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| Federal Court of Appeal |  | Cour d'appel fédérale |
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Date: 20100806

Docket: A-314-09
A-315-09

Citation: 2010 FCA 207

CORAM: SHARLOW J.A.
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

CHARLES RIVETT

A-314-09

Appellant

and

MONSANTO CANADA INC. and
MONSANTO COMPANY

Respondents

A-315-09

LAWRENCE JANSSENS, RONALD JANSSENS
and ALAN KERKHOF

Appellants

and

MONSANTO CANADA INC. and
MONSANTO COMPANY

Respondents

Heard at Ottawa, Ontario, on June 16, 2010.

Judgment delivered at Ottawa, Ontario, on August 6, 2010.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

SHARLOW J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] Once infringement is established, the *Patent Act*, R.S.C. 1985, c. P-4, provides for two alternative types of monetary remedy: damages and an accounting of profits.

[2] Our Court is seized with two appeals and cross-appeals arising from judgments by Zinn J. [the Judge] of the Federal Court whereby he addressed the latter remedy and set the total amount of profits to be disgorged by the appellants (Mr. Rivett [Rivett] and Messrs. Lawrence Janssens, Ronald Janssens and Alan Kerkhof [together Janssens][all together the appellants]) in favour of the respondents Monsanto Canada Inc. and Monsanto Company. The reasons for judgment (*Rivett's* reasons or *Janssens'* amended reasons are reported as *Monsanto Canada Inc. v. Rivett*, 2009 FC 317 (judgment issued on 10 July 2009, T-1515-05) and *Monsanto Canada Inc. v. Janssens* 2009 FC 318 (judgment issued on 26 March 2009, T-1545-05).

[3] On 22 October 2009, Sexton J.A. directed that these appeals be heard together. Therefore, I shall address both files in these reasons. However, as each one presents its own set of facts and, at times, unique issues, I shall highlight the differences as required over the course of my discussion.

Background

[4] Monsanto Canada Inc. and Monsanto Company [together Monsanto] are the licensee and owner, respectively, of Canadian Patent No. 1,313,830 (the '830 Patent), which relates to an invention entitled "Glyphosate-Resistant Plants". The patent does not claim the whole plant, but rather the engineered genes that give the plant its herbicide resistant qualities and the plant cells containing those genes. For our purposes, we need only know that in Canada, glyphosate-resistant seeds and plants protected under the '830 Patent are sold under the trademark ROUNDUP READY® [RR]. Crops emerging from RR seeds and RR plants are therefore resistant to glyphosate herbicides such as Monsanto's product sold under the name ROUNDUP®.

[5] The appellants have all admitted infringement of the '830 Patent by growing, harvesting and selling crops of soybeans which they knew contained genes and cells as claimed in said Patent [RR soybeans]. As a result of the appellants' admission, summary judgments were issued on consent providing that questions relating to Monsanto's remedies arising from the deliberate infringement were to be dealt with after Monsanto's election as between damages and an accounting of profits. Monsanto chose accounting of profits as the remedy for the appellants' breach.

[6] The starting point in any method of accounting for profits is the determination of the infringer's revenues made from the acts of infringement of the patent. In all cases, the party whose patent has been infringed need only prove these revenues. Here, they were formally admitted. (See Agreed Statement of Facts, Rivett's appeal book, volume 1, tab 8, page 158, at paragraph 21; Janssens' appeal book, tab 8, at paragraphs 20, 41-43.)

[7] Then, it is the infringer who has to reveal the costs incurred to derive the revenues and who has to disgorge the profits (*Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (C.A.), [1995] 1 F.C. 483, at page 494, at paragraph 16 (FCA) [*Reading & Bates*]). The profit to be disgorged is the difference between the revenues and the costs. Of course, at times an apportionment will be required as the patentee is only entitled to that portion of the infringer's profit which is causally attributable to the invention. (See *Lubrizol Corp. v. Imperial Oil Ltd.*, [1997] 2 F.C. 3 (C.A.); *Celanese International Corp. v. B.P. Chemicals Ltd.*, [1999] R.P.C. 203 (Pat. Ct.), at paragraph 37, cited in *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902 [*Schmeiser*], at paragraph 101.) The controversy between the parties is in the approach to be used in

implementing the causation requirement in the accounting. What rules should be used in determining “the costs that are to be deducted from [the appellant’s] gross revenues from sales” (*Rivett’s* reasons, at paragraph 67)?

[8] Monsanto argues that there are three approaches to quantifying an award of profits in patent infringement cases: the differential profit approach; the full absorption or full cost approach; and the variable cost or differential cost approach urged on this Court by it.

[9] Having considered the practical consequences of each approach (*Rivett’s* reasons, at paragraphs 28-65), the Judge came to the conclusion “... that this Court must apply the differential profit approach when conducting an accounting of profits in this case” (*ibidem*, at paragraph 65).

[10] The Judge described the analysis required under this approach (*ibidem*, at paragraph 29):

- a. Is there a causal connection between the profits made and the infringement? If there is none, then there are no profits that require an accounting.
- b. If there is a causal connection, then what were the profits made by the infringer as a result of the infringement? This amount I shall describe as the Gross Profits of Infringement.
- c. Is there a non-infringing option that the infringer could have used?
- d. If there is no non-infringing option, then the Gross Profits of Infringement are to be paid over to the patentee.
- e. If there is a non-infringing option, then what profit would the infringer have made, had he used that option? This amount I shall describe as the Gross Profits of Non-Infringement.
- f. Where there was a non-infringing option available, the amount to be paid over to the patentee is the difference between the Gross Profits of Infringement and the Gross Profits of Non-Infringement. This sum is the profit that is directly attributable to and that results from the infringement of the invention.

[11] Item (c) of the Judge's formula asks whether there was a non-infringing option that the infringer could have used. The Judge concluded that "... conventional soybeans are a non-infringing alternative to [RR] soybeans". As a result, the Judge went on to item (e) of his formula and used the alternative product as a comparator because it had none of Monsanto's invention (*ibidem*, at paragraphs 63 and 57 of *Rivett's* reasons).

[12] The appellants agree with the differential profit approach adopted by the Judge, but allege that he erred in various respects in his calculations and when deducting expenses from gross profits. In addition, they posit that the Judge erred in determining too high a differential between the gross profits of infringement and the profit the appellants would have made had they used the next best non-infringing alternative.

[13] Monsanto challenges the Judge's chosen approach and, in the alternative, his finding that conventional soybeans were an appropriate comparator, and in the case of Mr. Rivett, whether or not such conventional seed was in fact available to him in 2004, as found by the Judge at paragraph 63 of his reasons.

