Citation: 2009 TCC 190
Date: 20090407
Docket: 2004-2360(IT)G

BETWEEN:

ADVANCED AGRICULTURAL TESTING INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] The appellant corporation appeals from assessments under the *Income Tax Act* (the *Act)* for the taxation years 1995, 1996, 1997, 1998 and 1999. In each of those years, it claimed a deduction from income on account of expenditures for scientific research and experimental development (SRED). By the time of trial the issues in dispute had been somewhat narrowed. The appellant claimed deductions for SRED in respect of two trials, referred to as trial #48, and trial #49, in the year 1998, and for trial #50 in the year 1999. The Minister of National Revenue has disallowed these. For the taxation years 1995, 1996, 1997 and 1998, the appellant elected to report its expenditures for SRED by the proxy method, as is permitted by clause 37(8)(*a*)(ii)(B) and subsection 37(10) of the *Act*. It later sought to revoke these elections. The Minister says that it cannot do so. Certain expenses related to SRED claimed in the taxation years 1995, 1996 and 1997 are also in dispute.

[2]Neither the pleadings nor the written arguments of counsel define the issues in these appeals as precisely as I would wish. As I understand these documents, and the opening statements of counsel, the issues are:

(a) Do trials #48, #49 and #50, or any of them, qualify as SRED as that expression is defined in section 248 of the Act?

(b) Can an election duly made under clause 37(8)(*a*)(ii)(B) and subsection 37(10) of the *Act* later be revoked by the taxpayer?

(c) Are bedding for cattle and diesel fuel "material consumed" and therefore deductible under section 37, or are they overhead expenses not deductible by a taxpayer reporting by the proxy method?

[3]Subsection 37(1) of the *Act* reads as follows:

> 37(1) Where a taxpayer carried on a business in Canada in a taxation year, there may be deducted in computing the taxpayer's income from the business for the year such amount as the taxpayer claims not exceeding the amount, if any, by which the total of
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> (*a*) the total of all amounts each of which is an expenditure of a current nature made by the taxpayer in the year or in a preceding taxation year ending after 1973
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> (i) on scientific research and experimental development carried on in Canada, directly undertaken by or on behalf of the taxpayer, and related to a business of the taxpayer,
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> (i.1) by payments to a corporation resident in Canada to be used for scientific research and experimental development carried on in Canada that is related to a business of the taxpayer, but only where the taxpayer is entitled to exploit the results of that scientific research and experimental development,
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> (ii) by payments to
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> (A) an approved association that undertakes scientific research and experimental development,
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> (B) an approved university, college, research institute or other similar institution,
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> (C) a corporation resident in Canada and exempt from tax under paragraph 149(1)(*j*), or
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> (D) [Repealed, 1996, c. 21, s. 9(4)]
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> (E) an approved organization that makes payments to an association, institution or corporation described in any of clauses A to (C)

to be used for scientific research and experimental development carried on in Canada that is related to a business of the taxpayer, but only where the taxpayer is entitled to exploit the results of that scientific research and experimental development, or

(iii) where the taxpayer is a corporation, by payments to a corporation resident in Canada and exempt from tax because of paragraph 149(1)(*j*), for scientific research and experimental development that is basic research or applied research carried on in Canada

(A) the primary purpose of which is the use of results therefrom by the taxpayer in conjunction with other scientific research and experimental development activities undertaken or to be undertaken by or on behalf of the taxpayer that relate to a business of the taxpayer, and

(B) that has the technological potential for application to other businesses of a type unrelated to that carried on by the taxpayer, and

(*b*) the lesser of

(i) the total of all amounts each of which is an expenditure of a capital nature made by the taxpayer (in respect of property acquired that would be depreciable property of the taxpayer if this section were not applicable in respect of the property, other than land or a leasehold interest in land) in the year or in a preceding taxation year ending after 1958 on scientific research and experimental development carried on in Canada, directly undertaken by or on behalf of the taxpayer, and related to a business of the taxpayer, and

(ii) the undepreciated capital cost to the taxpayer of the property so acquired as of the end of the taxation year (before making any deduction under this paragraph in computing the income of the taxpayer for the taxation year),

(*c*) the total of all amounts each of which is an expenditure made by the taxpayer in the year or in a preceding taxation year ending after 1973 by way of repayment of amounts described in paragraph 37(1)(*d*),

(*c.1*) all amounts included by virtue of paragraph 12(1)(*v*), in computing the taxpayer's income for any previous taxation year,

(*c.2*) all amounts added because of subsection 127(27), (29) or (34) to the taxpayer's tax otherwise payable under this Part for any preceding taxation year, and

(*c.3*) in the case of a partnership, all amounts each of which is an excess referred to in subsection 127(30) in respect of the partnership for any preceding fiscal period,

exceeds the total of

(*d*) the total of all amounts each of which is the amount of any government assistance or non-government assistance (within the meanings assigned to those expressions by subsection 127(9)) in respect of an expenditure described in paragraph 37(1)(*a*) or 37(1)(*b*) that, at the taxpayer's filing-due date for the year, the taxpayer has received, is entitled to receive or can reasonably be expected to receive,

(*d.1*) the total of all amounts each of which is the super-allowance benefit amount (within the meaning assigned by subsection 127(9)) for the year or for a preceding taxation year in respect of the taxpayer in respect of a province,

(*e*) that part of the total of all amounts each of which is an amount deducted under subsection 127(5) in computing the tax payable under this Part by the taxpayer for a preceding taxation year where the amount can reasonably be attributed to

(i) a prescribed proxy amount for a preceding taxation year,

(ii) an expenditure of a current nature incurred in a preceding taxation year that was a qualified expenditure incurred in that preceding year in respect of scientific research and experimental development for the purposes of section 127, or

(iii) an amount included because of paragraph 127(13)(*e*) in the taxpayer's SR&ED qualified expenditure pool at the end of a preceding taxation year within the meaning assigned by subsection 127(9),

(*f*) the total of all amounts each of which is an amount deducted under this subsection in computing the taxpayer's income for a preceding taxation year, except amounts described in subsection 37(6),

(*f.1*) the total of all amounts each of which is the lesser of

(i) the amount deducted under section 61.3 in computing the taxpayer's income for a preceding taxation year, and

(ii) the amount, if any, by which the amount that was deductible under this subsection in computing the taxpayer's income for that preceding year exceeds the amount claimed under this subsection in computing the taxpayer's income for that preceding year,

(*g*) the total of all amounts each of which is an amount equal to twice the amount claimed under subparagraph 194(2)(*a*)(ii) by the taxpayer for the year or any preceding taxation year, and

(*h*) where the taxpayer is a corporation control of which has been acquired by a person or group of persons before the end of the year, the amount determined for the year under subsection 37(6.1) with respect to the corporation.

