

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** Canada *v.* Craig, 2012 SCC 43, [2012] 2 S.C.R. 489 | **Date:** 20120801  **Docket:** 34144 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**John H. Craig**

Respondent

**Coram:** LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 48) | Rothstein J. (LeBel, Deschamps, Abella, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

Canada *v.* Craig, 2012 SCC 43, [2012] 2 S.C.R. 489

Her Majesty The Queen *Appellant*

v.

John H. Craig *Respondent*

**Indexed as: Canada *v.* Craig**

2012 SCC 43

File No.: 34144.

2012:  March 23; 2012:  August 1.

Present: LeBel, Deschamps, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the federal court of appeal

*Taxation — Income Tax — Deduction of farming losses — Taxpayer drawing income from farming and other sources — Taxpayer deducting farming losses from total income — Whether farm income combined with other income constitutes chief source of income — Whether totality of farming losses deductible from income — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 31(1)(a).*

*Courts — Decisions — Stare decisis — Whether subordinate courts may overrule higher court precedent — Circumstances in which prior Supreme Court of Canada decisions will be reconsidered or revised.*

Section 31(1) of the *Income Tax Act* limits deductible losses “[w]here a taxpayer’s chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income”. In *Moldowan* *v. The Queen*, [1978] 1 S.C.R. 480, this Court found that a predecessor to s. 31(1) contemplated three classes of taxpayer involved in farming. In the first class are taxpayers for whom farming provides the bulk of income or the centre of work routine. Loss deductions are not limited for this class. In the second are taxpayers who do not look to farming, or to farming and some subordinate source of income, for their livelihood, but carry on farming as a sideline business. For this class, s. 31(1) limits loss deductions. The third class consists of taxpayers who carry on some farming activities as a hobby, not as a business, and whose losses are not deductible in any amount.

In *Gunn v. Canada*, 2006 FCA 281, [2007] 3 F.C.R. 57, the Federal Court of Appeal adopted a more generous interpretation of what could constitute a combination of farming and some other source of income.

In this case, C’s primary source of income came from his law practice. He also had income from investments, stock options, and farming (buying, selling, training and maintaining horses for racing). He deducted losses from the horse‑racing business from his other income in 2000 and 2001. Based on *Moldowan*, the Minister reassessed and limited the deductions on the grounds that the combination of the law practice and the horse‑racing business was not C’s chief source of income. Following *Gunn*, the trial judge allowed C’s appeal, finding that the loss deduction limitation in s. 31(1) did not apply. The Federal Court of Appeal dismissed the Minister’s appeal, holding that it was required to follow its prior decision in *Gunn*.

*Held*: The appeal should be dismissed.

*Moldowan* was a binding precedent and the lower courts should have limited themselves to writing reasons as to why it was problematic rather than purporting to overrule it. This Court can, however, overrule its own decisions. While this is not a step not to be lightly undertaken, the *Moldowan* approach to the combination question is incorrect and it is appropriate for this Court to revisit this aspect of the interpretation of s. 31. Section 31(1) provides two distinct exceptions to the loss deduction limitation. A judge‑made rule that reads one of them out of the provision cannot stand.

Taking a contextual approach, the relevant factors to consider are the capital invested in farming and the second source of income; the income from each of the two sources of income; the time spent on the two sources of income; and the taxpayer’s ordinary mode of living, farming history, and future intentions and expectations. If they tend to show that the taxpayer places significant emphasis on both his farming and non‑farming sources of income, there is no reason that such a combination should not constitute a chief source of income, avoiding the application of the loss deduction limitation of s. 31(1). Both endeavours must be significant endeavours of the taxpayer, but they do not need to be connected, and farming does not need to be the predominant source of income. The determination is a factual one for the trial judge. The approach must be flexible, recognizing that not each factor need be significant. The question is whether, looking at these factors together, the taxpayer places significant emphasis on each of the farming business and other earning activity, and if so, the combination will constitute a chief source of income and avoid the loss deduction limitation of s. 31(1). Such an interpretation is consistent with the general policy of the *Income Tax Act* that, subject to specific exceptions, taxpayers may offset losses from one business or source of income against profits from another without limitation.