[14] In the end, I conclude that the Judge made no error when he chose and applied the differential profit approach to the cases at bar. I also conclude that Monsanto's arguments on the cross-appeals do not justify the intervention of our Court. I would therefore dismiss Monsanto's cross-appeals.

[15] Conversely, I would allow the appeals, in part, because I find that the Judge erred when determining that the profit differential expected of RR soybeans when compared to conventional soybeans was 31% instead of 18%. A chart prepared by Monsanto to demonstrate the increased profit that could be realized by the use of its product showed a profit differential of 18%. In the Rivett appeal, I also find that the Judge erred in failing to have regard to a whole body of evidence relating to costs for general maintenance and equipment repairs, which should have lead to a further deduction from gross profits.

[16] By arguing that the Judge erred in not choosing the differential cost approach, Monsanto attacks the very foundation of the Judge's reasons. Therefore, I shall dispose of this argument up front as all other issues are concerned with the differential profit approach. Once done, I will continue on with my analysis of the cross-appeals before turning to the appeals.

Analysis

A. Standard of review

[17] On the cross-appeals, Monsanto argues that the standard of review in respect of the Judge's identification and articulation of the legal test to be applied to the facts is correctness (Monsanto's memorandum in Rivett, at paragraph 53).

[18] The appellants argue that their appeals raise questions of law or questions of mixed fact and law. Although statutory in nature, the monetary remedies, they say, are equitable in origin. When

the Judge disallowed some of their expenses, he erred in law because he misapplied “the principle of equity”.

[19] I disagree with both Monsanto and the appellants. While I agree that a standard of correctness applies to the question of whether the Judge applied an appropriate test, in this case, the Judge chose between a number of legally acceptable tests. When a judge chooses between a set of legally acceptable tests, his or her choice, and the results of his or her application of the test, must be accorded deference.

[20] The jurisprudence dictating the standard of review of damages awards is founded in large part on the speech of Viscount Simon in *Nance v. British Columbia Electric Railway Company Ltd.* [1951] A.C. 601, at 613 (P.C.) [*Nance*]:

Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage [...]

[21] This rule has been adopted repeatedly by the Supreme Court. (See, for example, *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at paragraph 80; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at paragraph 280; *Woelk v.*

Halvorson, [1980] 2 S.C.R. 430; *Industrial Teletype Electronics Corp. v. Montreal (City)*, [1977] 1 S.C.R. 629; *Stewart Estate v. Dyck*, [1953] 1 S.C.R. 244) and this Court (*Northeast Marine Services Ltd. v. Atlantic Pilotage Authority*, [1995] 2 F.C. 132, at paragraph 60 (F.C.A.); *The Queen v. CAE Industries Ltd. and CAE Aircraft Ltd.*, [1986] 1 F.C. 129, at 173 (F.C.A.).)

[22] The “wholly erroneous estimate” standard is in turn comparable to the “palpable and overriding error” standard articulated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. (See *Moskaleva v. Laurie*, 2009 BCCA 260, 94 B.C.L.R. (4th) 58, at paragraph 117; *Abbott v. Sharpe*, 2007 NSCA 6, 250 N.S.R. (2d) 228, at paragraph 110; *Litwinenko v. Beaver Lumber Co.* (2008) 237 O.A.C. 237, at paragraph 57.)

[23] While *Nance* refers to damages specifically, the rule can also be applied to an accounting of profits. In this case, an incorrect principle would mean that the trial judge used an unacceptable method to calculate profits attributable to the infringement and therefore subject to disgorgement. As is discussed below, the jurisprudence does not indicate that there is only one accepted method for the calculation of profits of damages; in truth, there may be many. While the differential profit approach may be the preferred method in many circumstances, it is not the only method. Indeed, an accounting of profits, unlike damages, is an equitable remedy (*Teledyne Industries Inc. v. Lido Industrial Products Ltd.* (1979), 45 C.P.R. (2d) 18 (FC) [*Teledyne*]; see also *Colburn v. Simms* (1843) 12 L.J. Ch. 388). As such, an accounting of profits should be flexible in order to make the injured party whole. Therefore, as long as the trial judge selected an acceptable method and

followed it, his calculation cannot be overturned absent a “wholly erroneous estimate of the damage.”

B. Monsanto’s cross-appeals

[24] The following questions are put to this Court:

- 1) Did the Judge err when applying the differential profit approach to the accounting of profits?
- 2) Were conventional soybeans a non-infringing alternative?
- 3) Were conventional soybeans an available option to Mr. Rivett in 2004?

(1) The differential profit approach v. the differential cost approach

[25] Despite the fact that, in *Schmeiser*, at paragraph 102, the Supreme Court of Canada called the differential profit approach the “preferred means of calculating an accounting of profits”, Monsanto argues that Canadian courts have consistently declined to apply the differential profit approach.

[26] Basically, Monsanto relies on the courts’ application of the variable cost approach, in which “the sale revenues are first ascertained and the only deductions permitted are the variable expenses directly attributable to those infringing products, and any increases in fixed expenses directly attributable to the infringing products” (Monsanto’s memorandum in Rivett, at paragraph 103). It refers to *Teledyne, Reading & Bates, Wellcome Foundation Ltd. v. Apotex Inc.* (1998), 82 C.P.R. (3d) 466; [2001] 2 F.C. 618 (F.C.A.) [*Wellcome*], and *Bayer Aktiengesellschaft v. Apotex Inc.*

(2002), 16 C.P.R. (4th) 417 (O.C.A.) [*Bayer*], four pre-*Schmeiser* decisions, and suggests that the variable cost approach is the preferred means in situations of deliberate and intentional infringement.

[27] Under that approach, Monsanto adds, “no part or proportion of any expenditures which would have been incurred had the infringing operation not taken place, is to be considered as deductible” (*ibidem*). Therefore, the amount on account of profits to be disgorged should have been \$129 477.21 for Mr. Rivett, rather than the \$40 137.94 awarded by the Judge. In the Janssens’ case, which covers years 2004 and 2005, it should have been \$16 258.08 instead of \$5 040.00 for Lawrence Janssens; \$14 379.04 instead of \$4 457.50 for Ronald Janssens; and \$16 258.08 instead of \$5 040.00 for Alan Kerkhof. (See conclusions of Monsanto’s memoranda.)