In the context of this case an amount, in order to be deductible, must be shown to have been expended on activity that comes within the meaning of the expression "SRED", which is given the following definition by section 248 of the *Act*:[1]

"scientific research and experimental development" means systematic investigation or search that is carried out in a field of science or technology by means of experiment or analysis and that is

(*a*) basic research, namely, work undertaken for the advancement of scientific knowledge without a specific practical application in view,

(*b*) applied research, namely, work undertaken for the advancement of scientific knowledge with a specific practical application in view, or

(*c*) experimental development, namely, work undertaken for the purpose of achieving technological advancement for the purpose of creating new, or improving existing, materials, devices, products or processes, including incremental improvements thereto,

and, in applying this definition in respect of a taxpayer, includes

(*d*) work undertaken by or on behalf of the taxpayer with respect to engineering, design, operations research, mathematical analysis,

[1] This definition was formerly section 2900 of the *Income Tax Regulations*.

> computer programming, data collection, testing or psychological research, where the work is commensurate with the needs, and directly in support, of work described in paragraph (*a*), (*b*), or (*c*) that is undertaken in Canada by or on behalf of the taxpayer,
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> but does not include work with respect to
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> (*e*) market research or sales promotion,
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> (*f*) quality control or routine testing of materials, devices, products or processes,
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> (*g*) research in the social sciences or the humanities,
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> (*h*) prospecting, exploring or drilling for, or producing, minerals, petroleum or natural gas,
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> (*i*) the commercial production of a new or improved material, device or product or the commercial use of a new or improved process,
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> (*j*) style changes, or
>
> (*k*) routine data collection;

[4] In *Northwest Hydraulic Consultants v. The Queen*,[2] Bowman J. considered this definition and postulated the following as the correct approach to be taken in applying it.

> 1. Is there a technical risk or uncertainty?
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> (a) Implicit in the term "technical risk or uncertainty" in this context is the requirement that it be a type of uncertainty that cannot be removed by routine engineering or standard procedures. I am not talking about the fact that whenever a problem is identified there may be some doubt concerning the way in which it will be solved. If the resolution of the problem is reasonably predictable using standard procedure or routine engineering there is no technological uncertainty as used in this context.
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> (b) What is "routine engineering"? It is this question, (as well as that relating to technological advancement) that appears to have divided the experts more than any other. Briefly it describes techniques, procedures and data that are generally accessible to competent professionals in the field.

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[2] 98 DTC 1839.

2. Did the person claiming to be doing SRED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty? This involves a five stage process:

(a) the observation of the subject matter of the problem;

(b) the formulation of a clear objective;

(c) the identification and articulation of the technological uncertainty;

(d) the formulation of an hypothesis or hypotheses designed to reduce or eliminate the uncertainty;

(e) the methodical and systematic testing of the hypotheses.

It is important to recognize that although a technological uncertainty must be identified at the outset an integral part of SRED is the identification of new technological uncertainties as the research progresses and the use of the scientific method, including intuition, creativity and sometimes genius in uncovering, recognizing and resolving the new uncertainties.

3. Did the procedures adopted accord with established and objective principles of scientific method, characterized by trained and systematic observation, measurement and experiment, and the formulation, testing and modification of hypotheses?

(a) It is important to recognize that although the above methodology describes the essential aspects of SRED, intuitive creativity and even genius may play a crucial role in the process for the purposes of the definition of SRED. These elements must however operate within the total discipline of the scientific method.

(b) What may appear routine and obvious after the event may not have been before the work was undertaken. What distinguishes routine activity from the methods required by the definition of SRED in section 2900 of the Regulations is not solely the adherence to systematic routines, but the adoption of the entire scientific method described above, with a view to removing a technological uncertainty through the formulation and testing of innovative and untested hypotheses.

4. Did the process result in a technological advance, that is to say an advancement in the general understanding?

(a) By general I mean something that is known to, or, at all events, available to persons knowledgeable in the field. I am not referring to a piece of knowledge that may be known to someone somewhere. The scientific community is large, and publishes in many languages. A technological advance in Canada does not cease to be one merely because there is a theoretical possibility that a researcher

> in, say, China, may have made the same advance but his or her work is not generally known.
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> (b) The rejection after testing of an hypothesis is nonetheless an advance in that it eliminates one hitherto untested hypothesis. Much scientific research involves doing just that. The fact that the initial objective is not achieved invalidates neither the hypothesis formed nor the methods used. On the contrary it is possible that the very failure reinforces the measure of the technological uncertainty.
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> 5. Although the *Income Tax Act* and the Regulations do not say so explicitly, it seems self-evident that a detailed record of the hypotheses, tests and results be kept, and that it be kept as the work progresses.

This approach was later endorsed by the Federal Court of Appeal in *RIS-Christie Ltd. v. The Queen.*[3]

[5] Robert Bechtel is the president and the sole shareholder of the appellant company. He operates it with the assistance of his sons. Mr. Bechtel is a graduate of the Ontario Agricultural College (now the University of Guelph); he has been engaged in farming for many years, and founded the appellant in 1987. He and his two sons also own the shares of Hyplains Feedyard in Kansas. The appellant carries out its operations at Baden, Ontario. It has four buildings there, with 55 pens, each accommodating 8 cattle. There is also a central weighing facility. Dr. Ken Bateman is a doctor of veterinary medicine and a member of the faculty of the University of Guelph. He is described in one document as a cattle health management consultant. At the material times, he was engaged on retainer by the appellant. In his evidence Mr. Bechtel described Dr. Bateman as being "… almost an employee of mine…".[4] The appellant also engaged the services of Dr. Kenneth Eng, a feedyard consultant in the United States, and Dr. Hutchison, a statistician, of Amarillo, Texas.

The Expert Evidence

[6]Three expert witnesses testified at the trial of this matter, one for the appellant and two for the respondent. They all were qualified to give opinion evidence on the subject of SRED in the field of animal health science. Dr. Smith testified for the appellant. He graduated in veterinary medicine from the University of Guelph in

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3 99 DTC 5087.

4 Transcript, vol. 1, p. 29, l. 8.

1965, and earned his Ph.D. from Cornell University in 1974. Since then he has gained some 35 years experience in the field as an employee of pharmaceutical companies, and as an entrepreneur. For the past eight years he has operated his own consulting company, Maurice Smith Consulting Inc. In that capacity he has been engaged in assisting companies with obtaining product approvals. He has been extensively involved in research work, and from time to time has done consulting work for the appellant.