There is no basis for this Court to disturb the findings that farming, in combination with C’s law practice, was a chief source of income, and that the loss deduction limitation in s. 31(1) did not apply to the facts. The Crown conceded that the horse‑racing operation was a business, not a personal endeavour, and the relevant factors, other than demonstrated profitability, clearly pointed to it being more than a sideline business. C devoted both a material amount of capital and a very significant part of his daily work routine to the farming business, and he was an active member of and contributor to the community of standard‑bred racing.

**Cases Cited**

**Overruled:** *Moldowan v. The Queen*, [1978] 1 S.C.R. 480; **discussed:** *Gunn v. Canada*, 2006 FCA 281, [2007] 3 F.C.R. 57; **referred to:** *Hover v. M.N.R.*, [1993] 1 C.T.C. 2585; *Hadley v. The Queen*, [1985] 1 C.T.C. 62; *The Queen v. Graham* (1985), 85 D.T.C. 5256; *Morrissey v. Canada*, [1989] 2 F.C. 418; *Poirier (in bankruptcy) v. Minister of National Revenue* (1986), 2 F.T.R. 11; *Watt v. Minister of National Revenue*, 2001 FCA 72, 273 N.R. 201; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Stackhouse v. R.*, 2007 TCC 146, [2007] 3 C.T.C. 2402; *Falkener v. R.*, 2007 TCC 514, [2008] 2 C.T.C. 2231; *Loyens v. R.*, 2008 TCC 486, [2009] 1 C.T.C. 2547; *Johnson v. The Queen*, 2009 TCC 383, 2009 D.T.C. 1245; *Scharfe v. The Queen*, 2010 TCC 39, 2010 D.T.C. 1078; *Turbide v. The Queen*, 2011 TCC 371, 2011 D.T.C. 1347; *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Queensland v. Commonwealth* (1977), 139 C.L.R. 585; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645; *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147.

**Statutes and Regulations Cited**

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 31, 248(1).

**Authors Cited**

Felesky, Brian A. “‘Hobby’ Farm Losses”, in *Report of Proceedings of the Twenty‑Sixth Tax Conference*. Toronto: Canadian Tax Foundation, 1974, 625.

McNair, D. K. *Taxation of Farmers and Fishermen*. Toronto: Richard De Boo, 1980.

Thomas, Richard B. “A Farm Loss with a Difference — The Farmer is Successful!” (1993), 41 *Can. Tax J.* 513.

APPEAL from a judgment of the Federal Court of Appeal (Evans, Dawson and Stratas JJ.A.), 2011 FCA 22, [2011] 2 F.C.R. 436, 414 N.R. 396, [2011] 3 C.T.C. 189, 2011 D.T.C. 5047, [2011] F.C.J. No. 435 (QL), 2011 CarswellNat 586, affirming a decision of Hershfield T.C.C.J., 2009 TCC 617, [2010] 3 C.T.C. 2341, 2010 D.T.C. 1032, [2009] T.C.J. No. 505 (QL), 2009 CarswellNat 4372. Appeal dismissed.

*Simon Fothergill* and *Daniel Bourgeois*, for the appellant.

*Glenn Ernst* and *Sandon Shogilev*, for the respondent.

The judgment of the Court was delivered by

Rothstein J. —

I. Introduction

1. This is a farm loss case. Where farming is a source of income for a taxpayer, s. 31 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), may apply to limit the amount of loss from farming that can be deducted from the taxpayer’s other income. Section 31(1)(*a*) provides that, where a taxpayer’s chief source of income is neither farming nor a combination of farming and some other source of income, the taxpayer’s deductible farm loss is limited to $8,750 annually.
2. The main issue in this case concerns the interpretation of s. 31 of the *Income Tax Act*. The question is under what circumstances the combination of farming and some other source of income constitutes a “chief source of income”, allowing a taxpayer to avoid the farm loss deduction limit in s. 31.
3. A preliminary issue arises, however, namely whether the Federal Court of Appeal was entitled to disregard this Court’s precedent in *Moldowan v. The Queen*, [1978] 1 S.C.R. 480.