[28] As acknowledged by the judge, in *Schmeiser*, the Supreme Court endorsed the differential profit approach to an accounting of profits in five short paragraphs:

101 It is settled law that the inventor is only entitled to that portion of the infringer’s profit which is causally attributable to the invention: *Lubrizol Corp. v. Imperial Oil Ltd.*, [1997] 2 F.C. 3 (C.A.); *Celanese International Corp. v. BP Chemicals Ltd.*, [1999] R.P.C. 203 (Pat. Ct.), at para. 37. This is consistent with the general law on awarding non-punitive remedies: “[I]t is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach” (*Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at p. 556, per McLachlin J. (as she then was), quoted with approval by Binnie J. for the Court in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 93).

102 The preferred means of calculating an accounting of profits is what has been termed the value-based or “differential profit” approach, where profits are allocated according to the value contributed to the defendant’s wares by the patent: N. Siebrasse, “A Remedial Benefit-

Based Approach to the Innocent-User Problem in the Patenting of Higher Life Forms” (2004), 20 C.I.P.R. 79. A comparison is to be made between the defendant’s profit attributable to the invention and his profit had he used the best non-infringing option: *Collette v. Lasnier*, (1886), 13 S.C.R. 563, at p. 576, also referred to with approval in *Colonial Fastener Co. v. Lightning Fastener Co.*, [1937] S.C.R. 36.

103 The difficulty with the trial judge’s award is that it does not identify any causal connection between the profits the appellants were found to have earned through growing Roundup Ready Canola and the invention. On the facts found, the appellants [referred to as Mr. Schmeiser in my reasons] made no profits as a result of the invention.

104 Their profits were precisely what they would have been had they planted and harvested ordinary canola. They sold the Roundup Ready Canola they grew in 1998 for feed, and thus obtained no premium for the fact that it was Roundup Ready Canola. Nor did they gain any agricultural advantage from the herbicide resistant nature of the canola, since no finding was made that they sprayed with Roundup herbicide to reduce weeds. The appellants’ profits arose solely from qualities of their crop that cannot be attributed to the invention.

105 On this evidence, the appellants earned no profit from the invention and Monsanto is entitled to nothing on their claim of account.

[29] Monsanto denies any precedential authority to *Schmeiser* and moves away from its comparative approach, taking the position that the Supreme Court’s statement in *Schmeiser* was made in the context of the unique and particular facts of that case. It sees significant differences between the *Schmeiser* case and the ones at bar, emphasizing why *Schmeiser* and the cases at hand must be distinguished and treated differently:

1. *Schmeiser* was a test case where Mr. Schmeiser, in good faith, was also attacking the validity of the ‘830 Patent (Monsanto’s memorandum in Rivett, at paragraph 104);

2. Mr. Schmeiser was found to be a “non-benefiting intentional infringer”, because the RR canola seed were inadvertently carried onto his land (Monsanto’s memorandum in Rivett, at paragraphs 105-107 and 115-116); and

3. Mr. Schmeiser never took advantage of the invention because he did not spray his crops with ROUNDUP herbicide.

[30] Monsanto submits that “... the differential profit approach ought to be restricted to those circumstances in which the infringer is ... found to be a non-benefiting intentional infringer ... [who] does not adjust his farming practices to take advantage of the technology” (Monsanto’s memorandum in Rivett, at paragraph 116). Monsanto adds that the appellants’ wilful infringement should have led the Judge away from the differential profit approach; a method that allegedly offers insufficient deterrence to infringement. (See *Wellcome*, at paragraph 20, where it was found that “... adopting the comparative approach would have the further disadvantage of providing no incentive to individuals to take measures to avoid infringing others’ patents”.)

[31] On a fair reading of *Schmeiser*, I am unable to see how the factual matrix in that case is materially different from the one in the cases at hand. Monsanto’s statement as to Mr. Schmeiser’s innocent use of the patent was obviously not reflected in the evidence accepted by the courts. Rather, it was found that Mr. Schmeiser

“... actively cultivated canola containing the patented invention as part of their business operations. Mr. Schmeiser complained that the original plants came onto his land without his intervention. However, he did not at all explain why he sprayed Roundup to isolate the Roundup Ready plants he found on his land; why he then harvested the plants and segregated the seeds, saved them, and kept them for seed; why he next planted them; and why, through this husbandry, he ended up with 1030 acres of Roundup Ready Canola which would otherwise have cost him \$15 000.” (*Schmeiser*, at paragraph 87).

[32] As mentioned by the judge, “the findings of fact regarding Mr. Schmeiser and the [RR] canola growing on his farm remove him from the innocent user category. He planted the crop knowing what it was and he took active steps to ensure that most of the crop he planted was from [RR] seed” (*Rivett’s* reasons, at paragraph 43).

[33] On these facts, the Supreme Court upheld the finding of our Court that Mr. Schmeiser “used Monsanto’s patented gene and cell and hence infringed the *Patent Act*” (*Schmeiser, supra*, at paragraph 97). Therefore, the majority of the Court addressed and rejected the argument that Mr. Schmeiser did not use the invention because he did not use ROUNDUP as an aid to cultivation, and therefore never took commercial advantage of the special utility of the invention. That argument, seen as “a way of attempting to rebut the presumption of use that flows from possession” failed because it ignored “the stand-by or insurance utility of the properties of the patented genes and cells. Whether or not a farmer sprays with Roundup herbicide, cultivating canola containing the patented genes and cells provides stand-by utility. The farmer benefits from that advantage from the outset: if there is reason to spray in the future, the farmer may proceed to do so” (*Schmeiser, supra*, at paragraphs 83-84). In the end, Mr. Schmeiser’s intention, as determinative as Monsanto would want it to be, became irrelevant to the finding of infringement. It only came into play in the accounting for profits.

[34] So, no matter how they came to it, wilfully or not, after a trial or upon admissions, Mr. Schmeiser and the appellants were all found to have infringed a biotechnology-based patent. Mr.

Schmeiser and the appellants all met the one condition precedent to an accounting of profits: infringement of the '830 Patent.

[35] Once this is said, I find that the cases under appeal fit *Schmeiser*. Firstly, as stated by the judge: “On this basis alone, one may reject [Monsanto’s] claim that *Schmeiser* has to be read as the Court fashioning a remedy to absolve the defendant of his innocent use of the patented seed” (*Rivett, supra, ibidem*).

[36] Also, the Supreme Court’s statement in *Schmeiser* is unambiguous: the preferred means of calculating an accounting of profits [in French « la méthode privilégiée de calcul des profits»] is the differential profit approach [emphasis added]. The fact that the award of profits in *Schmeiser* is zero does not, in my opinion, taint that principle or narrow its application. It is simply the result of the non-existence of “any causal connection between the profits [Mr. Schmeiser was] found to have earned through growing [RR] Canola and the invention” (*Schmeiser*, at paragraph 103). Because Mr. Schmeiser had not sprayed the crops, no profits were causally attributable to the invention. As a result, an apportionment was neither necessary nor possible as there were no profits from the infringement to oppose to those that were not caused by the infringement.