[7] Dr. Kenneth Koots and Dr. Benjamin Lobo gave opinion evidence for the respondent. Dr. Koots has a Ph.D. from the University of Guelph, where his thesis was the construction of a bioeconomic model of a beef herd, dealing with the many facets of beef production. His career has included both academic and provincial government experience, and at the time of the trial he had spent 8½ years as a research and technology advisor for Revenue Canada reviewing SRED claims in the Prairie Region. He has worked in the field of beef cattle research for approximately 25 years.

[8] Dr. Lobo graduated from the University of Guelph in Veterinary Medicine in 1977, and obtained a graduate diploma from the Ontario Veterinary College in 1979. Since 1981 he has been a drug evaluator in the Veterinary Drugs Directorate of Health Canada, reviewing the submissions of pharmaceutical companies for approval of new products. In that capacity, he reviews the proposed trial protocols for the testing of drugs for cattle and swine, and also for aquaculture applications.

[9] Neither counsel took issue with the qualification of the other party's expert witnesses; indeed none of them were cross-examined as to their qualifications either before or after I ruled them to be qualified to give opinion evidence. All of these witnesses are well qualified by both their education and their subsequent experience to assist the Court in understanding and applying the statutory definition given by Parliament to the expression "SRED". Unfortunately, none of them expressed an opinion in the abstract as to the criteria that characterize systematic investigation or search, or otherwise shed light on the meaning to scientists of the language used by Parliament in the statutory definition. Instead, they all simply reviewed what was involved in the conduct of each of trials 48, 49 and 50, and then gave their opinions as to the ultimate issue before me, namely whether in each case the trial qualified as SRED carried out by the appellant.

[10] *In R. v. Mohan*,[5] Sopinka J. said at page 23:

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[5] [1994] 2 S.C.R. 9.

In *R. v. Abbey*, *supra*, Dickson J., as he then was, stated, at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, *per* Lawton L.J.)

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature.

At page 24 he added this:

> Although the [ultimate issue] rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude evidence as to an ultimate issue.

[11] In *RIS-Christie*, Robertson J.A. put it this way at paragraph [12]:

> What constitutes scientific research for the purposes of the *Act* is either a question of law or a question of mixed law and fact to be determined by the Tax Court of Canada, not expert witnesses, as is too frequently assumed by counsel for both taxpayers and the Minister. An expert may assist the court in evaluating technical evidence and seek to persuade it that the research objective did not or could not lead to a technological advancement. But, at the end of the day, the expert’s role is limited to providing the court with a set of prescription glasses through which technical information may be viewed before being analyzed and weighed by the trial judge. Undoubtedly, each opposing expert witness will attempt to ensure that its focal specifications are adopted by the court. However, it is the prerogative of the trial judge to prefer one prescription over another.

[12]In the present case, the opinions of the experts are in evidence without objection, but I find them to be of very limited usefulness. In relation to trials #48 and #50, the result depends primarily on the determination of whose research it was. In large measure, this turns on the interpretation to be given to the documents relating to these trials that were put in evidence by agreement between the parties, and on the evidence of Mr. Bechtel and Dr. Bateman. This is certainly an instance of the experts being asked to give opinion evidence in an area that is the exclusive province of the court.

[13] There is another difficulty with the evidence of the expert witnesses. None of them demonstrated the level of objectivity that is expected of a person called to testify as an expert. My impression was that all of them, while sincere in the evidence that they gave, were well aware of where the interests of the party calling them, and paying them, lie, and that they were there to assist that party rather than the court. This in itself rendered their evidence less useful than it should have been. The problem was compounded, in my view, by their instructions. If they had been asked to give their opinion as scientists as to what constitutes “systematic investigation or search” then their evidence could have been helpful, particularly in relation to trial #49. Instead they were all asked the most general of questions, and thereupon launched into lengthy and rambling speeches in which they purported to answer the ultimate question that is before me in respect of each trial, rather than confining themselves to scientific opinion. Contributing to the imprecise nature of their evidence was the failure of the pleadings to define adequately the issues as to which opinion evidence might be addressed. All these factors leave me reluctant to give significant weight to any of the opinion evidence.

trial #48

[14] Mr. Bechtel described trial #48 as having resulted from discussions that he had with representatives of Schering-Plough Animal Health Corporation at a trade conference. The object of the study was to compare the effectiveness of different strength hormone implants in promoting cattle growth. According to Mr. Bechtel's evidence Schering-Plough's interest was limited to examining the question in the context of cattle during what is referred to in the evidence as the pasture stage. His own interest was in examining the effectiveness of the implants during the feedlot stage. For purposes of this test, the pasture stage for the cattle was from approximately mid-May to mid-September.

[15] There is a protocol for the pasture stage of this trial.[6] It clearly was prepared by Schering-Plough. In paragraph 14, it names Dr. K. Bateman as investigator, and Terry Katz of Union, New Jersey as Statistician. A Study Agreement was entered into between Dr. Bateman and Schering-Plough a month or so before the protocol was finalized. Mr. Bechtel and Dr. Bateman both testified that trial #48 was carried out by the appellant for Schering-Plough, and they conveyed the impression that Dr. Bateman's involvement in it was simply as a veterinary consultant to the appellant. Counsel for the appellant argues that in the absence of any contrary evidence from a representative of Schering-Plough, I must accept this characterization of the relationships. I disagree. The relationship between Dr. Bateman and Schering-Plough is established by the written contract ("Study Agreement") that they entered into and that the parties put into evidence by agreement. A copy of the contract, signed by Dr. Bateman, is found at Exhibit A-1, Volume 1, page 78. Dr. Bateman testified that a copy was signed on behalf of Schering-Plough as well. By the terms of that agreement, Dr. Bateman is named as "Investigator", and he agreed to conduct the study described in the protocol. He agreed to provide the animals, the feed, the facilities and the care and management of the animals, and to provide Schering-Plough with all the records, documents and raw data. The final provision of the agreement is that it may only be amended by a written instrument.

