

Docket: 2004-206(IT)I
2004-2803(IT)I

BETWEEN:

JEAN-FRANÇOIS BLAIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard in joint evidence with the appeals of *Christiane Auray-Blais* (2004-208(IT)I and 2004-2804(IT)I) and *Innovations et intégrations brassicoles inc.* (2004-42(IT)I and 2004-2805(IT)I) from February 28 to March 3, 2005, at Sherbrooke, Quebec, and on May 11, 2005, at Montréal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant: The Appellant himself and
Christiane Auray-Blais
(representative)

Counsel for the Respondent: Philippe Dupuis

JUDGMENT

The appeals of the assessments issued pursuant to the *Income Tax Act* for the 1996, 1997, 1998, 1999, 2000 and 2001 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for review and reassessment based on the attached reasons for judgment.

A single group of costs is awarded to the Appellants for costs incurred in respect of their expert witness.

Signed at Ottawa, Canada, this 25th day of October, 2005.

"Paul Bédard"

Bédard, J.T.C.C.

Citation: 2005TCC417
Date: 20051025
Dockets: 2004-206(IT)I
2004-2803(IT)I

BETWEEN:

JEAN-FRANÇOIS BLAIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND

Dockets: 2004-208(IT)I
2004-2804(IT)I

CHRISTIANE AURAY-BLAIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND

Dockets: 2004-42(IT)I
2004-2805(IT)I

INNOVATIONS ET INTÉGRATIONS BRASSICOLES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bédard, J.T.C.C.

[1] The appeals of Jean-François Blais, Christiane Auray-Blais and Innovations et intégrations brassicoles inc. (IIB inc.) in dockets 2004-206(IT)I, 2004-2803(IT)I, 2004-208(IT)I, 2004-2804(IT)I, 2004-42(IT)I and 2004-2805(IT)I were heard in joint evidence, with the parties' consent, from February 28 to March 3, 2005 at Sherbrooke, Quebec, and on May 11, 2005, at Montréal, Quebec. The Appellants Jean-François Blais and Christiane Auray-Blais acted on their own behalf and as majority shareholders of IIB inc. (the two other shareholders being the Appellants' children).

[2] In brief, the matter before this Court involves the activities of two companies, one a corporation, IIB inc., which, according to the Appellants, conducts research on beer, and a general partnership, La Société Christiane Auray-Blais et Jean-François Blais (the General Partnership) which, again according to the Appellants, conducts research on seedlings.

[3] Specifically, through their General Partnership, the Appellants seek to develop a formula for a nutraceutical beer by adding rutin to [TRANSLATION] "lower blood pressure by fortifying capillary and blood vessel tissue, preventing hemorrhaging... also a major role as antioxidant;"¹ in other words, health beer. The Appellants compare this future product to the addition of vitamin D to milk, one of the great achievements of the century given that few people consume enough of this vitamin. In parallel with this main objective of the General Partnership, the Appellants are also striving, with IIB inc., to develop a method to enable hops, one of the ingredients of beer, to grow in Quebec's soil without pesticides and to eliminate the need for labour to secure these plants to stakes.²

[4] The debate in all these cases comes down to five questions in dispute (in the order in which they were submitted to the Court).

- a) What is the leasing cost of property for purposes of calculating the investment tax credit?

¹ Exhibit A-8 at p. 3, T661 of the General Partnership for 2001.

² See Exhibits A-6 and A-9 for the detailed description of the projects conducted by IIB inc.

- b) Can a partner in a General Partnership also be an employee of that same General Partnership for purposes of the *Income Tax Act* (the *Act*)?
- c) Did the Appellants fail to declare agricultural losses under the terms of section 31 of the *Act*?
- d) Do the Appellants' activities constitute experimental research and development activities under the terms of the *Act*?
- e) Other points raised on May 11, 2005.

[5] It should be noted that the parties reached agreement a few days before the start of the hearings on admission of interest charges of \$3,107, \$3,605 and \$3,665 as expenses for scientific research and experimental development (SR&ED) under subparagraph 37(1)(a)(i) of the *Act*, instead of agricultural expenses, for the 1998, 1999 and 2000 tax years. Application of subsections 127(8) and (9) of the *Act*, as well as division 2902(a)(i)(C) of the *Income Tax Regulations*, would follow, according to counsel for the Respondent, who drafted the agreement in a letter to the Appellants dated February 24, 2005. Since the parties raised no objection to this agreement at the hearing, I therefore take for granted that neither the facts underlying this agreement nor the law are in dispute.

[6] Now, before addressing each of the questions in dispute in the order in which they were raised at the hearing, it must be noted that although I reversed the order in which evidence was produced at the hearing by asking counsel for the Respondent if he could start, this does not mean that the burden of proof has shifted to the Respondent. I simply allowed this procedure to give the Appellants, who were acting on their own behalf under the informal procedure, a better opportunity to respond to the Respondent's allegations. However, it is still incumbent on the Appellants to defeat the Minister's factual allegations to win their case.

- a) **What is the leasing cost of property for purposes of calculating the investment tax credit?**

[7] The Appellants submit that this question covers two series of leases.

[8] Under the first series, IIB inc. leases the laboratory equipment listed in Exhibit I-2, tab 6, to the General Partnership under leasing contracts.³ This equipment apparently comes from various organizations. In his testimony, Mr. Blais admitted that all this equipment was off the balance sheet⁴ and that the amount of \$404.88 appearing as the only capital expenditures on the property was actually related to the cost of incorporating the company, not to the laboratory equipment as the Minister presumed.

[9] Under the second series, the General Partnership in turn leased to IIB inc. most of the agricultural equipment listed in Exhibit I-4, tab 53 (as well as other equipment, according to the Appellants) under another lease.⁵ This equipment was previously used by the Appellants in beekeeping activities, also known as apiculture, but due to the diseases affecting their bees, the Appellants refocused their efforts on brewing activities (and specifically for purposes of this equipment, the study of barley, hops and rutin). According to the Appellants, most of this agricultural equipment was acquired in 1981; however, no document can confirm the purchase dates much less the cost of each of the properties in question.

[10] The Minister maintains that the Appellants should have been denied the investment tax credits (ITC) set out in section 127 of the *Act* because the purchase cost and date for each of these leased properties were unavailable, except for a tractor purchased in 1996 for \$36,000. This tractor was accepted in an earlier decision of this Court involving the same Appellants.⁶ In allowing fiscal depreciation of this same tractor, the Minister allowed the Appellants to deduct an eligible expenditure of \$3,068 as an ITC for the 2000 tax year, in docket 2004-42(IT)I.