[37] As stressed by the appellants, Monsanto did not invent soybeans. The differential profit approach can properly account for this fact by affording Monsanto “the portion of the appellant’s profits which equals the profit differential expected of [RR] soybeans when compared to

conventional soybeans” (Rivett’s responding memorandum, at paragraph 22). This was also the opinion of the Judge who wrote at paragraph 53 of his reasons:

“...the differential profit approach ... isolates and identifies the profit that was generated because of the patented invention. In short, it looks to those profits that result from the invention that is protected and eliminates those profits that may be earned but that have no causal link to the invention. Profits that are made that are not attributable to the invention may be retained by the wrong-doer.”

[38] In my view, *Schmeiser* is a complete answer to Monsanto’s first issue in these cross-appeals. An in-depth analysis of *Teledyne*, *Reading & Bates*, *Wellcome* and *Bayer* is neither necessary, nor useful.

[39] In *Schmeiser*, the Supreme Court characterized the differential profit approach as the “preferred” means, not the “only” means of accounting for profits. Therefore, I do not read *Schmeiser* as closing the door definitely on the use by trial judge of other valuation methods better suited to a different set of facts.

[40] It may be that the majority had intended that this method of determining an accounting of profits was to apply in the context of biotechnology-based inventions, or that the parties in *Schmeiser* had styled their arguments in terms of apportionment, as some authors have suggested. (See: Case Comment by A. David Morrow & Colin B. Ingram, “Of Transgenic Mice and Roundup Ready Canola; The Decisions of the Supreme Court of Canada in *Harvard College v. Canada* and *Monsanto v. Schmeiser*” (2005) 38 U.B.C.L. Rev. 189-222.)

[41] It could also be that the majority Judges, who had already taken support from Professor Siebrasse's article, as cited at paragraph 102 of *Schmeiser*, also agreed with him that the results in *Reading & Bates* and *Wellcome* "are arguably consistent with the differential profit approach" (Rivett's book of authorities, volume 2, tab 19, at page 16); or that the majority Judges' intention "was to take the law on the remedy of the account of profits in a new direction" Ronald G. Dimock, *Intellectual Property disputes: Resolutions & Remedies*, looseleaf (Toronto: Carswell, 2004, p. 18-29 and f.).

[42] In any event, all these considerations are better left for another day. On the facts of this case and, on the record, I conclude the Judge was right in his approach. He understood Monsanto's position and thoroughly canvassed and analysed Monsanto's arguments in his reasons. The Judge was obviously aware of other valuation methodologies, prior court cases dealing with them and the scholarly debate amongst intellectual property practitioners as to their relevance and applicability. He was not convinced that the Supreme Court's stated preference for the differential profit approach should be as narrowly construed as suggested by Monsanto (*Rivett's* reasons, at paragraph 44). Based on the factual evidence presented to him, and taking support from *Schmeiser*, the Judge exercised his discretion, and applied the differential profit approach in situations very similar to the one in *Schmeiser*. I have not been persuaded that the Judge erred in applying the differential profit approach to Messrs. Rivett, Janssens and Kerkhof. As I stated above, the Judge was required to choose an acceptable remedy. I am of the view that he devised the best monetary remedy to address the infringement cases before him and therefore committed no reviewable error in respect of this issue.

(2) Conventional soybeans as a non-infringing alternative

[43] As the Judge found, "... it will always be an issue when applying the differential profit approach whether there is a non-infringing alternative that can be used as a comparator" (*Rivett's* reasons, at paragraph 54). In the cases at bar, the Judge held that "(t)he comparison is to the profit that would have been earned from using the next best product that is not the patented product itself, with the latter acting as a baseline from which to calculate added value. That results in a true reflection of the profits made from the invention – the necessary causal link" (*ibidem*, at paragraph 56).

[44] Having said this, the Judge concluded that conventional soybean was the appropriate comparator. Monsanto argues that the Judge's finding ignores the undisputed evidence of the enduring agricultural, lifestyle and environmental benefits which the uniqueness of the patented technology provides to farmers. These very attributes, it adds, render conventional soybean seeds an inappropriate candidate as a non-infringing alternative because none of these benefits accrue to the users of ordinary seeds. (See Monsanto's memoranda, at paragraph 127 in *Rivett*, and 144 in *Janssens*.)

[45] Monsanto's argument is not convincing. In his reasons, the Judge discusses the testimony of Mr. McGuire who attested, on behalf of Monsanto, to the value of the invention from a farmer's viewpoint, relying on a chart prepared by Monsanto and published on its website. That chart shows how a farmer "can potentially earn a \$40.00/acre advantage on Roundup Ready vs. conventional bin run soybeans" (exhibit P-1, *Rivett's* appeal book, volume 1, tab 9, at pages 160 and f.).

[46] Having heard the evidence, the Judge agreed with the appellants that the motivation for a grower to choose RR soybeans is financial. Presumably, as submitted by the appellants, any alleged agricultural benefits enjoyed by the farmer will translate into a measurable financial benefit – such as increased yields or cost of production savings – of which the court duly accounted for when assessing the profit differential of RR soybeans (Rivett’s responding memorandum, at paragraph 31).

[47] It seems that while Monsanto alleges an error in the Judge’s finding that the profits derived which are attributable to the invention relate to the extra yield reaped as a result of the RR system, it was Monsanto’s pleadings and evidence that established exactly that (See Monsanto’s compendium (cross-appeal), tab 7B, at pages 97-98; Rivett’s appeal book, volume 1, tab 5, at paragraph 12; see also Agreed Statement of Facts, *ibidem*, page 156, at paragraph 7).

[48] Moreover, in *Schmeiser*, the Supreme Court addressed, as we know, the same patent and a very similar situation, and found that ordinary canola was an appropriate comparator for RR canola. Monsanto has failed to explain how this finding was wrong.

[49] The record shows that there was a clearly non-infringing alternative available for comparison: conventional soybean seeds. Monsanto has not persuaded me that the Judge erred in his finding.

(3) Availability of conventional soybeans to Mr. Rivett in 2004

[50] This last question concerns Mr. Rivett only. His testimony was that in the spring of 2004, there was a shortage of ordinary soybeans. In cross-examination, he said:

“We checked with our local co-op and they were sold out of conventional beans. Our co-op in Alliston and Beeton – that’s our closest co-op – they own seven or eight different locations, and all they have to do is punch it up on the computer, and it goes to all locations to tell you there what they have in inventory. . . . We used our own bin run conventional beans first, and, when they ran out, these other RR beans were in a trailer and wagon and we opted to use them” (Monsanto’s compendium (cross-appeal), tab 8(B), at pages 216-217).