[16] Dr. Bateman said in his evidence-in-chief that he regarded trial #48 as having been conducted by the appellant and Schering-Plough. On cross-examination, he acknowledged both the protocol that named him as "Investigator" and the Study Agreement entered into by him and Schering-Plough. However much they might

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6 Exhibit A-1, vol. 1, pages 66-77.

wish to, neither he nor Mr. Bechtel could by their evidence change the legal relationships created by those documents. When the appellant participated in the carrying out of trial #48, it did so for Dr. Bateman who was obliged by his agreement with Schering-Plough to carry out the functions specified in the documents. His statement that he was carrying on these functions on behalf of the appellant is simply not correct. No matter what arrangement Mr. Bechtel and Dr. Bateman had, or thought that they had, between them, their evidence as to the legal relationships is quite contrary to the effect of the documentary evidence that the parties put in by agreement. It is also inconsistent with Mr. Bechtel's evidence to the effect that Schering-Plough insisted on having a qualified veterinarian fill the role of principal investigator. As there was no written contract between the appellant and Dr. Bateman, and they gave only the most vague evidence as to their arrangement, I am left to infer that Dr. Bateman, having contracted with Schering-Plough to conduct the trial, then subcontracted to the appellant almost all the work, reserving to himself only the functions of overseeing the work done by the appellant and attending to the health needs of the animals. Mr. Bechtel stated that Dr. Bateman was only made principal investigator

> … because they needed somebody with a lot more letters behind their name in order to be the principal investigator than I had. So, Dr. Bateman, who was almost an employee of mine, became the principal investigator.[7]

The fact remains, however, that Dr. Bateman was the principal investigator under a contract with Schering-Plough to carry out the research pursuant to that company's protocol, and he was not an employee or other representative of the appellant in doing so.

[17] The fee agreed to between Schering-Plough and Dr. Bateman was $47,000. I have no doubt that Dr. Bateman discussed that fee with Mr. Bechtel before agreeing to it. It is evident that from the start, it was intended between them that Mr. Bechtel, or more precisely the appellant, would purchase the animals for the study and do much of the work that Dr. Bateman contracted to do, such as implanting, feeding and otherwise caring for the animals. He also found and rented the pasture facility that was used for the trial. Mr. Bechtel's evidence was that Dr. Bateman kept sufficient of the $47,000 fee to cover his expenses, by which I take it he meant not only the expense related to traveling to the pasture several times to oversee the trial, but also compensation for his time spent doing that. Mr. Bechtel and Dr. Bateman were both remarkably vague in giving their evidence, and neither of them could remember how

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[7] Transcript, vol. 1, p. 29, l.l. 3-9.

the $47,000 was divided between them. Nor did they produce a written contract between Dr. Bateman and the appellant dealing with the division between them of either the work or the fee for this trial.

[18] Mr. Bechtel testified that he found and rented the pasture at Hanover, Ontario at which the trial was to be conducted. He bought 250 heifers and 250 steers, which were shipped to the appellant's facility where they remained for 60 days until they had recovered from any disease they may have been suffering from. The animals included some British and some exotic breeds. They were divided into random groups, each animal was weighed, and the cattle in each group were implanted with one of the implants to be tested, or, in the case of the control group, no implant. Every 35 days the animals were caught, weighed and observed. In particular, their ears were examined for abscesses at the site of the implant. At the end of the summer they were weighed for the last time, then shipped back to the appellant's premises. At this point, the trial for which Schering-Plough had contracted was completed and the company had no further interest in the animals. Mr. Bechtel, having collected the data throughout the trial, which consisted of the weights of the animals and the observations as to the existence of abscesses in their ears, turned it over to Dr. Bateman who in turn sent it to Schering-Plough. There is no evidence that either the appellant or Dr. Bateman made any statistical analysis of the data.

[19] When asked about the observations and the results of trial #48 at the end of the pasture phase, Mr. Bechtel replied:

> Well, to be kind of blunt, the implant was no good at all. There was no improvement on any level of the implants at all.

He did make the observation, however, that at the end of the trial there were three times as many exotic breed animals as British breed in which the implants had not been absorbed. He also observed that certain of the cattle contracted a disease known as pink eye during trial #48, and that those that contracted it and were treated had weight gain similar to those that did not contract it, while those that were not treated could be expected to show significantly less weight gain.

[20] Following the end of the pasture phase of trial #48, Mr. Bechtel removed the white Charolais cattle from the trial and sold them in Canada, and then shipped the remaining animals to a feedlot in Kansas where they were fed for a further four months before being slaughtered. Before they left Canada they were retagged, and they were implanted once again with a stronger implant, Synovex +. On arrival

in Kansas, they were weighed, not individually but by the truckload, and they were weighed again every 28 days, and at the end of the feedlot phase.

[21] The appellant's position is that Mr. Bechtel developed the protocol for both the pasture and the feedlot phases of trial #48, and that he carried out the trial as the investigator, in cooperation with Schering-Plough. In a letter to Dr. Gantotti of the Canada Revenue Agency (CRA) in March 2006, he states that he carried out the trial according to a protocol that he and Schering-Plough had jointly agreed upon, and that both he and Schering-Plough had made an analysis of the data that he had collected. His evidence at trial made no reference to any such analysis by him, and his claim that he was the investigator is not consistent with the "Study Agreement" between Schering-Plough and Dr. Bateman that I have referred to above. My conclusion with respect to the pasture phase of trial #48 is that the appellant did not conduct SRED as that expression is defined for purposes of the *Income Tax Act*, either alone or in partnership with Schering-Plough, for the reasons that I have given at paragraphs 6 and 7 above. I accept that the appellant had an interest in the subject matter, and that Mr. Bechtel had discussions concerning it with representatives of Schering-Plough prior to the beginning of trial #48. His ideas on the subject may have contributed in some measure to the development of the protocol, but the research was that of Schering-Plough, from the protocol through to the statistical analysis. The appellant's role was one of routine data collection, which is specifically excluded by the definition in section 248 from qualifying as SRED.

[22] Dr. Maurice Smith is qualified by his education and experience to testify about matters relating to animal health. However this does nor qualify him to determine the legal relationships that arise out of the Study Agreement and the protocol in this case, as he purported to do. He stated that Schering-Plough was not the company carrying out the research and cited in support of that the absence of an experimental studies certificate issued to it. The evidence does not address the question whether Schering-Plough applied for an experimental studies certificate. It does, however, make it quite clear that the contractual relationship in respect of the conduct of the pasture phase of trial #48 is between Schering-Plough and Dr. Bateman, that Schering-Plough paid $47,000 to Dr. Bateman to conduct the study for it, and that Dr. Bateman paid some unspecified part of that amount to the appellant for its services.

[23] So far as the feedlot phase of trial #48 is concerned, if there was any SRED then it was the appellant's, as Schering-Plough clearly was neither interested nor involved after the conclusion of the pasture phase. There are a number of problems with the appellant's claim, however. The first of those is the absence of anything that could reasonably be described as a protocol governing the feedlot phase. Among the

documents entered into evidence by consent is what appears to be a draft protocol for trial #48 dated December 1997. It is unsigned, and is at best rudimentary in its description of the methodology. It may have provided the idea for the protocol that Schering-Plough and Dr. Bateman signed in April 1998, and the appellant placed some reliance on it at the trial. All that it has to say beyond the pasture phase of the trial is this cryptic comment:

> If possible the feedlot performance will be measured following the pasture season.