[11] In particular, the Respondent submits, since item A in the formula appearing in the definition of "the cost to the supplier of rendering the particular service" in subsection 127(11.7) of the *Act* is no more than \$3,068, the amount of the eligible expenditure is also \$3,068.

[12] In reaching this conclusion, the Minister first cited subsection 127(5) of the *Act* which makes provision for the investment tax credit. This subsection then refers to the definition of "investment tax credit" in subsection 127(9), which in turn refers

³ The contract signed on June 30, 1998 was entered as Exhibit I-3, tab 21, while that signed on January 1, 2000 is found in Exhibit I-3, tab 22.

⁴ The IIB inc. balance sheet at December 30, 1998 is Exhibit I-4, tab 44.

⁵ This second leasing contract was entered as Exhibit I-4, tab 52.

⁶ Testimony of Éric Beauséjour, Revenue Canada appeals officer at the time, stenographer's notes (the Notes) dated February 28, 2005 at pp. 133 and 136. The decision in question is *Auray-Blais v. The Queen*, [2002] T.C.J. No. 7 (QL)(T.C.C.).

in its paragraph (a.1) to "eligible expenditures." These expenditures are subject to the assumptions in subsection 127(5.1), including paragraph (a), which refers to subsection 127(11.6) and the concept of "adjusted service cost." The expression "adjusted service cost" in turn is defined in subsection 127(11.7), especially in its item A which represents "the cost to the supplier of rendering the particular service." This item A applies in this case since we are dealing with the leasing of property and since, according to paragraph 127(11.8)(c), the "leasing of a property is considered to be the rendering of service." Subsection 127(8) was also cited by the Minister for the calculation of the General Partnership's investment tax credit. Unfortunately for the concept of simplicity of statutes as fiscal policy, this type of cascade of legislative provisions is common in tax law. There are even worse examples.⁷ At least for purposes of these appeals, we need suffer no further intellectual dizziness since the parties are not challenging the application of all these provisions.

[13] Two of the arguments raised by the Appellants merit special attention.

[14] The first holds that the property had a cost after it was purchased by the two companies, contrary to what the Minister claims.

[15] In respect of the laboratory equipment, the Appellants first testified that they had received it in the form of a donation from a few organizations. They then added that they and their children had provided certain services in exchange for this equipment. The Appellants produced in Court three letters signed by three different persons representing three organizations, stating that the laboratory equipment (without specifying what this included) was in fact "donated" (this word is used in each of the letters with no mention of services by the Appellants or their children).⁸

⁷ Here is how Judge Sedley summarized a tax statute in *Royal and Sun Alliance Insurance Group plc v. Commissioners of Customs & Excise*, [2001] STC 1476:

Beyond the everyday world, both counsel have explained to us, lies the world of value added tax (VAT), a kind of fiscal theme park in which factual and legal realities are suspended or inverted.

This passage was selected as "Quote of the Week" by David M. Sherman in *GST Times*, Carswell, January 18, 2002.

⁸ The three letters were entered as Exhibit A-1. Although the authors of these letters were not present in Court to testify, counsel for the Respondent did not object to deposition of the letters as evidence and did not challenge the veracity of their respective content. I note in passing that it is clear the authors of these letters all used the same form letter. For example, the first reads, [TRANSLATION] "We believe it important to promote scientific research by Estrie researchers and this donation is a wonderful example;" the second, "We believe it important to promote scientific research by researchers from the region and these donations are good proof of that;" and the third, "We are pleased to assist, through this donation, the scientific research conducted by researchers in the region." It remains, especially since the *Selmeci v. Canada*, [2002] A.C.T. no 1086 (QL)(F.C.A.), that the exceptions in the hearsay have even more meaning in the context of the formal procedure.

Yet at the hearing, Mr. Blais testified that he and the other members of his family had conducted research using radiation spectroscopy, performed equipment maintenance and allegedly dismantled and transported laboratory equipment. In all, the Appellants claim that they received equipment with a value of \$100,000 (but, according to the appraisal of this property performed by Labequip Ltd for the Canada Revenue Agency (CRA), dated August 19, 2003, the value of the equipment is \$85,764).⁹

[16] On the matter of the agricultural equipment, the Appellants believed that the cost was consistent with the fair market value (FMV) in 1997, when the General Partnership changed activities. The FMV of the agricultural equipment at the time, according to the Appellants, was slightly more than \$122,000. In tax law, however, the concept of FMV is not the same as that of cost.¹⁰

[17] The second argument was submitted in writing and orally. At the third unnumbered page of the document produced at the hearing on arguments, the Appellants raised the following.

[TRANSLATION] The interpretation of the CRA agents applying subsection 127(11.7) of the *Act* essentially is that the value of the adjusted service cost is almost identical to the adjusted selling cost. They also used an accounting form of the base service cost without considering the intrinsic and extrinsic cost (maintenance cost, replacement cost, economic obsolescence cost, etc.). The attitude of CRA staff is to grant the fewest economic benefits and interpret the ITA as restrictively as possible.

[18] Despite the Appellants' insistence, I concur with the Respondent on the cost. First, in respect of the laboratory equipment:

- a) little property is identified in the three letters entered into evidence;
- b) according to these same letters, these were always donations, not an exchange of anything;

⁹ The Labequip Ltd. assessment was entered as Exhibit A-3.

¹⁰ For example, in the context of capital gains, and especially section 54 of the Act, the Federal Court of Appeal, in *Queen v. Stirling*, 85 DTC 5199, defines "cost" as "the price that the taxpayer gave up in order to get the asset; it does not include any expense that he may have incurred in order to put himself in a position to pay that price or to keep the property afterwards." To this cost may be added certain amounts listed in subsection 53(1) of the Act, but only to calculate the adjusted base price. The "cost" is also defined as follows in the context of paragraph 20(1)(a), the deduction of the capital cost, by Vern Krishna in *The Fundamentals of Canadian Income Tax*, 8th Ed., Toronto, Ontario, Carswell, 2004, at p. 367: "'Cost' refers to the actual cost of the property to the taxpayer, whether paid in money or some other property." In this context, there are cost adjustments in subsections 13(7) ff. However, these adjustments do not apply in this case.

- c) in his testimony, Mr. Blais was unable to provide sufficient details about the said services, including the number of hours and the value of these services. It is also hard to conceive that, under the circumstances, the Appellants and their children actually provided services with a value of \$100,000. Had this been the case, Mr. Blais surely would have provided more information in his testimony;
- d) even if the maintenance, replacement and obsolescence costs could be factored into the total cost of the property in this case, the Appellants produced no evidence on this aspect; and
- e) since the Respondent accepted part of the credit based on a cost of \$405, I cannot rule that the cost was nil because the Minister could then appeal its own assessment. (*Petro-Canada v. Canada*¹¹)

[19] In respect of the "agricultural" equipment, the Appellants simply failed to establish evidence of the cost, except for the tractor, the cost of which has already been allowed by the Respondent.

b) Can a partner in a General Partnership also be an employee of that same General Partnership for purposes of the Act?