[51] The Judge concluded that market availability of the best non-infringing alternative was not determinative. He was of the view that “(i)f one uses a comparator only if it is actually physically available for use, but not when it exists but is physically unavailable, the fact that the resulting crop has a value apart from the invention will be ignored” (*Rivett’s* reasons, at paragraph 62).

[52] Monsanto argues that this statement is a clear error and cites paragraph 30 of *Reading & Bates* for the proposition that Mr. Rivett had the onus of proving the availability of conventional soybean seeds. Having failed, the Judge could not conclude that there was a non-infringing option that Mr. Rivett could have used.

[53] Once again, I disagree with Monsanto. *Reading & Bates* must be distinguished from the Rivett case. The accounting in *Reading & Bates* concerned the profits made by the appellant from the infringement of the respondents’ patented method for installing a pipeline. Counsel for the

infringer expressly argued that the differential profit approach should be used. Our colleague, Létourneau J.A., distinguished cases applying the differential profit approach by characterizing them as “the sort of cases where a patent or process represents only a part of the ultimate production” whereas the case at hand was one where the contract required the use of the very method devised by the respondents and where the patent comprised the whole of what was sold by the appellant (*Reading & Bates, supra*, at paragraph 28).

[54] Moreover, while the Court did consider the alternative tunnelling processes to be unavailable and theoretical, the facts behind this comment show that it referred more to the existence of the relevant process, or the practicality of its use for the job in question. At footnote 18, the Court noted:

The evidence revealed that “Method A” had already been tried unsuccessfully by the respondents on a previous occasion in an attempt to install a pipeline. The method failed and the respondents suffered a loss of \$1.7 million. See the transcript of proceedings, vol. I, at pp. 87-88 and 203-204. “Method B” had only been used once out of more than a hundred jobs of which the witness for the appellant was aware. It was used more than five years after the installation of the pipeline in the St. Lawrence River for the crossing of a river under conditions very different and much more favourable than those encountered with the St. Lawrence River. Yet, losses in the amount of \$200,000 were incurred. See the transcript of proceedings, vol. II, at pp. 134-141. As to the impossibility of using “Method C” over a distance of more than 5,200 feet as required for the crossing of the St. Lawrence River, see the transcript of proceedings, vol. I, at pp. 206-207. According to the witness, the distance was too great and the pipe too slender. “Method D” was impractical for the St. Lawrence River project and could have led to a twist-off and the necessity of abandoning the hole and starting all over again. See the transcript of proceedings, vol. I, at pp. 208-210.

[55] In the instant case, conventional soybeans existed at that relevant time and they were suitable for planting in Mr. Rivett’s fields. It is also worth noting that at paragraph 30 of *Reading &*

Bates, cited with approval by Monsanto, the Court does not state the comparator must be shown to have been actually available to the infringer. Rather, it requires proof that such is available in similar conditions.

30. Assuming that these alternatives could have been taken into consideration in computing the profits, the burden of proving their availability, their utility and workability in conditions similar to those under which the work was performed, along with their costs, rested with the appellant.

[56] This is a very different proposition than Monsanto makes it out to be. The availability, utility and workability of conventional soybeans in conditions similar to those in which Mr. Rivett used the RR soybeans are established by Monsanto's evidence, which itself compares the two.

[57] Further as Mr. Rivett points out, there was evidence before the Court that 40% of soybeans cultivated in 2004 were conventional soybeans (Rivett's appeal book, volume 1, tab 9, page 161). And, in fact, the Judge found according to the Agreed Statement of Facts that Mr. Rivett did cultivate 811 acres of conventional soybeans.

[58] Therefore, there was ample written and oral evidence on which the Judge could have concluded as he did. In my view, he committed no error.

[59] I now turn to the appeals.

C. The Appeals

[60] Although both files share some issues, the appeals will be examined separately as the Judge's factual findings are grounded on original evidence presented by each appellant.

(1) The appeal of Mr. Rivett

[61] Mr. Rivett having abandoned one of his five grounds of appeal, the remaining issues are:

1. Did the Judge err in refusing to include custom costs and labour in the deductions?
2. Did the Judge err in disallowing a deduction for rent in respect of 319 acres of land?
3. Did the Judge err in disallowing deductions of other expenses relating to equipment repairs and general maintenance?
4. Was the percentage of the profit differential too high?

[62] I am of the view that questions 1 and 2 must be answered negatively. Generally, the Judge made evidentiary rulings and factual findings in order to arrive at the profits to be disgorged. Subject, of course, to admissibility, the Judge was prepared to accept evidence that a farming operation expense was incurred, in part, with respect to the 947 acres of RR soybeans. Unless there was evidence that an expense was incurred with respect to less than the total acreage, 26.9% of an expenditure claimed for the farming operation as a whole would be allocated (947/3516 acres).

[63] In each case, the admissibility of a deduction was determined on a principled basis, that is, on the evidence, or lack thereof, tendered by Mr. Rivett in his attempt to meet his onus (*Monsanto Canada Inc. v. Schmeiser (C.A.)*, 2002 FCA 309, [2003] 2 F.C. 165, at paragraph 85). The appellant takes support from *AlliedSignal Inc. v. Du Pont Canada Inc.*, [1998] F.C.J. No. 190 (FC)

[*AlliedSignal*], asking this Court to re-weigh the evidence given little or no weight to by the Judge, either because it was based on hearsay or because it was found unreliable. It cites *AlliedSignal*, at paragraph 144, for the proposition that although it may be difficult to calculate some costs, it does not preclude “the court’s obligation to make its best estimate, and ultimately to take such costs into account.”

[64] With respect, I find *AlliedSignal* of little use in this appeal. After a careful review of the Judge’s reasons and of the transcripts, I have not been persuaded that the Judge committed a palpable or overriding error. The Judge could not find evidence where there was none. As well, the Judge could not “guesstimate” the costs directly related to Mr. Rivett’s RR soybean crop. As stated by the Judge, Mr. Rivett was “properly entitled to deduct from the gross revenue received from the sale of the crop his legitimate and proved expenses” (*Rivett’s* reasons, at paragraph 66) (emphasis added).

