cannot possibly be expected to provide for every outcome it *does not* intend in the Act. To the contrary, the Minister must "pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities."[18] If Parliament had sought to impose the absurd result now urged by the Crown, it would have done that in more explicit language.

31. The Minister routinely relies on accepted legal principles and administrative practices not explicitly delineated in the Act to ensure that it operates on a commercially reasonable basis.[19] The Alberta Court of Appeal in *Methanex Corporation v Alberta (Provincial Treasurer)* was cognizant of this reality.[20] Far from contradicting "the essence" of our self-assessment system,[21] this decision recognizes that a taxing statute cannot be interpreted in isolation from the real-world context in which it operates.

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16 Appellant's Factum at paras 145-151, detailing the Minister's published practices.
17 *Bank of Nova Scotia v Canada*, 2024 FCA 192 at para 39.
18 *Morgentaler v The Queen,* [1975] SCJ No 48 at 676.
19 For example, the Minister does not require employers to report certain employment benefits.
20 *Alberta (Provincial Treasurer) v Methanex Corporation*, 2004 ABCA 304 at para 12.
21 Respondent's Factum at para 19.

C. Lower Court Decisions Fail to Account for Realities Facing Canadian Businesses

32. The Business Council of Canada has an interest in ensuring that this Court benefits from the perspective of its member companies. As a practical matter, Canadian businesses do not just interpret the provisions of the Act to understand their tax obligations—they function within the realities of an audit environment that is largely controlled by the CRA. From the perspective of the Council, the outcome produced by the lower court decisions not only fails to account for these realities but is particularly prejudicial to businesses operating in cyclical economic sectors.

(i) Audit Adjustments Are Common After Lengthy Audits

33. Audits are a necessary part of our tax system. In recent years, the CRA has dramatically expanded its capacity to audit broadly with an increased workforce and the use of new technologies such as artificial intelligence. At the same time, the legislature has expanded the powers of auditors to compel answers and information. This combination of increased capacity and power has already led to longer audit timelines, less standardization in audit practices, and more uncertainty during audits.[22]

34. If any additional taxes are found to be owing following an audit, the taxpayer and CRA typically engage in a dispute resolution process involving discussions between the parties and, in some cases, appeals to the courts. Such discussions are necessarily informed by the final economic impact to both the taxpayer and the government of any resolution, including the application of any available losses to reduce proposed adjustments to income.

35. As the Federal Court of Appeal acknowledged, "Parliament must have been aware that a loss carryback might well be requested as a result of an audit adjustment" and that "substantial interest could accrue under subparagraph (b)(*iv*) if the carryback request resulted from an audit." As the Crown also accepted in the court below, this scenario is not obscure.[23]

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[22] Canada Revenue Agency, "2024-25 Departmental Plan" (29 February 2024). *An Act to implement certain provisions of the fall economic statement on November 3, 2022* (introduced as Bill C-32). Office of the Auditor General, "*Report 7- Compliance Activities- Canada Revenue Agency*" (2018). Canada Revenue Agency, "Standard Timelines for Information Requests to Taxpayers for Audit Purposes" (07 August 2020).

[23] *Bank of Nova Scotia v Canada*, 2024 FCA 192 at para 50.

36. Nonetheless, the Crown rationalizes its interpretation of subparagraph 161(7)(b)(*iv*) on the basis that a self-reporting system places the onus on the taxpayer to report income "correctly" and not on the Minister to "uncover reporting errors." It goes on to emphasize that liability for the "correct" amount of tax for a year exists regardless of whether a taxpayer is assessed.[24]

37. These truisms miss the point. A negotiated settlement does not equate to the taxpayer conceding it made an "error" and "misreported" its income. This is especially true in a transfer pricing case such as this, where the legislation itself contemplates a range of potentially "correct" outcomes. Moreover, the Act separately penalizes taxpayers for inaccuracies in computing taxes owing in other circumstances (*e.g.*, involving gross negligence), which do not exist here.

38. Tax legislation has become increasingly complicated over time and inherently more uncertain. A taxpayer has no way of knowing whether the CRA is likely to challenge an earlier reporting position taken in good faith. Moreover, lengthy audits often result in adjustments to taxes payable.[25] Following a multi-year audit, it is not uncommon for the Minister, with the benefit of hindsight, to form a different view than the taxpayer as to the amount of tax owing.

39. A taxpayer cannot predict with precision what additional tax the Minister may seek to assess, and which available losses should be applied, before an audit begins. Despite this obvious truth, the Crown argues that Parliament never intended to give taxpayers credit merely for carrying loss balances on their books and a taxpayer must "proactively request the application of its future losses" before being treated as having paid a tax liability for a prior year.[26]

40. Taking the Crown's position to its logical end, a taxpayer would have to pre-emptively request the Minister when filing its return that any available losses from the past or in the future be applied in response to any potential reassessment following any potential audit in an amount to be determined. But there is no statutory basis to take this type of action (as taxable income cannot be negative) and no provision in the Act, much less any section of a tax return, that would entitle a taxpayer to pre-emptively make such a contingent request.