[20] The Appellants are seeking a deduction for the General Partnership of salary or wages of \$27,060 paid to Mr. Blais despite the fact he is also a partner in this same General Partnership.¹² In other words, they maintain that a partner in a General Partnership can also be an employee of this same company.¹³

¹¹ 2004 FCA 158, at paragraphs 65-69.

¹² In their [TRANSLATION] "Partnership Summary for 1998" for the General Partnership, the expense of \$27,060 is entitled [TRANSLATION] "Salary of a research partner." The reply to the notice of appeal in docket 2004-206(IT)I adds nothing to the facts and simply rejects the expense. See paragraphs 13(mm) to (oo) as well as 19.

¹³ It must be noted that the Appellants have not raised the possibility that Mr. Blais had received this salary for his "office" or as a self-employed worker independent from the General Partnership. I therefore will not rule on this point. At first glance, I still have doubts about the fact that Mr. Blais held an "office" under the terms of subsection 248(1) the Act and the case law on this point. The possibility that Mr. Blais was a self-employed worker independent from the General Partnership is very slim, given the reasons that Justice Dussault recently stated in *Lévesque v. Canada (M.N.R.)*, 2005 TCC 248. In that decision, the parties' intent and the relationship of subordination (control) are very important factors in addressing this question in Quebec. In this case, the Appellants said that in their mind, Mr. Blais was an employee. It would also be difficult for the Appellants to claim lack of control (if one of them must control him or herself, should we accept this line of thinking).

[21] In support of their position, the Appellants raised several arguments, including these five: (1) the reasons given by this Court in *Crestglen Inv. Ltd. v. Canada*¹⁴; (2) the reasons given by this Court in *Archbold v. Canada*¹⁵; (3) the former interpretation bulletin IT-138R which appeared to allow deduction of salary expenses for a partner; (4) an excerpt from the book by Lord *et al.*, *Les principes de l'imposition au Canada*¹⁶ (in which the authors imply that the matter appears to be unresolved, despite the fact that bulletin IT-138R has been rescinded by the CRA); and (5) the reasons in *Drolet v. Charron*,¹⁷ a decision by the Superior Court of Quebec permitting the employee/partner duality.

[22] In turn, counsel for the Respondent instead cited the mechanism of section 96 of the *Act* and the fictions this provision creates. He submits that the amount paid is instead a capital attribution set out in subparagraph 53(2)(c)(v) of the *Act*. In support of this position, counsel for the Respondent cites *Lachance*,¹⁸ *Metro-Can Construction Ltd.*,¹⁹ and *Madsen*.²⁰ And even if bulletin IT-138R were still in force (bulletin rescinded on December 31, 2000),²¹ it is obvious that such an administrative policy cannot set aside application of a clear provision of the *Act*.

[23] Based on my reading of the law on this question, I unfortunately cannot find for the Appellants, for the following reasons.

[24] Although the Appellants agreed that Mr. Blais would receive a "salary," it remains that such [TRANSLATION] "agreements made between two partners, even if binding on the partners, does not necessarily bind the Minister of National Revenue if the said agreements run counter to the *Act*."²²

[25] In the *Archbold* decision [*supra*], Justice Lamarre Proulx did in fact refer to an act, the Ontario *Partnerships Act*, to conclude that a partner may also be an employee of his General Partnership given that nothing in that Act prohibits this. I cannot concur with this conclusion. First, as Justice Noël repeated in *Canada (Attorney*

¹⁴ [1993] T.C.J. No. 121 (T.C.C.)(QL).

¹⁵ [1995] T.C.J. No. 111 (T.C.C.)(QL).

¹⁶ 13th Ed., Montréal, Quebec, Wilson & Lafleur ltée, 2002, at pp. 382-384.

¹⁷ [2003] J.Q. No. 13510 (S.C.Q.). However, as will be noted later, this decision has just been overturned by the Court of Appeal of Quebec: 2005 QCCA 430.

¹⁸ [1994] A.C.T. No. 263 (F.C.A.)(QL).

¹⁹ [1998] T.C.J. No. 888 (T.C.C.)(QL), sustained by [2000] A.C.T. No. 994 (F.C.A.)(QL), leave to appeal to the S.C.C. denied, [2000] S.C.C.A. No. 445 (QL).

²⁰ [2000] A.C.T. No. 2139 (F.C.A.)(QL), leave to appeal to the S.C.C. denied, [2001] S.C.C.A. No. 96 (QL).

²¹ This date is found in the "Index to Interpretation Bulletins and Technical News" dated December 31, 2000.

²² *Lamarre v. M.N.R.*, 90 DTC 1180, at p. 1183.

General) v. National Bank of Canada,²³ provincial law can only be cited when federal law on the matter is silent. Here is how he summarized the rule after citing sections 8.1 and 8.2 of the *Interpretation Act*.

[33] Thus, if, in interpreting the application of a federal enactment in a province, one is to refer to the province's law of property and civil rights as suppletive law, reference to that law must be necessary and there must be no provision to the contrary in federal law.²⁴

[26] In this case, I conclude there is no need to refer to Quebec law to answer this question in dispute, since the *Act* provides the answer. In any event, even if this were not the case, I believe that the provincial law concurs.

[27] In the case before us, the *Act* sets out several rules for general partnerships in section 96. In that provision, the legislator codified the principle by which a General Partnership is not a separate person from its partners (paragraphs 96(1)(a) and (c)).²⁵ This principle is by no means new and has existed in common law for a very long time.²⁶ It is now accepted in Quebec following the decision by the Court of Appeal of Quebec in (*Québec*) *Ville v. Cie d'immeubles Allard Ltée*.²⁷ In fact, several judges and authors now appear to accept the absence of legal personality in general

²³ 2004 FCA 92 at paragraphs 32 and 33.

²⁴ R.S.C. (1985), c I-21; 2001, c 4, section 8.

²⁵ *Lachance* [supra], at paragraph 5; *Metro-Can Construction Ltd.* [supra], at paragraphs 4-6; *Madsen* [supra], at paragraphs 16-17; *Fredette v. Canada*, [2001] A.C.T. No. 170, at paragraph 50, note 16 (T.C.C.)(QL); and Norman C. Tobias, *Taxation of Corporations, Partnerships and Trusts*, 2nd Ed., Toronto, Ontario, Carswell, 2001 at pp. 28-39. It should be noted that the use of multiple sources is more for the benefit of the Appellants, who are acting on their own behalf and who personally referred to several other useful and interesting sources.