(a) *Custom costs and labour*

[65] The appellant argues that the Judge erred in not permitting “any deductions representing the cost of planting, cultivating, spraying, harvesting and trucking the infringing soybean crop”, referred to as custom work costs (*Rivett’s* memorandum, at paragraph 27). In the Agreed Statement of Facts, Mr. Rivett made a number of formal admissions that he did not pay any third party to carry out the infringing activities.

[66] Still, in order to obtain a deduction for his own labour, Mr. Rivett attempted to introduce an unaudited Income Statement comparing his revenue and expenses for the years ended December 31,

2004 and December 31, 2005, which had not been previously produced on record and whose author was not on the list of witnesses. This evidence was ruled inadmissible. The appellant also produced a hand-written document he had prepared that purported to reflect mostly the average cost incurred to grow soybeans (exhibit D-12, Rivett's appeal book, volume 2, tab 26, at page 499), along with a chart apparently prepared by the Ontario Federation of Agriculture relating to average custom work rates in Ontario in 2003 (exhibit D-13, Rivett's appeal book, volume 2, tab 27, at page 500).

[67] The Judge ruled that the appellant could speak to the information contained in exhibit D-12, but that any information contrary to direct evidence of actual expenses incurred, or contrary to any of the agreed facts would be given no weight. Further, it was indicated that little weight was likely to be given the evidence insofar as it relied on information obtained from third party sources. In the end, in light of his ultimate decision on the issue, the Judge completely disregarded exhibit D-12.

[68] Also, the Judge did not allow a deduction for the cost of Mr. Rivett's labour. Mr. Rivett argued that in *Schmeiser*, the trial judge had reduced the gross revenues by a reasonable amount to reflect an allowance for Mr. Schmeiser's labour (*Monsanto Canada Inc. v. Schmeiser*, [2001] F.C.J. No. 436 (FC)). However, the Judge found the facts of the instant case on that point quite distinguishable from those in *Schmeiser*. In that case, the infringing party was not Mr. Schmeiser, but his corporation. The profits to be disgorged were those of the corporation, from which Mr. Schmeiser would have been paid a salary for his work instead of the dividends he actually took, and on that basis the profits were reduced by an allowance of \$16 per acre. Here, as the Judge found at paragraph 92 of his reasons in *Rivett*:

... Whether [Mr. Rivett] pays himself a salary or takes the whole of the yearly profits of the farming operation at year end, the result is the same -- the entire amount is his profit. To permit a deduction for his labour in these circumstances would be to permit him to keep, rather than disgorge, some of the profits made because of the infringement. That is neither equitable nor just.

[69] In light of the record, it was open to the Judge to disallow custom work costs and labour costs. I conclude that this ground of appeal is ill-founded.

(b) Rent costs for 319 acres

[70] On its reading of the evidence, Monsanto had suggested that land rent should be calculated on the basis of \$49.00 per acre for the 947 acres of RR soybeans. The Judge found at paragraph 79 of his reasons in *Rivett* that only 628 acres out of the total 947 were accounted for in terms of rent. He allowed a deduction of \$44 795.62. Records for the rest were incomplete. Rent for the remaining 319 acres in question, at least, in part, was not paid by Mr. Rivett. Rather, it was exchanged for goods and services. The Judge wrote:

[80] ... on a balance of probabilities all of the land devoted to the cultivation of the infringing crop in 2004 was rented for value. However, that value appears, in large part, to have been Mr. Rivett's own labour. Counsel for Monsanto took the Court to passages from the discovery of Mr. Rivett wherein it is clear that some of the land was paid for, at least in part, in goods and services to the landowner, e.g., tillage, snow removal, or hay.

[81] I find below that Mr. Rivett is not entitled to any deduction from gross revenue for his labour. The same reasoning applies here. Further, there is no principled basis on which the Court can determine the value of any goods, such as hay, that were exchanged for use of the land he cultivated.

[71] Once again, Mr. Rivett argues that the Judge was tasked with making his best estimate of the costs associated with the rented land since he had found that use of the 319 acres was clearly not for free. Having failed to do so, he committed an error. I disagree.

[72] In light of the wide variation in rent prices (see Rivett's transcript for 12 January 2009, pages 118-130), lack of specific evidence as to the market value of the acres in question, and the fact that Mr. Rivett had given value in the form of unquantifiable goods and services (*ibidem*, at pages 157 and following), the Judge was entitled to conclude as he did.

(c) Expenses not otherwise allowed, equipment repairs and general maintenance

[73] Mr. Rivett suggests that the general apportionment of 26.9% applied in respect of other costs should have been applied to the \$11 961.40 (total amount disbursed according to exhibit D-7) paid for general maintenance and equipment repairs which the evidence showed (exhibit D-7, Rivett's appeal book, volume 2, tab 21, at pages 383-417) . The result would be a further reduction of the profit by \$3 217.62. Monsanto replies that the appellant failed to correlate such costs with revenues derived from his infringing activities. I agree with Mr. Rivett.

[74] Exhibit D-7 is a series of invoices from Midnight Excavation (generally in respect of repairs to farm equipment) dated from February 2004 to June 2004, each one accompanied by a cheque for a corresponding amount duly cashed by its payee. The work performed is described as "general repairs" on all of them, but one that mentions "skidster work" needed "to clean up some fence rows to put the trees back (...) so they don't smother the crop" (Rivett's transcript for 12 January 2009, at

page 169, lines 15-20). In his reasons, the Judge did not specifically deal with this evidence. On a fair and liberal reading of his reasons, I do not think that these general repair costs are caught by his statement at paragraph 69:

... In my view, it is not appropriate to consider costs such as general farm insurance, capital depreciation, water, electricity, etc. as would be additionally considered under the full cost approach, discussed above. These expenses are too indirect to be entitled to consideration. In any event, the defendant provided no evidence of such costs.

[75] Then it leaves unaccounted for the costs associated with general maintenance and equipment repairs. I am of the view that this omission constitutes an error. A deduction of \$3 217.62 should have been allowed for the reasons given below.

[76] As mentioned above at paragraph [62], the Judge had set the general rule that “(p)rovided there is evidence that the expense was incurred, in part, with respect to the 947 acres of [RR] soybeans, a principled basis [upon which] to allocate that expense is ... the percentage of the acreage of RR soybeans to the total acreage of the business” (*Rivett’s* reasons, at paragraph 68) (Emphasis added).