II. Facts

1. John Craig’s primary source of income was, and was intended to be, his professional income from his law practice. He also had income from investments and gains on the exercise of stock options. In addition, Mr. Craig was in the business of buying, selling, training and maintaining horses for racing.
2. Although the horse-racing business had had some profitable years, it incurred losses in 2000 and 2001, of $222,642 and $205,655 respectively. Mr. Craig deducted these losses from his other income. Pursuant to s. 31 of the *Income Tax Act*, as interpreted by Dickson J. (as he then was) in *Moldowan*, the Minister reassessed, limiting the deductible losses for each year to $8,750, on the basis that the combination of his law practice and his horse-racing business was not his chief source of income, because the horse-racing business was a subordinate or sideline business.
3. Hershfield T.C.C.J. of the Tax Court of Canada found, on the basis of *Gunn v. Canada*, 2006 FCA 281, [2007] 3 F.C.R. 57, a decision of the Federal Court of Appeal that did not follow *Moldowan*, that the combination of the horse-racing business and his law practice constituted Mr. Craig’s chief source of income (2009 TCC 617, [2010] 3 C.T.C. 2341). The Federal Court of Appeal also found in favour of Mr. Craig on the basis that it was required to follow that Court’s prior decision in *Gunn* (2011 FCA 22, [2011] 2 F.C.R. 436).
4. The Minister now appeals to this Court.

III. The Statutory Provisions at Issue

1. Section 31(1) of the *Income Tax Act* provides, in relevant part:

**31.** (1) Where a taxpayer’s chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, . . . the taxpayer’s loss, if any, for the year from all farming businesses carried on by the taxpayer shall be deemed to be a total of

(*a*) the lesser of

(i) the amount by which the total of the taxpayer’s losses for the year, determined without reference to this section and before making any deduction under section 37 or 37.1, from all farming businesses carried on by the taxpayer exceeds the total of the taxpayer’s incomes for the year, so determined from all such businesses, and

(ii) $2,500 plus the lesser of

(A) 1/2 of the amount by which the amount determined under subparagraph 31(1)(*a*)(i) exceeds $2,500, and

(B) $6,250, and

(*b*) [an additional amount not relevant here].

The maximum deduction under s. 31(1)(*a*) is $8,750, the extent of the deduction allowed to Mr. Craig.

1. Section 248(1) provides:

. . .

“farming” includes . . . maintaining of horses for racing . . .

IV. *Moldowan*

1. Similar to this case, *Moldowan* involved a taxpayer who, in addition to having other sources of income, engaged in the business of farming, namely buying, selling, and maintaining of horses for racing. He sought to deduct his losses from his farming business against his other income. The Minister limited his deductible losses against his other income under s. 13(1) of the Act(now s. 31(1)) to $5,000 (then the limit under that provision). This Court upheld the loss deduction. Dickson J. (as he then was) found that s. 13(1) contemplated three classes of taxpayer involved in farming:

(1) a taxpayer, for whom farming may reasonably be expected to provide the bulk of income or the centre of work routine. Such a taxpayer, who looks to farming for his livelihood, is free of the limitation of s. 13(1) in those years in which he sustains a farming loss.

(2) the taxpayer who does not look to farming, or to farming and some subordinate source of income, for his livelihood but carries on farming as a sideline business. Such a taxpayer is entitled to the deductions spelled out in s. 13(1) in respect of farming losses.

(3) the taxpayer who does not look to farming, or to farming and some subordinate source of income, for his livelihood and who carries on some farming activities as a hobby. The losses sustained by such a taxpayer on his non-business farming are not deductible in any amount. [pp. 487-88]

As Mr. Moldowan’s farming business was a subordinate source of income in relation to his other sources of income, he fell into the second class of taxpayer and the farming loss deduction limitation was applicable.