²⁶ *The Queen v. Pinot Holdings Limited*, 99 DTC 5772, at p. 5778 (F.C.A.); *Lachance* [supra], at paragraph 5; *Metro-Can Construction Ltd.* [supra], at paragraphs 4-6; and *Molson Brewery B.C. Ltd. v. Canada*, [2001] F.C.J. No. 87 at paragraph 9 (F.C.)(QL).

²⁷ [1996] R.J.Q. 1566 (C.A.Q.).

partnerships in Quebec,²⁸ with only a few exceptions,²⁹ including Justice Lamarre Proulx in a subsequent decision, *Latourelle v. Canada (M.N.R.)*.³⁰

[28] Here is how she bypassed the decision of the Court of Appeal of Quebec:

¶ 31 In support of the statements in subparagraph 4(f) of Reply No. 1, and subparagraph 6(g) of Reply No. 2 [...] referred to the judgment of the Quebec Court of Appeal in *Ville de Québec v. La Cie d'immeubles Allard Ltée et le Régistrateur de la division d'enregistrement de Québec* [1996], R.J.Q. 1566, which held that although a partnership might appear to possess certain attributes of legal personality it does not have such personality and so cannot enjoy ownership of a separate patrimony. Relying on this judgment, the appellant's agent maintained that a partnership is not a person and so has no power to contract.

¶ 32 As the judgment does not say that a partnership has no power to contract in Quebec law, I shall not rely on that aspect in making my decision, especially as it seems to me that this statement runs directly counter to the actual wording of art. 2221 of the *Civil Code of Quebec*, which reads as follows:

In respect of third persons, the partners are jointly liable for the obligations contracted by the partnership but they are solidarily liable if the obligations have been contracted for the service or operation of an enterprise of the partnership.

Before instituting proceedings for payment against a partner, the creditors shall first discuss the property of the partnership; if proceedings are instituted, the property of a partner is not applied to the payment of creditors of the partnership until after his own creditors are paid.

¶ 33 The respondent's agent also referred to two decisions of this Court, of which one, *Alain Carpentier c. M.R.N.*, dated May 14, 1996, takes the approach that there cannot be a contract of employment between a partnership and a

²⁸ *Holding action sociale Engelmaier Inc. v. Coopérants, société mutuelle d'assurance-vie (liquidateur de)*, [2002] J.Q. No. 194 at paragraphs 35-37 (C.A.Q.)(QL); *R. v. Paul*, [1997] A.Q. No. 1643 at paragraphs 5-11 (S.C.Q.)(QL); *Marion v. Canada (M.N.R.)*, 2003 TCC 456 at paragraphs 20-24 (T.C.C.); *Fredette v. Canada [supra]*, at paragraph 50, note 16; *Parent v. Canada*, [1999] A.C.T. No. 83 (T.C.C.)(QL); *Molson Brewery B.C. Ltd. v. Canada [supra]*, at paragraph 10; René Roy, "Les sociétés de personnes: Enjeux civils et répercussions fiscales," in *Congrès 2004*, Association de planification fiscale et financière, 23:1-34; École du Barreau, *Droit des affaires, faillite et insolvabilité*, Collection de droit, 2003-2004, Volume 9, Cowansville, Quebec, Éditions Yvon Blais, at pp. 50-52; Générosa Bras Miranda, "La propriété collective. Est-ce grave docteur? – Réflexion à partir d'une relecture de l'arrêt Allard," *Revue du Barreau*, 2003, EYB2003RDB67; Charles P. Marquette, "Les sociétés de personnes, aspects civils" (1998), Vol. 20, No. 2, *Revue de planification fiscale et successorale* 247-303; and Nicole Prieur, "Règles fiscales affectant les sociétés de personnes" (1998), Vol. 20, No. 2, *Revue de planification fiscale et successorale*, 305-409 at pp. 314, 329 and 330.

²⁹ See *Société en nom collectif Vausko v. Ameublement et décoration Côté-Sud (St-Denis) inc.*, [1999] R.J.Q. No. 3037 (S.C.Q.).

³⁰ [1998] A.C.T. No. 5 (T.C.C.)(QL).

member of that partnership, and the other, *Louise Brady-Charette c. M.R.N.*, dated December 6, 1990, takes the opposite view.

¶ 34 **As to the impossibility of a contract of employment between a partner and a partnership of which he is a member, the respondent's agent did not refer the Court to any Quebec precedent or commentary in support of his argument.** I shall therefore also not base my decision on this legal argument.

[emphasis added]

[29] First, a partner is not a third party in the eyes of the General Partnership. Second, there is now a Quebec precedent supporting the Minister's position. The Quebec judgment cited by the Appellants has in fact been overturned very recently (April 28, 2005) by the Court of Appeal of Quebec in *Charron v. Drolet*³¹ for the following reasons, at paragraphs 14-21.

[TRANSLATION] [14] The Appellants claim that the Superior Court judge erred in fact and law in finding that the Respondent was both a partner and a salaried employee and granting him a period of leave. They maintain that a single given person cannot have the status of both partner and employee. Furthermore, there has never been a bond of subordination between the Respondent and the Appellants;

[15] The Respondent instead argues that the statuses of partner and employee can be held simultaneously. She maintains that she became an employee in 1999 when Charron made several unilateral decisions, including that to pay, in the form of salary with source deductions, for the withdrawals made by both partners;

[16] In support of her claims, she cites the following excerpt from authors Aust and Charrette:

Quite often, a relationship is determined by a variety of legal relationships. A single given employee may be both shareholder, employee, manager and director, each of these positions involving various legal obligations that must be met simultaneously.

(emphasis added)

as well as this passage from Robert P. Gagnon's book:

[TRANSLATION] Finally, it will be noted incidentally that the status of employee can coexist, in the same person, with others, such as shareholder or director of the company, or even that of independent contractor.

(emphasis added)

³¹ 2005 QCCA 430.