The Schering-Plough protocol, of course, did not speak to the feedlot stage at all as that company had no interest in carrying the trial beyond the pasture phase for which it had contracted with Dr. Bateman. The requirements to define and articulate a technological risk or uncertainty and to formulate a hypothesis to be tested that Bowman J (as he then was) referred to in *Northwest Hydraulic* are simply not met.

[24] In fact, what happened here is that the appellant simply embarked on, or perhaps more accurately continued on, the path of commercial production when he shipped the cattle to be finished at the feedlot, and ultimately slaughtered, in Kansas. That Mr. Bechtel's interest at this stage was in commercial production rather than research is borne out by his decision to remove the white Charolais cattle before shipping the remainder to Kansas. He explained this decision on the basis that the Charolais were not well suited to the United States market and, therefore, did not grade as well there as they did in Canada. He defended the decision on the basis that the Charolais were equally dispersed among the trial groups, but the fact is that he compromised the test result to some degree by making this variation in the test groups for what was simply a commercial advantage.

[25] The appellant also relies upon two observations made by Mr. Bechtel during the course of trial #48. He testified that he observed that while certain animals developed pink-eye during the pasture phase of the test, if they were treated for the disease then they performed as well in terms of weight gain as those that had not developed pink-eye. The other observation concerned the absorption of implants differently by different breeds of cattle. Mr. Bechtel testified that when he examined the ears of the cattle at the end of the summer, that is at the end of the pasture phase, he found that among the exotic breed of cattle there were about three times as many unabsorbed implants as in the British breed cattle. These, he said, were discoveries that emerged from trial #48. These were not, however, matters that the appellant investigated in a systematic way. There is again no risk or uncertainty articulated, and no hypothesis formulated and tested. Dr. Smith was asked during his examination-in-chief whether he considered each of these two findings to be "… a scientific

advancement …", and on each occasion he answered in the affirmative.[8] The credit that the *Act* allows, however, is not for the discovery, accidental or otherwise, of something that may be described as a scientific advancement; it is for an expenditure made on SRED carried out by the taxpayer, as defined in section 248. Much that is of scientific value has been learned by accident and observation. Alexander Fleming did not set out to test the antibiotic properties of *penicillium* mould when he left on holiday without first cleaning his Petri dishes, and the serendipitous observation that he made on his return did not amount to scientific research or experimental development. Over the next decade, however, he and others did conduct scientific research, and a useful product was the result of it. Mr. Bechtel's observations concerning pink-eye treatment and the unabsorbed implants in exotic breeds of cattle may well have led to research in later years that would meet the requirements of the *Act*, but his observations alone do not. Dr. Smith's evidence on this point does not assist the appellant, because he was not asked the right question. If he had been asked whether the appellant carried out any systematic examination or search in respect of these matters, he would have had to answer no.

Trial #49

[26] On March 8, 1998 the appellant and Brookover Ranch entered into an agreement whereby the appellant would carry out this trial and Brookover would pay it $25.00 per animal to do so. Under the agreement the appellant had the right to retain the trial results for its own use. The purpose of the trial was to compare the pasture performance, and the subsequent feedlot performance, of heifer calves receiving four different strength hormone implants, and those receiving none. The four implants compared were Synovex C, Synovex H, Ralgro, and Revalor H, each of which contained a different strength hormone. A fifth implant was a placebo that contained no hormone. Superimposed on this trial was a test of something called a Rumensin rumen bolus, (the bolus) which administers an antibiotic to cattle by dissolving over a lengthy period of time in the animal's rumen, or first stomach. The trial was conducted using 425 heifer calves which the appellant purchased from breeders in Saskatchewan and Eastern Canada. After preconditioning at the appellant's premises, they were divided into five random groups of 85 each, and each group was given one of the five implants. Half the cattle in each group were also given the bolus. The cattle were then weighed and sent to one of three pastures rented by the appellant. The evidence is not entirely clear, but it seems that a third of each group went to each of the three pastures. According to Mr. Bechtel, the animals were

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[8] Transcript, vol. 1, p. 166, l.l. 14-22 and p. 168, l.l. 4-18.

weighed and observed at intervals during the pasture phase. At the end of it they were weighed again and each group was reimplanted. The various versions of the protocol do not make clear what implant was to be used in the feedlot phase. At page 405 of Exhibit A-1, it is said that "[t]he same implant will be used on all cattle during fattening". According to Dr. Smith's evidence they were all implanted with Synovex + prior to the feedlot phase.[9] The cattle then were shipped to Coe County Feedyards, a custom feedlot in Nebraska, where they were fed for a further 158 days before being slaughtered. They were weighed individually before shipment. On arrival in Nebraska they were not weighed individually, but in bulk by the truckload. Individual weights at the end of the feedlot phase were lost due to a computer error at the packing plant, but the total live weight of the shipments and individual carcass weights were available. From these the individual live weights at the end of the feedlot phase were computed based upon an estimate of shrinkage during transit (4%) and the ratio of total carcass weight to total live weight.

[27] Mr. Bechtel summarized the result of trial #49 as showing that none of the implants produced any significant benefit during the pasture phase, but that there was a significant difference in performance during the feedlot phase, depending on which implant had been used during the pasture phase.[10] That significant difference, he said, was in the quality of the carcass; the more potent the implant used in the pasture phase, the less fat cover and marbling there was on the carcass.[11] Dr. Smith characterized this as scientific advancement resulting from applied research and experimental development.[12] Specifically, the appellant's claim that trial #49 qualifies as SRED is based on the proposition that the purpose of this trial was to develop a successful implant strategy for use with heifer calves.

[28]There was disagreement among the expert witnesses as to the quality of the design and the implementation of this trial. Dr. Smith found no fault with it, and declared the trial to qualify as meeting the definition of SRED. Dr. Koots was critical of trial #49 on a number of grounds related to its design and execution. The three pastures used for the study were of poor and uneven quality; the animals at the start were of very different weights, varying between 509 and 587 lbs.; the animals were

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9 Exhibit A-3, p. 5.

10 Transcript, p. 188, l. 10 to p. 189, l. 7.

11 Transcript, p. 185, l. 10 to p. 186, l. 11.

12 Transcript, p. 188, l.l. 10 to 20.

weighed only twice in the pasture phase, at the beginning and at the end. It is not clear from the evidence whether Mr. Bechtel or Dr. Koots is correct about this. Dr. Lobo voiced most of the same criticisms of trial #49. He added that in his view there were too many variables, and that by including the rumen bolus comparison the appellant departed from sound practice by making the different groups too small and thereby diluting the validity of the results.