V. *Gunn*

1. *Moldowan* provides guidance as to the interpretation of s. 31(1). However, there has been criticism from the judiciary, academics and members of the profession over the three decades following *Moldowan* with respect to Dickson J.’s description of the second class of taxpayer who would be subject to the $8,750 loss deduction limitation. (See, for example, D. K. McNair, *Taxation of Farmers and Fishermen* (1980), at p. 135; R. B. Thomas, “A Farm Loss with a Difference — The Farmer is Successful!” (1993), 41 *Can. Tax J.* 513, at pp. 514-15; *Hover v. M.N.R.*,[1993] 1 C.T.C. 2585 (T.C.C.), at pp. 2598-99, *per* Bowman T.C.C.J. (as he then was); *Hadley v. The Queen*, [1985] 1 C.T.C. 62 (F.C.T.D.); *The Queen v. Graham* (1985), 85 D.T.C. 5256 (F.C.A.), *per* Marceau J.A., dissenting; *Morrissey v. Canada*, [1989] 2 F.C. 418 (C.A.), *per* Mahoney J.A.; *Poirier (in bankruptcy) v. Minister of National Revenue* (1986), 2 F.T.R. 11, *per* Jerome A.C.J.; *Watt v. Minister of National Revenue*, 2001 FCA 72, 273 N.R. 201, *per* Sexton J.A.)
2. The critics point out that the effect of the definition of the second class of taxpayer is that the taxpayer’s chief source of income must be farming, the same as the first class of taxpayer, in order to avoid the loss deduction limitation of s. 31(1). In other words, *Moldowan* says that if farming is a subsidiary source of income in relation to the taxpayer’s other sources of income, the loss deduction limitation will apply. The necessary implication is that in order for the limitation not to apply, farming must be the chief source of income, the same as for a taxpayer in the first class established in *Moldowan*. There is nothing in the text or context of s. 31(1) from which to infer that, in order to avoid the loss deduction limitation of the provision, farming in relation to taxpayers’ other sources of income has to be predominant, and could not be a subsidiarysource.
3. In 2006 in *Gunn*, Sharlow J.A. engaged in a thorough analysis of *Moldowan* and the legislative history of s. 31(1). While she endorsed most of Dickson J.’s reasoning, she disagreed with the portion of his analysis that has given rise to criticism, and that is at issue in this appeal. At para. 71, she stated:

Based on Justice Dickson’s view of the combination question, that person cannot avoid the application of section 31 unless he can establish that his other source of income is subordinate to farming. But if he could establish that, he probably would be able to establish that farming is his chief source of income.

1. In Sharlow J.A.’s view, Dickson J.’s judge-made rule was inconsistent with this Court’s modern approach to the interpretation of the *Income Tax Act*. At para. 75, she cited *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at para. 43:

This Court has consistently held that courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention . . . . Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act.

1. Sharlow J.A. answered the “combination” question by observing that the ordinary grammatical meaning of the term “combination” is comprehensible, and in ordinary language means an “addition” or “aggregation”. Following this interpretation of the term “combination”, Sharlow J.A. concluded, at para. 83:

In my view, the combination question should be interpreted to require only an examination of the cumulative effect of the aggregate of the capital invested in farming and a second source of income, the aggregate of the income derived from farming and a second source of income, and the aggregate of the time spent on farming and on the second source of income, considered in the light of the taxpayer’s ordinary mode of living, farming history, and future intentions and expectations.

Applying her interpretation of the combination test, Sharlow J.A. found that Mr. Gunn’s chief source of income was a combination of farming and the practice of law. At para. 92, she stated:

For the reasons explained in the discussion above, I would have adopted a more generous interpretation of the combination question in section 31 that requires an aggregation of the various relevant economic factors (capital, income and time), leading to the conclusion that Mr. Gunn’s chief source of income is a combination of farming and the practice of law.

1. In the present case, Hershfield T.C.C.J. followed *Gunn*, allowed Mr. Craig’s appeal and determined that the loss deduction limitation in s. 31(1) did not apply. The Federal Court of Appeal dismissed the Minister’s appeal.

VI. Issues

1. The main issue in this appeal is whether this Court should overrule *Moldowan*. Before dealing with that issue, however, it is necessary to address a preliminary concern raised by the Crown.