[17] However, these two excerpts deal only with the possible confusion between the status of employee and that of shareholder, not that of employee and partner. Admittedly, confusion prevailed during the hearing. In her statement of August 9, 2000, the Respondent claimed to own 40 percent of the shares of the Appellant Conseillers Corporatifs Focus inc. Only after several days of hearings and discussion was this statement amended, on February 28, 2002, to make a distinction between the joint-stock company and the undeclared partnership;

[18] In reality, the Respondent was never a shareholder of the Appellant Conseillers Corporatifs Focus inc., a joint-stock company owned by the Appellant Charron. She joined the latter as partner to operate an undeclared partnership under the name "Conseillers Corporatifs Focus." The similarity of names explains the error made by the Superior Court judge, who deemed the Respondent a shareholder;

[19] One of the key innovations of the *Civil Code of Quebec* on the issue of companies is the distinction between a general, limited or undeclared partnership and a joint-stock company. Only the last one is an artificial person (2188 *C.C.Q.*). Yet in all forms of companies, we find the same constituent elements of the partnership agreement: pooling of contributions, sharing of monetary profits, and a spirit of collaboration (2186 *C.C.Q.*);

[20] The Respondent and the Appellant chose to adopt a legal structure incompatible with the contract of employment defined in article 2085 *C.C.Q.* as that "by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer." A partnership agreement, in turn, is described in article 2186 *C.C.Q.* as that "by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share among themselves any resulting pecuniary profits";

[21] It is not our place here to determine what roles partners may play within a joint-stock company, only to recognize that the parties' intent was to operate a joint business in a spirit of collaboration and to share the company's losses and profits;

[infrapaginal notes omitted]

[30] Thus, with no legal personality separate from its partners, a general partnership cannot hire one of its partners as an employee, given that a person may not employ himself.³² This is especially true when the general partnership consists of

³² For decisions of this Court that apply this principle in Quebec, see *Marion v. Canada* [*supra*]; *Parent v. Canada*, [*supra*] at paragraph 27. Examples from the common law provinces: *Crestglan Inv. Ltd.*, [*supra*] at paragraph 21, citing in support *Re Thome and N.B. Workmen's Comp. Bd.* (1962), 48 M.P.R. 756 (C.A.N.B.), orally upheld by the S.C.C.; *Janicek v. M.N.R.*, 92 DTC 1265, at p. 1270 (T.C.C.). See also Paul K. Tamaki and Alisa Ruvinsky, "Salaried Partners' and Old Interpretation Bulletin IT-138R," VIII(4) *Business Vehicles* (Federated Press: 2002) 416-18. It must also be noted that Chief Justice Bowman recently asked, in *Zupet v. M.N.R.*, 2005 TCC 89 at paragraph 13 (T.C.C.), why there is

only two partners, as in the present case. I therefore would not grant the Appellants the requested deduction, despite former bulletin IT-138R. The Appellants have admitted in arguments that they had been notified on July 8, 2003,³³ if not before that date, of the fact that this bulletin was no longer in force. In any event, this Court is not bound by the CRA position, whether stated orally or in writing, but by the *Act*.³⁴

c) Did the Appellants fail to declare agricultural losses under the terms of section 31 of the *Act*?

[31] For the tax years from 1998 to 2001, the Minister believes that the Appellants did [TRANSLATION] "not declare any amount as gross income and net income (net loss) from agriculture related to the General Partnership."³⁵ According to the Minister, all these amounts are linked to "farming" [*agriculture* in French] under the meaning of subsection 248(1) of the *Act*, and particularly to "tillage of the soil" [*culture du sol* in French], one of the activities listed in the *Act* for the term "farming" [*agriculture* in French]. In the English version of subsection 248(1), the legislator uses the term "farming" pour "*agriculture*," and the expression "tillage of the soil" pour "*culture du sol*."

[32] The Appellants have argued that the activities linked to these amounts were more scientific than agricultural. In light of the evidence on this point, I agree with the Appellants this time, for the following reasons.

[33] First, the very contract by which the General Partnership was created stipulates the following as the purpose of this company.

even acceptance that a person can be an employee of his own joint-stock company. Given the case law of the past hundred years accepting this possibility based on the separate legal personality of joint-stock companies, the chief justice was forced to accept this proposition.

³³ In the Appellants' arguments, the following passage from a letter from Éric Beauséjour to them (dated July 8, 2003) was read:

[TRANSLATION] The comments and calculations presented in paragraphs 10 and 11 of IT-138R are not correct. You have already been sent a technical interpretation on this. The calculations performed by the auditor comply with the *Income Tax Act* (ITA).

The Appellants then referred us to technical interpretation 2001-0066067, dated May 10, 2001.

³⁴ *London Life Insurance Co. v. Canada*, 2000 CanLII 16657 at paragraphs 29-32 (F.C.A.); and *Goldstein v. Canada*, [1995] T.C.J. No. 170 (T.C.C.)(QL).

³⁵ See the replies to the notices of appeal in court file nos. 2004-208(IT)I, 2004-206(IT)I, 2004-2803(IT)I and 2004-2804(IT)I, at paragraphs 13 z) to bb), 13 aa) to cc), 8 w) to y), and 8 v) to x), respectively.

[TRANSLATION] This company henceforth includes a single distinct undertaking, conducting scientific research and development for the purpose of developing and marketing a healthy or nutraceutical [*sic*] beer...³⁶

[34] We discover more when we read another document produced by the Appellants, entitled "Historique de l'entreprise – Société Christiane et Jean-François Blais (la Société)." I believe it is useful at this point to reprint a good part of this document, given that it extensively matches what I understand from the Appellants' testimony on this aspect.

[TRANSLATION] **Purpose of the Company**

The purpose of the said Company is the characterization and technological development of a value-added brewing business to be established in Quebec. We intend to produce a nutraceutical and ecological beer without the use of pesticides. This stated goal involves various phases of study, research and production of strategic ingredients to align the various desired compounds for a nutraceutical beer. These will be the focus of projects involving various research activities to resolve a number of technological and scientific uncertainties encountered, to attain the technological progress initially targeted for marketing nutraceutical beer.

Strategic phases of the Company

We have developed four strategic implementation phases for a brewing business, presented in sequence.

The first phase addresses the uncertainties raised by the cultivation method to establish brewer's barley in our region, while meeting the production criteria of no pesticides or fertilizers and targeting links with mycorrhizae. This experimentation will also help determine whether small barley seeds can be used for sowing, to specify the barley growing technique for our suppliers so we can obtain the required compounds to produce nutraceutical beer. The research conducted on hops first includes assessment of the cold resistance of different varieties of hops seedlings. Cold resistance is in fact a major technological uncertainty that must be resolved, given Quebec's winters, and may be intimately linked to the individual genetics of each variety. We must pose the following question: Must the ultimate selection of varieties be strictly based on this cold resistance factor? The answer will provide potential local producers with guidance and even certainty, to produce certain cold-resistant varieties rather than others without this characteristic. This explains the importance of studying this factor so we can determine which varieties are cold-resistant. We will also study the assessment of pest control for hops grown in Quebec, and finally, assessment of growing methods in various soil types using

³⁶ This contract, dated December 25, 1997, is one of a series of documents entered as Exhibit A-6.

mycorrhizae. This first phase also involves studying and refining a production, extraction and dosing method for rutin obtained from *Rhinanthus*.