[29] In my view, there are two fundamental reasons that trial #49 cannot qualify as scientific research or experimental development. The first is that its purpose and effect was simply to compare the results achieved by using four different implants during the period that the cattle were on pasture. Paragraph (*f*) of the definition specifically excludes:

> … work with respect to
> …
> (f) quality control or routine testing of materials, devices, products or processes,

One purpose of this exclusionary provision clearly is to prevent claims in respect of products that have already been developed, where the work done is simply to put existing products to use rather than to develop a new product or to improve an existing one. The appellant's trial #49 was simply a comparison of the effectiveness of the four commercially available implants used during the pasture phase to see what results they would produce when used in combination with another implant that was also commercially available. All of these implants were purchased by the appellant for use in this test. Mr. Bechtel chooses to describe this as developing a strategy for the use of implants, but his own documents describe trial #49 as "A COMPARISON OF VARIOUS IMPLANTS ON THE PASTURE PERFORMANCE OF GRAZING HEIFER CALVED AND IMPACT ON SUBSEQUENT FEEDLOT PERFORMANCE AND CARCASS CHARACTERISTICS". That, or a minor variation of it, is the title of the various documents in Exhibit A-1 that describe this trial.

[30] The second fundamental problem is the inability of the appellant to point to anything in the evidence that can properly be called a hypothesis to be tested, or a protocol by which to conduct the trial. In *RIS-Christie Ltd.*, Robertson J.A. stated at paragraph 15 that:

> …it is reasonable to expect a taxpayer to adduce documentary evidence of systematic research, including testing. If, however, the taxpayer has a plausible explanation for the failure to adduce such evidence, it is still open to the court to hold that, on a balance of probabilities systematic research was undertaken. For , example, where research notes are accidentally destroyed, it should be permissible

> for the trial judge to infer that systematic research was conducted, having regard to the totality of the evidence.

In Exhibit A-1, there are four documents that at first look might appear to be the protocol for this trial. All of them appear to have been created at some time after the trial was completed. The first, which is between pages 386 and 391, includes the Research Agreement with Brookover Ranch Feedyards. Page 3 of it is titled EXPERIMENTAL DESIGN, and consists of eight lines in total, telling virtually nothing of the methodology. Some of it is written in the future tense, as one would expect of an experimental protocol, but much of it, including two pages devoted to results and discussion, is in the past tense. Pages 402 to 407 are an expanded version, and again some of it is written in the future tense, while much of it is in the past tense and describes results. The other two, at pages 409 to 411 and at pages 412 and 413, appear to be essentially repetitive of the first. Mr. Bechtel stated that the actual protocol for this trial is the three pages 409 to 411[13], and like the others it is written primarily in the past tense. I conclude that these documents were all prepared after the completion of the trial, and that their purpose was not so much to govern the conduct of the trial as to make the case for a deduction from income under section 37 of the *Act*.

[31] Nor do I find in the evidence any clear statement of a hypothesis to be tested by the experiment. The protocol at page 402 does state four objectives at page 404, and at pages 405-6 it states seven technological uncertainties.

> **OBJECTIVE:**
>
> - To determine if an implant program on heifers will improve pasture performance as it does in steers. (New implants are now available)
> - To determine if increasing the strength of the implant will increase performance.
> - To determine if the addition of a Rumensin Bolus will economically improve performance of heifers on pasture.
> - The following feedlot-finishing phase it *[sic]* will determine the effect of each pasture implant on grade, gain, consumption, yield and dressing percentage.

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13 Transcript, vol. 1, p. 102, l. 21 to p. 103, l. 17.

TECHNOLOGICAL UNCERTAINTIES:

- Will the use of hormonal implants increase the weight gain of pasture heifers at the same rate as in steers.

- The advantages of the use of a Rumensin rumen bolus are unavailable in North America.

- Will an implant strategy during the pasture life of heifers affect the rate of gain during the fattening period?

- Will an implant strategy during pasture affect feed consumption during the fattening period?

- Will an implant strategy during the pasture affect the conversion of feed to meat during the fattening period?

- Will an implant strategy during pasture affect the federal grade or yield of the heifers?

The protocol at pages 409 to 411 contains none of this material.

[32] The stated objectives at pages 405-6, rather than formulating a hypothesis to be tested, amount simply to a proposed comparison of the effectiveness of the four implants tested during the pasture phase of the trial, and of the bolus. The appellant's case for trial #49 is based on the proposition that it was applied research designed to develop an "implant strategy". The only references to implant strategy to be found here, however, refer to the pasture phase. There was no variation in the way that the implants were used in the pasture phase; the single difference was the particular product that was applied to each group. Neither in the documents nor in the testimony of Mr. Bechtel do I find that the appellant has formulated a hypothesis to be tested. Nor am I satisfied that before the trial took place the appellant had any plan that could be described as a protocol for systematic investigation to test a hypothesis. It simply used four different commercial products at the pasture stage, and one at the feedlot stage, to compare their effectiveness.

[33] As to the bolus, Mr. Bechtel's evidence was:

> So at that time we decided we could superimpose the rumen bolus on top of the other trial with no effect because it was two entirely different things. So half of each treatment had it and half didn't.[14]

To administer the bolus to half of each group of cattle, therefore, was not an element of formulating an implant strategy; it was a separate test of a different commercial product, superimposed on a trial whose purpose was to compare the effectiveness of other commercially available products. Moreover, Mr. Bechtel stated in one of the documents that he authored:[15]

> This is also the second year of the Rumensin Bolus study. In the previous year we showed no advantage in using the product which was in sharp contrast to the company data so it was decided to repeat the trial to see if results were specific to that year only.

In other words, the bolus aspect of the study was simply testing a commercial product that the appellant had already established the year before did not work. Nothing in the evidence suggests that it was now being used in a different way. That is certainly not systematic investigation; it is simply repetition of routine testing of a commercial product that had previously failed to perform.

Trial #50

[34] The subject matter of trial #50 was a study of the relationship between the occurrence of undifferentiated bovine respiratory disease and titer changes to *Haemophilus somnus* and *Mannhelmia haemolytica*. The results of the study were published in the Canadian Journal of Veterinary Research, under the names of Annette O'Connor, S. Wayne Martin, Éva Nagy, Paula Menzies, all of the University of Guelph, and Richard Harland of Novartis Animal Health Inc. The issue with respect to this trial, as with #48, is not whether it was SRED, as defined in the *Act*, but whether it was the appellant's research or someone else's.