VII. Analysis

A. *Should the Tax Court and the Federal Court of Appeal Have Followed Moldowan or Gunn?*

1. There is no doubt that Dickson J.’s interpretation of s. 13(1) in *Moldowan*, is a precedent binding on the Federal Court of Appeal and the Tax Court of Canada. While *Gunn* agreed with much of what Dickson J. wrote in *Moldowan*, on the crucial question of whether farming as a source of income could be subordinate to another source and still avoid the loss deduction limitation of s. 31(1), *Gunn* departed from *Moldowan*, a precedent binding on the Federal Court of Appeal.
2. One of the fallouts from *Gunn* is that it left the Tax Court of Canada and the Federal Court of Appeal itself in the difficult position of facing two inconsistent precedents and having to decide which one to follow. The uncertainty which the application of precedent is intended to preclude is seen in the decisions since *Gunn*, in which the Tax Court has acknowledged *Moldowan* as the leading case while also feeling bound to follow *Gunn*: *Stackhouse* *v. R.*,2007 TCC 146, [2007] 3 C.T.C. 2402; *Falkener v. R.*,2007 TCC 514, [2008] 2 C.T.C. 2231; *Loyens v. R.*,2008 TCC 486, [2009] 1 C.T.C. 2547; *Johnson v. The Queen*,2009 TCC 383, 2009 D.T.C. 1245; *Scharfe v. The Queen*,2010 TCC 39, 2010 D.T.C. 1078; and *Turbide v. The Queen*, 2011 TCC 371, 2011 D.T.C. 1347. And of course the Federal Court of Appeal followed *Gunn* in the instant case.
3. It may be that *Gunn* departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the section was “an awkwardly worded and intractable section and the source of much debate” (p. 482). Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided.
4. But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.
5. The Federal Court of Appeal, on the basis of its prior decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, in which that court reaffirmed the rule that it would normally be bound by its own previous decisions, followed *Gunn*, and not *Moldowan*. The application of *Miller* and the question of whether the Federal Court of Appeal should have followed *Gunn* simply did not arise, in view of the *Moldowan* Supreme Court precedent.
6. The Federal Court of Appeal’s purported overruling of *Moldowan* does not, however, affect the merits of this appeal or the core question of whether *Moldowan* should in fact be overruled.

B. *Should This Court Overrule Moldowan?*

1. The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*,2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. This is especially so when the precedent represents the considered views of firm majorities (para. 57).
2. Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled. (See *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 665; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at paras. 18-19; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44.)
3. Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

1. The vertical convention of precedent is not at issue with respect to the decision as to whether the Supreme Court should overrule one of its own precedents. Rather, in making this decision the Supreme Court engages in a balancing exercise between the two important values of correctness and certainty. The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error. Indeed, because judicial discretion is being exercised, the courts have set down, and academics have suggested, a plethora of criteria for courts to consider in deciding between upholding precedent and correcting error. (See *R. v. Bernard*, [1988] 2 S.C.R. 833,at pp. 850-61; *Chaulk*, at p. 1353; *Henry*, at paras. 45-46.)
2. In this case, I am of the opinion that relevant considerations justify overruling *Moldowan*. First, *Moldowan* essentially read the combination test out of s. 31(1). In finding that taxpayers in the second class were subject to the loss deduction limitation where farming as a source of income was a sideline or subordinate to another source of income, the necessary inference was that farming had to be the taxpayer’s chief source of income. However, the section provides two distinct exceptions to its loss deduction limitation. One is where farming is the taxpayer’s chief source of income. The second is where the taxpayer’s chief source of income is a combination of farming and some other source of income. By requiring that the second exception apply only where the other source of income was subordinate to the farming source of income, *Moldowan* collapsed the second exception into the first. Having regard to the words of the provision, these are two separate exceptions to the loss deduction limitation and each must be given meaning.
3. Second, there has been significant judicial, academic and other criticism of *Moldowan* from its issuance in 1977. In light of this criticism, it is appropriate for this Court to take notice and acknowledge the difficulties identified with the *Moldowan* interpretation of s. 31(1).
4. Third, since *Moldowan*, this Court has held on a number of occasions that unexpressed legislative intention under the guise of purposive interpretation is to be avoided (*Shell*,at para. 43). There is no doubt that s. 31(1) is, as Dickson J. recognized, an awkwardly worded and intractable section and the source of much debate. Nonetheless, the section is clear that two distinct exceptions to the loss deduction limitation can be identified. A judge-made rule that reads one of the exceptions out of the provision is not consistent with the words used by Parliament.
5. For these reasons I am of the respectful opinion that the *Moldowan* approach to the combination question is incorrect and that it is appropriate for this Court to revisit this aspect of the interpretation of s. 31.

C. *The Interpretation of Section 31(1)*

1. I have explained why I am of the view that the interpretation of s. 31(1) in *Moldowan* cannot stand. It is therefore up to this Court now to approach the question afresh.
2. While the *Moldowan* interpretation cannot stand, it is important to bear in mind that substituting a different combination test must not render s. 31(1) incapable of application. Dickson J. was mindful that a simple aggregation of two sources of income would yield just such a result. As he explained in *Moldowan*, at p. 487:

It is clear that “combination” in s. 13 cannot mean simple addition of two sources of income for any taxpayer. That would lead to the result that a taxpayer could combine his farming loss with his most important other source of income, thereby constituting his chief source. I do not think s. 13(1) can be properly so construed. Such a construction would mean that the limitation of the section would never apply and, in every case, the taxpayer could deduct the full amount of farming losses.