The second phase focuses on the rutin obtained to maximize the compounds for a nutraceutical beer, determining the growth stages at which *Rhinanthus* develops the highest levels of rutin in the plant and the conditions under which it must be added to the beer to preserve its properties.

[35] I believe that the following documents, produced by a representative of the Respondent, Mr. Éric Beauséjour, also support the Appellants' position: the project summaries accompanying the T661 forms for the 1998 and 1999 tax years, as well as a document entitled "Caractérisation et développement technologique et scientifique d'une ferme brassicole de 1995 à 2005."³⁷ The only significant criticism of one of these documents by counsel for the Respondent is use of the word "farm" in one occurrence. However, not only is this term taken out of context from the paragraph in which it occurs, but it does not reflect the reality as I perceive it based on the evidence as a whole.³⁸ The relevant part in question is found on the first page of the T661 form for 1998 and reads as follows.

[TRANSLATION] This characterization and technological development project for a value-added brewery farm has the following main objectives.

1. Make available a growing method and production variety (2 tonnes/acre) of barley with ecological and brewing qualities (warehousing, malting and brewing) adapted to southern Quebec and recover small seeds rejected in calibration for use in producing seedlings.
2. Make available productive varieties of hops and an ecological growing technology for extracting lupuline, and formulate various constituents in Quebec.
3. Make available, as a beer additive, extractable flavins of agricultural origin by experimenting with *Rhinanthus* and/or buckwheat cultivars.

[emphasis added]

[36] The Appellants testified in turn that once these techniques were developed, they would probably have others actually produce the desired ingredients for their brewing business. Here is what Ms. Auray-Blais first said.

[TRANSLATION] A. But one of the things for us, is that once the technique has been developed, we will not invest in production of this product. We're going to contract

³⁷ See tabs 7, 12 and 26 of Exhibit I-3, respectively.

³⁸ The same applies for the use of similar terms by the Appellants in a few other documents, including the "farm machinery" lease in Exhibit I-4, tab 52, mentioned earlier.

it out have others produce it, or we're going to obtain a supply with our technique, which will happen in the same way as for the barley...

Mr. Blais then followed.

[TRANSLATION] A. Well, we would be asking other producers to produce it for us, as they produce at a lower cost than we can ourselves because we're not growers, we're not farmers.³⁹

[37] Faced with this evidence, can it be said that the Appellants were engaged in agricultural activities? I believe not.

[38] Since the Minister did not advance other possible meanings of the term "farming" [*agriculture* in French], I therefore will only determine whether the Appellants were engaged in "tillage of the soil." In any event, as several judges have already remarked in the past, most of the definitions appearing in subsection 248(1) are simply expansions on the common meaning of the term "farming" [*agriculture* in French].⁴⁰

[39] Furthermore, of all the terms found in the *Act*, the case law and the dictionaries, the expression "tillage of the soil" [*culture du sol*] is that which best reflects the Appellants' activities, yet without defining them. Given that this expression is not defined in the *Act*, here is what the dictionaries say.

Le Petit Robert 1 (1991) by Paul Robert

Cultiver Travailler (la terre) pour lui faire produire des végétaux utiles aux besoins de l'homme. [...] Soumettre (une plante) à divers soins en vue de favoriser sa venue; faire pousser, venir.

Culture Action de cultiver la terre; ensemble des opérations propres à tirer du sol les végétaux utiles à l'homme et aux animaux domestiques. V. Agriculture. [...] *Culture hâtée, forcée* : usage de méthodes artificielles pour obtenir des récoltes en dehors des saisons normales.

Oxford English Dictionary Online (2005) published by Oxford University Press

³⁹ Testimony of Mr. Blais, notes of February 28, 2005 at pp. 218 and 291, and testimony of Ms. Auray-Blais, *ibid.* at p. 237.

⁴⁰ *C.B.A. Engineering Ltd. v. M.N.R.*, 71 DTC 5282, at p. 5287 (F.C. Trial Division), overturned for other reasons by [1974] C.T.C. 888 (F.C.A.); *Maber v. M.N.R.*, 71 DTC 5506, at p. 5510 (F.C. Trial Division); *Chan v. R.*, 1998 CarswellNat 18, at paragraph 13 (T.C.C.); *Corker v. Canada*, [1998] T.C.J. No. 146, at paragraph 8 (T.C.C.)(QL); *Clifford W. Ross v. M.N.R.*, 63 DTC 262, at p. 263 (C.A.I.).

Tillage	The act, operation, or art of tilling or cultivating land so as to fit it for raising crops; cultivating, agriculture, husbandry.
Tilling	... work done upon land for raising crops; cultivation, tillage.
Cultivation	The bestowing of labour and care upon a plant, so as to develop and improve its qualities: the raising of (a crop) by tillage.
Crop	The annual produce of plants cultivated or preserved for food, <i>esp.</i> that of the cereals; the produce of the land, either while growing or when gathered; harvest... The annual or season's yield of any natural product.

[40] The Appellants' research activities are not very consistent with these definitions. First, the production is only indirectly useful for humans or domestic animals, and not meant to feed them in a not-too-distant future. Second, the Appellants are doing much more than providing a range of care for their plants to enhance their growth, as most farmers would do; they are developing these methods through much more advanced research than that conducted by a non-scientist. Third, the Appellants have no intention of harvesting a crop each year or season as a genuine farmer would (although this last indicator is far from decisive in itself), and although the Appellants have sold seedlings to a greenhouse in Abbotsford, British Columbia, these activities are too accessory to change the nature of the Appellants' work. This is all the truer when we analyse the issue in terms of the legislator's intent. In this regard, I concur with Justice Bowie, of this Court, in the following passage from *Corker v. Canada*.