[35] Mr. Bechtel's evidence was that he was concerned about the high mortality rate of cattle shipped from Canada to his feedlot in the United States resulting from respiratory disease, and that he decided that he should study the causes and possible

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14 Transcript, vol. 1, p. 50, l. 1.-15.

15 Exhibit A-1, Vol. 2, p. 392.

prevention of it through immunization. He purchased 300 or more cattle (he was uncertain about the number) with such a study in mind. At about the same time, a postgraduate student at the University of Guelph, Annette O'Connor, required a topic for her doctoral thesis. She had been required to find a new topic and her faculty advisor, Dr. Wayne Martin, had funding available for a study of corona virus, but this was not a sufficiently extensive study for a doctoral thesis. As Dr. Bateman put it in his evidence, he was able to connect Dr. Martin and Annette O'Connor with Mr. Bechtel for the project.

[36] Mr. Bechtel described the work that he did on the project. When the cattle arrived at the appellant's premises he recorded their weights and temperatures, took blood samples, and checked them for respiratory disease. Annette O'Connor was there and labeled the blood samples, which she then took to the University of Guelph where the blood analysis was done. Two vaccines were tested, each individually and the two in combination. A control group had no vaccination. Throughout the 45-day trial period blood samples and temperatures were taken, the cattle were observed twice per day for signs of respiratory disease, and their feed consumption and mortality was recorded. When symptoms of respiratory disease were observed the animals were treated for it.

[37]Mr. Bechtel testified that he and Annette O'Connor jointly prepared a protocol for this study, which she took to her faculty advisor. The protocol was modified by him, or on his advice, to conform to the University's requirements, after which it could only have been changed with Dr. Martin's approval. The protocol under which the study then proceeded is the one appearing at pages 572 to 576 of Exhibit A-1, Vol. 3. It names Dr. Wayne Martin as principal researcher; the only other researcher named is Dr. Ken Bateman. The results of this study and the corona virus study that together made up Annette O'Connor's doctoral thesis were both published in the same issue of the Canadian Journal of Veterinary Research. The only reference to the Appellant is in the acknowledgments at the end of the paper:

> The help of … the staff at Advanced Agricultural Testing … is gratefully acknowledged.[16]

Mr. Bechtel's explanation of the failure to name him as an author of the paper was this:

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16 Exhibit A-1, Vol. 3, p. 708.

> Q. Was this their study or your study?
>
> A. I initiated the study and if they wanted to publish it, it didn't make any difference to me.

[38] It is correct that Mr. Bechtel initiated the study, in the sense that he first had the idea to do a study of that subject matter, and he took the initiative to acquire cattle for the purpose of doing the study. That, however, does not mean that he or his company can be said to have engaged in systematic investigation or search that meets the definition of SRED in the *Act*. As with the other trials, there are a number of draft protocols in Exhibit A-1 that appear to have been prepared by Mr. Bechtel at unspecified times, but he clearly identified the protocol that names Dr. Martin as principal researcher as being the one under which the study proceeded. Page 697 of Exhibit A-1, Vol. 3 is a letter from Dr. Annette O'Connor and Dr. S. Wayne Martin to the appellant. It begins:

> Dear Bob,
>
> Thank you for all your help with our research project over the past few months. Your assistance has been invaluable.

There is nothing in the evidence to suggest that Mr. Bechtel replied to this letter to assert that it was his research, not theirs, as one would expect if that were the case.

[39] On July 10, 2000, Dr. O'Connor sent a fax to Mileada Abdelmalik of the Canada Revenue Agency in which she described the appellant's part in trial #50 this way:[17]

> The technical support provided by the staff of Advanced Agricultural Testing included provision of cattle for the study, handling cattle for purposes of data collection and identification, the recording of diagnoses according to our profiles, as well as handling and treatment of sick cattle. The staff also maintained records about the individual cattle during the study period.

During cross-examination Mr. Bechtel acknowledged the accuracy of this statement. Mr. Bechtel's understanding of the meaning of the expression "scientific research" is somewhat different from the meaning assigned to it by section 248 of the *Act*. On re-examination by his counsel the following exchange took place:[18]

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17 *Ibid*., p. 603.

18 Transcript, vol. 1, p. 22, l. 24 to p. 25, l. 5.

> Q. Is it accurate for us to assume that all research trials that you're involved in, that is advanced is involved in, involve some great measure of data collection?
>
> A. Of course, that's what research is collection of figures and miles of them.

[40] I have no doubt that Mr. Bechtel had the idea to examine the subject of respiratory disease in cattle and the effectiveness of vaccines to prevent it. However, the evidence overwhelmingly demonstrates that it was Dr. Martin and Annette O'Connor and their colleagues at the University of Guelph who did the research, if research it was. It may be that they were simply doing routine testing of vaccines. That is not something that I have to decide. But if it was research it was their research, not the appellant's. The appellant's role, as in trial #48, was limited to data collection, and that is specifically excluded from the definition in section 248.

Revocation of the election

[41]Section 37 of the *Act* permits a taxpayer, when filing a claim for SRED expenses, to elect to compute the claim by what is referred to in the evidence as the proxy method rather than the traditional method. The traditional method requires the taxpayer to attribute an appropriate portion of its actual overhead expenses to the SRED claim. Under the proxy method, it may claim a percentage of the direct wage expense incurred in the research in lieu of overhead. The appellant's accountant, Allan McDougall, testified that he prepared and filed the appellant's income tax returns, and that in doing so he had elected the proxy method in the taxation years 1993, 1994, 1995, 1996, 1997 and 1998. There was a dispute between the appellant and Revenue Canada as to the application of the proxy method for the years 1993 and 1994 which required some years to resolve. Thereafter, the appellant sought to revoke its election of the proxy method for the years 1995, 1996, 1997 and 1998. The Minister's position is that the appellant, having duly elected to use the proxy method, cannot later revoke the election.

[42] Counsel for the appellant, in his written argument, relies on the fact that in resolving the dispute concerning the taxation years 1993 and 1994, the Minister permitted the appellant to use the traditional method, notwithstanding the earlier election, and he takes the position that it is unfair for the Minister now to refuse to permit it to revoke the election for the years after 1994. Counsel for the respondent relies on subsections 37(10) and 220(3.2) of the *Act* and *Regulation* 600.

37(10) Any election made under clause (8)(a)(ii)(B) for a taxation year by a taxpayer shall be filed by the taxpayer on the day on which the taxpayer first files a prescribed form referred to in subsection 37(11) for the year.

220(3.2) The Minister may extend the time for making an election or grant permission to amend or revoke an election if

(*a*) the election was otherwise required to be made by a taxpayer or by a partnership, under a prescribed provision, on or before a day in a taxation year of the taxpayer (or in the case of a partnership, a fiscal period of the partnership); and

(*b*) the taxpayer or the partnership applies, on or before the day that is ten calendar years after the end of the taxation year or the fiscal period, to the Minister for that extension or permission.