1. In 1974, prior even to the decision in *Moldowan*, tax lawyer Brian Felesky grappled with the very matter that is at issue in this appeal, summarizing the history of judicial attempts to interpret s. 31(1) (“Hobby Farm Losses” in *Report of Proceedings of the Twenty-Sixth Tax Conference* (1974), 625). He concluded that the judicial approach to s. 31(1) was in the nature of an “occupation test”. Under this test, the amount of capital, time, effort and commitment invested into the source of income, and the taxpayer’s general emphasis on that source of income indicated whether that source of income was the chief source of income. As he explained, the *Income Tax Act* provides that a “source of income” is property, business, or employment, but the “chief source” is the property, business, or employment from which the taxpayer reasonably expects the bulk of his income to come.
2. Dickson J.’s approach in *Moldowan* is somewhat similar, taking into account the taxpayers time spent, capital commitment and potential profitability. At p. 486, he stated:

The distinguishing features of “chief source” are the taxpayer’s reasonable expectation of income from his various revenue sources and his ordinary mode and habit of work. These may be tested by considering, *inter alia* in relation to a source of income, the time spent, the capital committed, the profitability both actual and potential.

1. In *Gunn*, Sharlow J.A., also an experienced tax practitioner before her judicial career, adopted the same general approach as Mr. Felesky, although she does not label it an “occupation test”. As noted above, she stated:

In my view, the combination question should be interpreted to require only an examination of the cumulative effect of the aggregate of the capital invested in farming and a second source of income, the aggregate of the income derived from farming and a second source of income, and the aggregate of the time spent on farming and on the second source of income, considered in the light of the taxpayer’s ordinary mode of living, farming history, and future intentions and expectations. This would avoid the judge-made test that requires farming to be the predominant element in the combination of farming with the second source of income, which in my view is a test that cannot stand with subsequent jurisprudence. It would result in a positive answer to the combination question if, for example, the taxpayer has invested significant capital in a farming enterprise, the taxpayer spends virtually all of his or her working time on a combination of farming and the other principal income-earning activity, and the taxpayer’s day to day activities are a combination of farming and the other income-earning activity, in which the time spent in each is significant. [para. 83]

1. All of these authorities support the idea that s. 31(1) does not contemplate a simple aggregation of two sources of income, but requires a wider inquiry into the amount of capital, time, effort, commitment and general emphasis on the part of the taxpayer with respect to the sources of income. There is no requirement that the two sources of income must be connected in order to meet the combination test.
2. However, before going further, two considerations must be borne in mind. First, it is necessary to interpret the provision having regard to its text, context and purpose (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 55). Nonetheless, purposive interpretation cannot justify finding unexpressed legislative intentions. (See *Shell*, at para. 43.) Second, the question as to whether the combination of farming and some other source of income constitutes the taxpayer’s chief source of income is a fact-based determination.
3. I see nothing in the words or context in s. 31(1) to support the proposition that farming must be the predominant source of income when viewed in combination with another source, in order to avoid the loss deduction limitation of the section. It is also not possible to relegate s. 31(1) to applying only to “hobby” or “gentleman” farmers because, for a loss to be deductable at all, farming must be a source of income. A taxpayer who is engaged in farming in a non-commercial manner, with no profit or intention to profit, does not have a source of income from farming and therefore no loss for income tax purposes, limited or not (*Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645, at paras. 51-54).
4. The provision is addressed to losses from farming businesses. There is no loss deduction limitation where farming is the taxpayer’s chief source of income. That implies that such a taxpayer is investing significant funds and spending considerable time in that business. Otherwise, it is difficult to see such a business as a chief source of income.
5. I do not think that characterization of farming changes under the combination test. The provision still contemplates that the taxpayer will devote significant time and resources to the farming business, even if he or she will also devote significant time and possibly resources to another business or employment. It seems to me that, as long as the taxpayer devotes considerable time and resources to the farming business, the fact that another source of income produces greater income than the farm does not mean that such a combination is not a chief source of income for the taxpayer.
6. The approach to the combination question described by Mr. Felesky, Dickson J. and Sharlow J.A., makes sense. It is grounded in the words of s. 31(1), which limits only a taxpayer’s losses “from all farming businesses” where the taxpayer’s chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income. With respect to the combination, a simple aggregation of income from two sources cannot have been contemplated by the section, meaning that factors other than two sources of income alone must be taken into account. The factors identified by Sharlow J.A., namely, the capital invested in farming and the second source of income, the income from each of the two sources of income, the time spent on the two sources of income, and the taxpayer’s ordinary mode of living, farming history, and future intentions and expectations, are all factors involved in running a farming business together with another source of income. If these factors tend to show that the taxpayer places significant emphasis on both his farming and non-farming sources of income, there is no reason that such a combination should not constitute a chief source of income, avoiding the application of the loss deduction limitation of s. 31(1). The determination is a factual one for the trial judge.
7. Such an interpretation is consistent with the general policy of the *Income Tax Act* that, subject to specific exceptions, taxpayers may offset losses from one business or source of income against profits from another without limitation (*Gunn*,at para. 20, citing *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147, at para. 53). The only restriction in the case of farming losses is that the combination must constitute the taxpayer’s chief source of income. This does not imply that either source of income by the taxpayer need be the predominant source. But it does imply that they must be significant endeavours of the taxpayer.