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[24] Respondent's Factum at paras 7 and 36.
[25] J. Fehr and J. Nataf, "Canada Revenue Agency Audit Trends" (2024), CTF Conference Report at 9:4-9:7.
[26] Respondent's Factum at paras 100 and 120.

41. In sum, the Crown's position before this Court belies a key distinction drawn in the law between persons who choose not to act and those who cannot act. This distinction is founded on the fundamental premise that persons should not be unfairly penalized for circumstances beyond their control. Statutes of limitation and rules of prescription, for example, embody this premise and bar stale claims by those who have failed to act in time, while ensuring that those who cannot reasonably assert their rights are not deprived of them. In this way, the law balances the need for finality and certainty with the equally important goal of preventing unjust outcomes.

42. Tax law is no different. This distinction was well understood by the Minister and was reflected in his prior administrative practices relating to loss claims made in the context of audit adjustments. In the courts below, the Minister gave no explanation for the departure from these historical practices, nor is there any sound basis for this Court to uphold it.

(ii) Businesses in Cyclical Industries Placed at a Competitive Disadvantage

43. Successful businesses operating in cyclical industries commonly experience losses in down years. That is particularly the case in Canada, and it is precisely why loss utilization is a significant element of our corporate tax regime.[27] Flexibility to use losses is key for businesses in cyclical industries. The lower court decisions create commercial uncertainty in general but especially place businesses more commonly exposed to losses at a competitive disadvantage.

44. The Crown appears to accept that the purpose of imposing interest cannot be enforcement or punishment. It says that arrears interest is intended to compensate the Crown for the time value of money which is owing when tax is under-reported.[28]

45. That may be true, but there is no tax debt in this case, nor was one deemed to be owing after 2008. To impose compounding arrears interest on a notional debt—as though an offsetting loss did not exist or was not utilized—is contrary to commercial common sense. Moreover, it creates an incremental cost for businesses that experience recurrent losses.

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[27] R. Couzin, "Tax Options for Competitiveness" (1991), CTF Conference Report at 7:10.
[28] Respondent's Factum at paras 38, 91, 96, 112.

46. Canada has considerable exposure to commodity price cycles, which results in more volatility in GDP growth over time, relative to its global peers.[29] For this reason, our system of loss carryovers creates a competitive advantage for Canadian businesses internationally. It does so by allowing for a long-term view of profit, so that cyclical businesses are not taxed in "up cycles" without credit for enduring the inevitable "down cycles".

47. Taxes significantly impact the growth, productivity and global competitiveness of Canadian businesses. When there is friction in the tax system—like exposure to interest on a notional tax debt that will be nullified *ab initio*—it creates uncertainty and instability for these businesses and effectively places them at a competitive disadvantage.

D. Concluding Observations

48. The courts below have concluded that a taxpayer is liable to pay arrears interest on a debt that it ultimately does not owe and that accrues for the entirety of a period largely outside of its control. That outcome is inherently at odds with the scheme of the Act, needlessly punitive and commercially absurd. Faced in this appeal with competing interpretative positions, this Court ought not to endorse a position that produces such an outcome.

PART IV - SUBMISSIONS ON COSTS

49. The Council does not seek costs, and it asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of November, 2025.

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[29] Business Council of Canada, "Canada's Competitiveness Scorecard: Measuring our Success on the Global Stage" (2019).

PART V - TABLE OF AUTHORITIES

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2.	*Income Tax Act,* RSC 1985, c 1 (5th Supp), ss. 161(7) *Loi de l'impôt sur le revenu*, LRC 1985, c 1 (5e suppl), ss. 161(7)	7, 8, 15, 18, 20, 21, 27, 28, 36

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2.	*Alberta (Provincial Treasurer) v Methanex Corporation*, 2004 ABCA 304 at para 12, 13	14, 31
3.	*Bank of Nova Scotia v Canada*, 2024 FCA 192 at para 3, 39, 50	7, 26, 29, 35
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2.	Canada, House of Commons Debates, 19-5, vol 4 (26 June 1944) at 4181	13
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4.	Canada Revenue Agency, "2024-25 Departmental Plan" (29 February 2024)	33
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6.	Canada Revenue Agency, "Standard Timelines for Information Requests to Taxpayers for Audit Purposes" (07 August 2020)	33
7.	Jacqueline Fehr and Jacob Nataf, "Canada Revenue Agency Audit Trends: Where Are We, and Where Are We Going?" in *Report of Proceedings of the Seventy-Fifth Tax Conference*, 2023 Conference Report (Toronto: CTF, 2024) 9:1-9:34 at 9:4 – 9:7.	38
8.	Office of the Auditor General, "*Report 7- Compliance Activities- Canada Revenue Agency*" (2018)	33
9.	Robert Couzin, "Tax Options for Competitiveness," in *Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: CTF, 1992) 7:1-21 at 7:10	43
10.	Ruth Sullivan, Sullivan on the Construction of Statutes, 7th ed (Toronto: LexisNexis Canada Inc, 2022) at section 1.05[4]	9