[77] A good example of how the Judge applied this rule concerns the fuel costs for which “Mr. Rivett’s testimony coupled with the documentary evidence permit[ted] a determination of these costs on a balance of probabilities” (*Rivett’s* reasons, at paragraph 83). In addition to providing accounts for diesel fuel for tractors and combines (exhibit D-6, Rivett’s appeal book, volume 2, tab 20, at pages 328-381), Mr. Rivett testified that “per acre fuel expenditures [were] similar from crop

to crop, with the exception of wheat which involve[d] marginally higher combining costs, or “a little bit of difference in fuel per acre””. The increase for wheat being marginal, the Judge held that the costs should be “spread equally among the crops” (*Rivett’s* reasons, at paragraph 85). This evidence allowed the Judge to conclude that fuel expenses were “incurred, in part, with respect to the 947 acres of [RR] soybeans” (*ibidem*, at paragraph 68).

[78] In direct examination, Mr. Rivett stated that the invoices filed under D-7, “again like the fuel”, dealt with the farm generally. Repairs were for “everything on the farm [...] It is not just one thing there that they’re allocated for. It is in general ... seed drills, calibrators, tractors...” (Rivett’s transcript for 12 January 2009, at page 165, lines 13 and f.). Once the Judge had decided to spread the fuel costs equally among the various crops, it seems only logical to allocate as well, and on the same basis, the costs of maintaining and repairing the machinery that burns the fuel. Having carefully examined the evidence and the transcripts available in appeal, I conclude that these costs were incurred in part to grow the infringing crop.

(d) Percentage of the profit differential: 31% versus 18%

[79] This leaves the final question of whether the percentage of the profit differential applied by the Judge was too high. I think that it was.

[80] The Judge found the differential was 31% based on a chart prepared by Monsanto, which advertised a profit differential of 18%.

[81] Interpreting the figures on the chart prepared by Monsanto in light of Mr. Rivett's admission that he did not pay for the RR seeds because he inherited them, the Judge found the differential profit to be 31%.

[82] In its relevant parts, the chart reads as follows:

| | Roundup Ready bulk | Conventional Bin run |
|---|--------------------------|-------------------------|
| Yield (bu) | 39.0 | 32.9 |
| Price per bushel | \$8.75 | \$8.75 |
| <hr/> | | |
| Total Revenue | \$341.25 | \$287.88 |
| <hr/> | | |
| Seed | \$51.32 | \$18.46 |
| Weed Control | | |
| 1 st application (preplant burndown) | \$14.69 | \$14.69 |
| 2 nd application | \$9.79 | \$37.23 |
| <hr/> | | |
| Total Seed and Weed Control | \$75.79 | \$70.38 |
| <hr/> | | |
| Return toward profit/other | \$265.46 | \$217.50 |

[83] Monsanto's chart is aimed at showing the greater value that RR soybeans can bring to a farming operation. It advertises a potential advantage of over \$40.00 per acre. Even though the

seeds are more expensive (\$51.32 compared to \$18.46), the yield is so much better (39 bushels compared to 32.9 bushels) and the total weed control costs are so much less (\$75.79 compared to \$70.38), that the expected net profit increases from \$217.50 to \$265.46 (a difference of \$47.96, or 18%).

[84] The Judge accepted that the chart represents the expected differential profit from using RR soybean seeds over conventional soybean seeds, but in applying the information on the chart to the facts of Mr. Rivett's case, he disallowed \$51.32, representing the cost of RR seeds, as that expense had not been incurred by Mr. Rivett (he had inherited the RR seeds he planted). Adding \$51.32 back to the amount of return toward profit in the RR bulk column, the final result changed from \$265.46 to \$316.78. On that basis, the Judge computed the profit differential between the RR bulk and the conventional bin run as 31%.

[85] In my view, it was reasonably open to the Judge to treat Monsanto's chart as the best evidence available to estimate the profit attributable to Monsanto's patent. It is a representation by Monsanto of the incremental profit a hypothetical farmer might expect to derive from planting RR soybean seeds (bought in bulk) instead of conventional soybean seeds. Thus, it represents a benchmark for the differential element in the computation of differential profit.

[86] However, the Judge should have recognized that the chart does not purport to state Mr. Rivett's actual farming costs, or anyone's actual farming costs. Altering the chart to remove the seed cost from one column, as the Judge did, is problematic because it adjusts one element of the

chart, and one element only, to reflect Mr. Rivett's actual situation while ignoring the fact that none of the other elements represent his situation either.

[87] According to Monsanto's chart, the advantage to a hypothetical farmer of using the patented invention is the difference between \$265.46 and \$217.50, or 18%. I agree with Mr. Rivett that the portion of his profits to be disgorged to Monsanto should follow Monsanto's own and unchallenged evidence and be equal to 18% (Rivett's memorandum, at paragraph 53).

[88] This being said, I now turn my attention to the Janssens' file. Of course, whenever issues in common with the Rivett appeal have already been dealt with, I will adopt my previous reasoning and simply refer to the relevant paragraphs of these reasons.

(2) The Janssens' appeal

[89] Lawrence and Ronald Janssens are brothers. They and Alan Kerkhof own a farming business and farm together in an informal arrangement. As mentioned earlier, the infringement, which is fully admitted, relates to two years of cultivation of RR soybeans. Collectively, fifty acres of soybean seeds, saved from a previous year's harvest were planted in 2004 and, using seeds retained from the 2004 yield, 250 acres in 2005.

[90] The issues are:

1. Did the Judge err in refusing cultivation costs for the year 2004?
2. Did the Judge err in refusing to include custom costs and labour in the deductions?

3. Did the Judge err in not allowing Ronald Janssens a deduction for the land costs?
4. Did the Judge err in disallowing deductions of other expenses relating to marketing and interest costs?
5. Did the Judge err in attributing the profits of Aldy Farms Inc. to Alan Kerkhof personally?
6. Was the percentage of the profit differential too high?

[91] I am of the view that the Janssens' appeal must fail on all issues, but the sixth one. The evidentiary record amply supports the Judge's findings on issues 1 through 5.

(a) Cultivation costs for the year 2004

[92] The Janssens submit that the Judge erred in refusing them any deduction whatsoever for the year 2004. Their best evidence for 2004 was that for the year 2005. Building on the same argument presented by Mr. Rivett, they argue that "the Court has an obligation to make its best estimate" (Janssens' memorandum, at paragraph 50). I accept paragraph 33 of the Judge's amended reasons in Janssens as a full answer to that ground of appeal:

[33] It was observed by counsel for the defendants that it is obvious that soybeans do not plant, cultivate and harvest themselves, and thus that some expenses must have been incurred in that process. However, the defendants provided no evidence on which the Court, on a principled basis, could find that the 2004 expenses would be of the same order as the 2005 expenses. The 2004 crop was planted in a sharecropping arrangement with a third party who is not before the Court in these proceedings. Accordingly, the Court finds that there is no basis on which to credit the defendants with any expenses against the gross revenue received from the 2004 crop.