VIII. Application

1. For s. 31 to apply and for a farming loss to be deductible at all, farming must be a source of income. At trial, the Crown conceded that Mr. Craig’s horse-racing operation was a business, as opposed to a personal endeavour, on the test articulated in *Stewart*. Accordingly, the trial judge did not have to engage in a *Stewart* analysis of the facts to determine whether Mr. Craig’s horse-racing operation was a source of income, but accepted that it was a business and not a personal endeavour (paras. 41-42). I see no reason to disturb this conclusion.
2. Since the horse-racing activities were a source of income, it remains to determine whether to apply the loss deduction limitation in s. 31(1). Taking a contextual approach to the combination question, the relevant factors to consider are the capital invested in farming and the second source of income; the income from each of the two sources of income; the time spent on the two sources of income; and the taxpayer’s ordinary mode of living, farming history, and future intentions and expectations. The approach must be flexible, recognizing that not each factor need be significant. The question is whether, looking at these factors together, the taxpayer places significant emphasis on each of the farming business and other earning activity; and if so, the combination will constitute a chief source of income and avoid the loss deduction limitation of s. 31(1).
3. Hershfield T.C.C.J. found that the relevant factors, other than demonstrated profitability, clearly pointed to Mr. Craig’s farming business being more than a sideline business (para. 76). Even though Mr. Craig derived his principal income from the practice of law and the total hours spent at his law practice exceeded that devoted to the farming business, he devoted both a material amount of capital and a very significant part of his daily work routine to the farming business (para. 76). Hershfield T.C.C.J. found that the horse-racing business was pursued as a major business preoccupation. Mr. Craig’s mornings, evenings and weekends were consumed by a dedication to enhancing the potential profitability of the operation, which was more than a distraction from his normal mode of living or an entertainment or sport (para. 76). Further, Mr. Craig was involved in his farming business beyond the stable and track. Hershfield T.C.C.J. gave weight to the fact that Mr. Craig was an active member of and contributor to the community of standard-bred racing (para. 77). He worked to improve the integrity of standard-bred racing so as to improve the potential profitability of his operation. His knowledge of the horse-racing competitions that were important for profitability was sufficient to place him as chairperson of the industry’s appeal board (para. 77). For these reasons, Hershfield T.C.C.J. determined that the horse-racing operation was a chief source of income on the basis of its contribution to the combination test in s. 31(1).
4. Having considered the relevant factors, Hershfield T.C.C.J. found that farming, in combination with Mr. Craig’s law practice, was a chief source of income, and that the loss deduction limitation in s. 31(1) did not apply to the facts. There is no basis for this Court to disturb Hershfield T.C.C.J.’s factual conclusion and his finding that the loss deduction limitation was not applicable.

IX. Conclusion

1. I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant:  Attorney General of Canada, Ottawa.

Solicitors for the respondent:  Goodmans, Toronto.