600 For the purposes of paragraphs 220(3.2)(*a*) and (*b*) of the *Act*, the following are prescribed provisions:

(*a*) section 21 of the *Act*;

(*b*) subsections 7(10), 12.2(4), 13(4), (7.4) and (29), 14(6), 44(1) and (6), 45(2) and (3), 50(1), 53(2.1), 70(6.2), (9), (9.1), (9.2) and (9.3), 72(2), 73(1), 80.1(1), 82(3), 83(2), 104(5.3) and (14), 107(2.001), 143(2), 146.01(7), 164(6) and (6.1), 184(3) and 256(9) of the *Act*;

(*c*) paragraphs 12(2.2)(*b*), 66.7(7)(*c*), (*d*) and (*e*) and (8)(*c*), (*d*) and (*e*), 80.01(4)(*c*), 86.1(2)(*f*) and 128.1(4)(*d*), (6)(*a*) and (*c*), (7)(*d*) and (*g*) and (8)(*c*) of the *Act*;

(*d*) subsections 1103(1), (2) and (2d) and 5907(2.1) of these *Regulations*.

She argues that subsection 220(3.2) and *Regulation* 600 specifically provide authority for the Minister to permit revocation of certain elections made under the *Act*, and since they do not include an election made under subsection 37(10), the Minister has no such power. An election that is made under a provision not mentioned cannot be revoked or amended at all.

[43] The Minister's power to permit revocation of an election made under the *Act* is limited to those election provisions that have been named in *Regulation* 600, and they do not include subsection 37(10). The maxim *espressio unius est exclusio alterius*

applies. Parliament's intention is very clearly to limit the Minister's discretion to permit revocation of elections to those that the Governor-in-Council chooses to prescribe for that purpose. In *Miller v. The Queen*,[19] the Federal Court of Appeal reached that conclusion in respect of an amendment to an election under the forward-averaging provision in section 110.4 of the *Act.* Mahoney J.A. said at page 5037:

> To allow amendment of the election, either by the Minister as part of the assessment process or the taxpayer after assessment, would, in my opinion, require an inadmissible reading into the *Act* of words that were not there.

Mr. Thrasher points out that in dealing with the objections filed following the assessment of the appellant for the 1993 and 1994 taxation years, the Minister did allow the appellant to revoke the election of the proxy method. That may be so, but it does not affect the years now under appeal. It is well-settled that the Minister, if he makes an error in the course of assessing, is not bound, or even entitled, to continue making the same mistake in perpetuity: see *Ludmer v. Canada.*[20]

[44] In his written argument, counsel for the appellant argues that this court should exercise its discretion to declare that the appellant should be permitted to use the traditional method of reporting for 1995 to 1998. This submission presupposes that the court has some equitable jurisdiction, perhaps akin to relief from forfeiture, that would permit it to relieve the appellant of what it now sees as an improvident exercise years ago of its right to choose between the two reporting methods that the *Act* permits. Unfortunately, I have no such jurisdiction. It is trite that this court must apply the provisions of the *Act* and the *Regulations* as they were written. It has no power to change them, or to declare them inapplicable in the circumstances of particular cases, on grounds of fairness or equity.

Bedding and diesel fuel

[45] The Minister takes the position that bedding for the cattle and diesel fuel are overhead items, and so not accountable separately under the proxy reporting method. The appellant's position is that they are both direct costs. There was no specific evidence as to the conduct of trials other than #48, #49 and #50, all of which I have found not to qualify as SRED. The scant evidence that there was about bedding for

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19 93 DTC 5035.

20 [1995] 2 F.C. 3.

the cattle leads me to conclude that it should be treated as a direct cost. As I understand it, all the bedding used would be attributable to a specific trial, and after use it would be of no value. For these reasons, I would classify it as a direct cost of goods consumed, and not as an overhead cost to be apportioned among numerous trials, or encompassed by the overhead amount under the proxy method.

[46] There was no evidence at all from which I can make a determination as to the appropriate way to account for the cost of diesel fuel. If, for example, the same vehicle was used in the yard to perform functions in connection with maintenance and several trials that were being conducted concurrently, then the cost of operating that vehicle, including the fuel used in it, would properly be considered overhead. On the other hand, diesel fuel used in shipping cattle that were the subject of one of the trials to a pasture or to a feedlot would more properly be considered a direct cost of that trial. As I have no evidence concerning the actual use of the fuel in question, I am unable to make any determination of the proper treatment of it.

[47] While there was reference in the pleadings and in the written arguments of counsel to purchase of cattle for SRED in all the taxation years under appeal, the only evidence of cattle purchases are those related to the three trials #48, #49 and #50, that I have found not to be SRED carried out by the appellant. I therefore have no basis upon which to decide what amount, if any, the appellant is entitled to deduct in respect of purchases of cattle for other SRED trials in any of the taxation years under appeal.

[48] There was a potential issue as to whether fees paid to Dr. Eng, a feedyard consultant resident in the United States, would qualify under paragraphs 37(1)(*a*) and 127(9)(*g*) of the *Act* as SRED expenses. Mr. Bechtel said in his evidence that Dr. Eng supplied "… all the nutritional and implant and any other additives that we need",[21] and that he was paid "… so much a month …".[22] It is not possible on the basis of these fragments of evidence to decide that question. Nor is it necessary to do so, as it appears from the appellant's reply to the respondent's written argument that the issue only arises in connection with trials #48, #49 and #50, which I have found do not qualify as SRED.

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21 Transcript, Vol. 1, p. 14, l.l. 9-15.

22 Transcript, Vol. 1, p. 21, l.l. 6-12.

[49] In the result, the appeals fail in respect of all issues except that relating to the cost of bedding for cattle. It is impossible to tell from either the pleadings or the evidence the extent to which this entitles the appellant to some relief from the assessments under appeal. Counsel for the respondent may prepare a judgment giving effect to these reasons, to be approved as to form by counsel for the appellant. If the parties are unable to agree as to costs they may make submissions in writing, not to exceed five pages.

Signed at Ottawa, Canada, this 7th day of April, 2009.

"E.A. Bowie"

Bowie J.

CITATION:	2009 TCC 190
COURT FILE NO.:	2004-2360(IT)G
STYLE OF CAUSE:	ADVANCED AGRICULTURAL TESTING INC. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kitchener, Ontario
DATE OF HEARING:	April 10, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice E.A. Bowie
DATE OF REASONS FOR JUDGMENT:	April 7, 2009

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