[8] The Appellant does no breeding of horses, and her attendance at equestrian events is not a source of revenue for her. No doubt there is some promotional value in her attendance at these events, because people who see her compete there may later become paying students, but it cannot be said to be her business. Nor is it principally the horse that is being exhibited on these occasions, but herself and her riding skill. It is noteworthy that Parliament, in enacting this extended definition, chose to include "maintaining of horses for racing," which is, of course, a popular pastime of well-to-do city people which would not necessarily fall within the ordinary meaning of the word farming, although it has long been an avocation of many farmers, particularly in England. Instruction in riding is, I think, **farther removed** than racing from the normal activities of a farmer. **Had Parliament intended** that it should be included in the activities which are the subject of section 31 of the Act, it would no doubt have said so.⁴¹

⁴¹ [1998] T.C.J. No. 146 (T.C.C.). for other comments on the subject of the legislator's intent and the history of this provision, see also *Juster v. Canada*, 74 DTC 6540 (F.C.A.); *Bourque v. Canada*, 96 DTC 6412 (F.C.A.); *Canada v. Donnelly*, A-604-93 (F.C.A.); *Fermes Miron Farms Inc. v. M.N.R.*, 70 DTC 1145 (C.A.I.); Marie-Andrée Legault, "Les hauts et les bas de la vie d'un gentleman-farmer," in Colloque technique – *Récents développements en fiscalité agricole*,

[41] Finally, it is interesting to note that in its report on the activities of the General Partnership, the Respondent's own expert described these activities as scientific, at page 1 of his report. In effect, when questioned about the subject of the number 060399 entered on this page as [TRANSLATION] "SCIENTIFIC FIELD(S) – (# CA)," the expert replied that this was an Australian code, but did not specify which. In response to this memory lapse by the expert, Mr. Blais suggested that it would have been interesting to know this detail. To avoid leaving the Appellants in suspense too long, I take the liberty of noting that a search on the website of the Australian Research Council (www.arc.gov.au) revealed the following field: Industrial Biotechnology and Food Sciences. For my part, the simple fact that the expert placed a number after the mention of the "scientific" field only adds an additional indication of the scientific nature of these activities.

[42] I therefore will find for the Appellants on this question. None of the cases raised by the Respondent support a different conclusion.

d) Do the Appellants' activities constitute experimental research and development activities under the terms of the Act?

[43] For the following reasons, I believe, contrary to the Respondent, that for all the projects in question, the Appellants maintained [TRANSLATION] "a detailed record of the assumptions, tests and results... as the work proceeded" consistent with the fifth criterion adopted by Justice Bowman (his title at the time) in *Northwest Hydraulic Consultants Ltd. v. Canada*.⁴² These criteria were subsequently approved by the Federal Court of Appeal in *C.W. Agencies Inc. v. Canada*.⁴³

[44] I also believe that the Appellants' activities are quite consistent with the following passage from *R I S – Christie Ltd. v. Canada*.

[14] In addition to developing new products or processes, scientific research connotes the existence of controlled experiments involving the testing of models or prototypes. Thus, evidence of scientific research must be adduced by the taxpayer in order to demonstrate that such research (including testing) was undertaken and that it is eligible for favourable tax treatment: see, for example, *Progressive Solutions Inc. v. R.*, 96 DTC 1232 (T.C.C.). Not only must taxpayers establish that tests were

Drummondville, December 3, 2004, Association de planification fiscale et financière, sixth tab, at pages 8 and 9; Brian Felesky, "Hobby' Farm Losses," Twenty-Sixth Tax Conference, 1974, Association canadienne d'études fiscales, pp. 625-634.

⁴² [1998] T.C.J. No. 340, at paragraph 16 (QL)(T.C.C.).

⁴³ [2001] A.C.T. No. 1886, at paragraph 17 (QL)(F.C.A.).

performed, they must also demonstrate that they were conducted in a systematic fashion. In my view, the requirement that research efforts be "systematic" is a higher threshold than simply requiring that research, including testing, be conducted. Although both documentary and *viva voce* evidence are admissible, the only sure-fire way of establishing that scientific research was undertaken in a systematic fashion is to adduce documentary evidence which reveals the logical progression between each test and preceding or subsequent tests.

[15] Thus, it is reasonable to expect a taxpayer to adduce documentary evidence of systematic research, including testing. If, however, a 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. During oral argument, counsel for the Minister accepted this proposition, if only because that scenario was inapplicable in the present case. However, in my view, it should also be permissible to infer that a taxpayer had conducted systematic research where it is established that such research led to a technological advancement. I say this because the whole foundation of the scientific research provisions of the Act and Regulations should not rest solely on the repeatability criterion. Otherwise, repeatability would negate the validity of all other evidence pertaining to scientific research.⁴⁴

[45] Let us now examine the evidence on this question in dispute.

[46] Each party led testimony from its respective expert, who was questioned about his report on the activities of the General Partnership and IIB inc. These persons' training and experience in their respective field were not questioned before me. Both experts completed doctoral studies in specialized fields of science (the Appellants' expert also pursued post-doctoral studies), and both were accustomed to assessing projects or studies (the Respondent's expert, for the CRA, the Appellants' expert, for scientific journals).

[47] In general, if we compare the two series of reports, that by the Respondent's expert is more complete and very damaging to the Appellants' case, whereas that by the Appellants' expert is fairly general and provides very few details. In brief, before the start of the trial, the Appellants had a challenge to overcome if they wanted to discharge the burden of proof.

[48] After hearing the testimony of each, however, I believe that the Appellants have discharged their burden by discrediting all the conclusions of the Respondent's

⁴⁴ [1998] A.C.T. No. 1890 (QL)(F.C.A.).

report in the brilliant cross-examination they conducted (Ms. Auray-Blais' cross-examination was by far the best structured). They obtained solid admissions from the Respondent's expert for each of the projects in question, they led him to contradict himself and they even obtained apologies for one passage in his report insinuating that the Appellants were liars. The complete, convincing answers given by the Appellants' expert, which I believe placed the Appellants' activities in perspective, were also decisive. Their expert gave convincing, satisfactory answers to the questions asked by counsel for the Respondent.

[49] It is highly likely that if the Respondent's expert had followed his own administrative policy requiring that questions be sent to taxpayers before conducting a visit as CRA representative (policy dated January 14, 2000),⁴⁵ the Appellants would have had the opportunity to prepare more for the visit and I might not have been seized of this matter in the instant appeals. It also would have been preferable for Ms. Auray-Blais to attend this visit by the expert since, by his own admission, Mr. Blais is not the best communicator in a stressful situation.

[50] Before reviewing the projects in the order followed by the Respondent's expert, I believe it is useful to cite the following passage contained in his report for each of the projects.

[TRANSLATION] No laboratory log or other type of evidence, dated and recording the test details for the various behavioural models, and no analysis and interpretation of the scope of the results were submitted for consultation by the RTA [research and technology advisor].

[51] Let us first review the evidence related to the two IIB inc. projects.

1) Develop an in vitro hops seedling production technique with rhizobium and/or mycorrhizae symbiosis through physiological manipulation.

[52] For the Respondent, the problem in this project is limited primarily to the following passage at pages 4 and 5 of the report.