(b) Custom costs and labour

[93] The same can be said about this ground of appeal. Paragraph 43 of the Judge's amended reasons in Janssens is a full answer to this issue:

[43] The difficulty with this submission is that the claimed expenses conflate a variety of separate items, such as fuel costs and labour, which cannot be disentangled on the evidence before the Court. Further, as counsel for the plaintiffs elicited in cross-examination of Mr. Kerkhof, the custom rates relied upon by the defendants to estimate the cost of spraying and trucking, for example, do not account for the fact that the market value of these services is determined by factors such as wage rates, insurance premiums, and licensing costs which the defendants would not have incurred. For this reason the figures provided by the defendants are not reliable and the Court will not allow deductions from gross revenue for any of these expenses. Further, for the reasons given in *Rivett*, the defendants are not entitled to any deduction for their own labour.

(c) Land costs of Ronald Janssens

[94] This ground of appeal stems from paragraph 52 of the Judge's amended reasons in Janssens where he held that:

“Ronald Janssens is being required to disgorge slightly more profit with respect to the 2005 crop than the other defendants despite the fact that his crop was only half of their crop. This results as he grew the soybean crop on land he owned, rather than rented. Therefore, while the other defendants were credited with the lease costs of the land, he was not. No evidence was led of any similar costs, such as property tax, that Ronald Janssens may have incurred with respect to his land. I have considered whether there is a basis on which the Court should provide some deduction for Ronald Janssens, but have concluded that in the absence of any evidence any deduction by the Court would be arbitrary and could not be said to have been made on a principled basis.”

[95] For Ronald Janssens, land involves actual and direct costs, including taxes, insurance, mortgage interest, upkeep, and use-value which could otherwise be spent growing other crops. Such

costs are difficult to assess, but are certainly incurred. Given that the Judge accepted evidence with respect to the cost of renting land by the other appellants, Ronald Janssens argues that equity demanded that the Judge used the cost of land rent as a means to determine deductible costs associated with his own land (Janssens' memorandum, at paragraph 57).

[96] Frankly, I fail to see the difficulty in proving or assessing land costs in the present context. It is Mr. Janssens who did not meet his burden of proof, not the Judge who failed at his task. Moreover, there is no basis to assume that Mr. Janssens' land costs approximated his partners' rental costs. In the absence of evidence, the Judge did not err in refusing to allow such a deduction.

(d) Marketing and Interest costs

[97] The Janssens argue at paragraphs 73 to 77 of their memorandum of fact and law that the Judge erred by not allowing a deduction for marketing costs and interest on loans for input costs. According to Mr. Kerkhof's testimony, these costs would have been "approximately \$1,000 in 2004, and \$5,000 in 2005, or an average of approximately \$20 per acre" (*ibidem*, at paragraph 75). The transcripts show that these figures were conceded to be estimated costs only, which included miscellaneous expenses. Cross-examined on the issue, Mr. Kerkhof answered as follows:

- Q. Your interest in marketing costs that you spoke to?
A. Yes.
Q. You don't have any documentation to back that up?
A. No, I don't.
Q. You said those figures are including accounting, household and office?
A. Right.
Q. And those expenses you would incur regardless of whatever crops are in your field?
A. That's right.

[98] On that evidence, the Judge was certainly entitled to find that the figures provided were “unreliable” (see paragraph 43 of Judge’s amended reasons in Janssens cited above at paragraph [93]).

(e) Mr. Kerkhof and Aldy Farms Inc.

[99] To avoid disgorging profits, Mr. Kerkhof submits that all farming activity done or managed by him was done on behalf of his company Aldy Farms Inc. As a result, Aldy Farms earned the profit from the 120 acres of infringing crop grown in 2004 and 2005, not him.

[100] The record does not support that statement. Firstly, Mr. Kerkhof’s statement of defence simply does not mention Aldy Farms. Secondly, Mr. Kerkhof, who was represented by counsel throughout the proceedings, admits to the infringement in his personal capacity and agrees to disgorge profits. Thirdly, no evidence was provided that suggested Aldy Farms was the recipient of the revenues and of Mr. Kerkhof’s services. The only reference to that entity was during his examination-in-chief. Finally, the Agreed Statement of Facts is to the effect that Mr. Kerkhof planted, harvested and sold the seeds in his personal capacity.

[101] Thus, I agree with Monsanto, that there was no basis for the Judge to take into account the alleged involvement of Aldy Farms Inc. in the infringing activities of Mr. Kerkhof.

(f) Percentage of the profit differential: 31% versus 18%

[102] For the reasons given above at paragraphs [79] and following, I would allow that ground of appeal.

Conclusions

Monsantos's cross-appeals

[103] Monsanto's cross-appeals should be dismissed.

The appeals of Mr. Rivett (A-314-09); and of Messrs. Janssens and Kerkhof (A-315-09)

[104] I propose to allow the appeals, in part.

[105] The Federal Court Judge set the specific amounts of money to be paid by the appellants to Monsanto. These amounts concerned (a) the profits to be disgorged (b) the pre-judgment interest calculated in accordance with subsection 36(1) of the *Federal Courts Act* (c) post-judgment interest calculated in accordance with subsection 37(1) of the same Act and (d) the costs, including post-judgment interest on these costs.

[106] As a result of my conclusion in the within appeals, these specific amounts will require re-calculation. It is hoped that with the guidance of these reasons, the parties will come to an agreement as to the new amounts replacing those appearing at paragraphs 1 through 4 of the Federal Court's judgment in File 314-09 and in paragraphs 2 through 17 in File 315-09.

[107] If they agree and wish for orders giving effect to these new amounts, the parties may prepare for endorsement draft orders implementing the Court's conclusions.

[108] If they disagree, any party may bring a motion for supplementary judgment in accordance with Rule 369 of the *Federal Courts Rules*.

[109] A copy of these reasons will be filed with the Registry for each appeal.

Costs: appeals and cross-appeals

[110] In view of the divided success, I would allow no costs on the appeals or cross-appeals.

“Johanne Trudel”

J.A.

“I agree
K. Sharlow J.A.”

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-314-09

STYLE OF CAUSE: Charles Rivett v. Monsanto
Canada Inc. and Monsanto
Company

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 16, 2010

REASONS FOR JUDGMENT BY: Trudel J.A.

CONCURRED IN BY: Sharlow J.A.
Dawson J.A.

DATED: August 6, 2010

APPEARANCES:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-315-09

STYLE OF CAUSE: Lawrence Janssens, Ronald
Janssens and Alan Kerkhof v.
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