⁴⁵ This policy is found in the *Guide to Conducting a Scientific Research and Experimental Development Review; Part 1: The Technical Review*, prepared by the SR&ED Directorate, Canada Customs and Revenue Agency, in cooperation with industry partners and stakeholders. Here is what Step 3 of this policy states at page 7 of the document:

A RFI [from scientific advisors] is to be clear and succinct. Specific questions about specific projects to determine eligibility are asked and generalities are avoided. This enables the claimant to provide clarification quickly and renders the review process more efficient.

[TRANSLATION] ... How can one claim to conduct a so-called "controlled" introduction of microorganisms or to promote bacillus "development" on roots if the population concentrations and growth in question are not measured? How can one claim to conduct a systematic activity for resolving uncertainty when the primary study subjects are not being monitored?

[emphasis added]

[53] As noted by the (underlined) words in this passage, the expert is fairly categorical in his conclusion on the General Partnership's first project.

[54] Yet the bacillus count does not seem so important if we rely on the testimony of Mr. Blais and his expert, since the cost incurred for this method is very high and the benefit relatively minor. In the Appellants' camp, the very presence of fungus is a sufficiently reliable indicator to conclude that a given method is not working. The Appellants could not financially afford to determine the specific causes of the failures but could simply continue moving forward by trial and error, which the Appellants' expert said is quite acceptable. I concur with him and find overall that the Appellants have discharged the burden of proof for the General Partnership's first project.

2) *Study various behavioural models for hops varieties based on plant geotropism.*⁴⁶

[55] The primary purpose of this project is to develop a method for growing higher-yield hops under Quebec's climatic conditions. In his report, the Respondent's expert criticized this project on three different points.

[56] First, the expert challenges the use of subjective over objective measurements.

[TRANSLATION] The RTA notes the lack of scientific validity, and thus of systematic experimental activity for the data gathered during presumed testing of behavioural models. In fact, aside from the stem length, recorded in cm (objective observation), all the other measurements are subjective (expressed by -, ± or +). Furthermore, there are no data on the history of the site (recorded on site or extrapolated from a local weather station) in terms of wind speed and direction, amount of rainfall, relative ambient humidity, soil humidity, evaporation rate, hours of sunlight and temperature. These objective observations are the very basis of interpretation for any study of *in situ* plant growth. How can one claim to measure the impact of wind, rain or drought on hops seedling geotropism when there are no historical data on these phenomena? How can one interpret, discuss and reach conclusions on seedling dry-out results if there are no data on variations in soil humidity, precipitation and temperature?

⁴⁶ According to the Respondent's expert, geotropism is simply defined by the fact that plants extend their roots into the soil under the effect of gravity. See p. 67 of the Notes for March 2, 2005.

[emphasis added]

[57] The Respondent's expert was again very categorical and, once again, the Appellants succeeded in reversing the burden of proof on this point, but this time, not solely through the credible and plausible testimony of Mr. Blais and his expert, but also through an admission by the Respondent's expert. For the Appellants' camp, there was no need to obtain more quantitative data, for the following reasons.

- a) Subjective data support the development of more assumptions and testing the validity of an assumption already formulated, while limiting time and cost. The goal in this case was simply to verify whether there had been considerable climatic changes during the month of July 2001, not to trace and study a certain stem resistance curve based on temperature, for example.
- b) By this very fact, these data have a much greater scientific validity than the Respondent's expert noted in his report.
- c) As so aptly pointed out by the Appellants' expert in cross-examination, why would the Appellants have fabricated data on weather conditions in July 2001 if these data could have been objectively verified by anyone? Why risk their scientific credibility on this type of data that are even easier to verify? If the Appellants had truly invented these data, it would have been possible for the Respondent's expert or counsel to follow the example of former United States president Abraham Lincoln, when he was an attorney.

... His most celebrated circuit case was his defense of Duff Armstrong, the son of his New Salem friend Jack Armstrong, on a murder charge. When a witness testified that bright moonlight had enabled him to see Duff commit the murder, Lincoln produced an almanac and proved that the moon had not been shining brightly at the time. In summing up the case, Lincoln described with great emotion his friendship with the boy's father. The jury voted for acquittal.⁴⁷

[emphasis added]

[58] Faced with this evidence and certain explanations by the Appellants, it must be noted that the Respondent's expert at least admitted the following.

⁴⁷ This excerpt comes from Microsoft Encarta Online Encyclopedia 2005 at: http://encarta.msn.com/text_761577113___17/Abraham_Lincoln.html

[TRANSLATION] Q. Within the protocol, when we wanted... when the protocol was developed, did it occur to you that observation might simply be something very secondary? The goal in respect of geotropism was curling. Moreover, did it probably not occur to you that observation of climatic conditions was secondary for us? Noted but not studied in detail because this was not the purpose of the project. Did this idea happen to cross your mind?

A. It has now crossed my mind, yes.

...

Q. So, quite simply, it has just now occurred to you that this was not the basis of our protocol. Moreover, if we have one month of rainy weather, would you agree with me that this might affect plant geotropism and curling?

A. Yes.

...

Q. Mr. Shooner, does this explain to you a little the reason why we did not use, and did not engage in development using, rain and wind meters, and does this help you understand better?

R. Yes, that helps me understand better.

Q. Thank you. I have finished.⁴⁸

[59] The next issue is the importance the report places on clearing rocks from the field.

[TRANSLATION] On the issue of installation of the hop field, the RTA saw 132 posts covering an area of approximately 16,500 m². The land had been cleared but there had not been significant removal of rocks. In fact, the field in question was covered in rocks of every size and the RTA saw only a small heap of rocks of about 10 m³. The RTA believes that, given the area of the hop field and the width of the teeth on the rock ripper (approximately 5 cm), a single pass with this machine would have produced a rock pile of at least several hundred m³. Yet by Mr. Blais' account, rock clearing had been proceeding each summer since 2001.

[60] The first problem with this statement is that the Respondent's expert was not recognized by the Court as an expert in rock clearance from fields. He is a scientist specialized in areas rather too far removed from rocks. It is incumbent on this Court

⁴⁸ Notes of March 2, 2005 at pp. 246, 248 and 256.

to judge whether or not there was sufficient rock clearance, and to weigh the issues of credibility.

[61] The second problem is the link the expert tried to draw between annual rock clearance and the total quantity of cleared rocks. However, it may be possible that Mr. Blais was unable to give the expert a complete answer to this question for the reason cited earlier. I accept Ms. Auray-Blais' explanations provided in Court, that rocks were in fact cleared each year but were simply discarded anywhere outside the area in question. It is quite likely that the Appellants, with their limited means, proceeded in this manner rather than assembling a series of rock piles for subsequent collection by a truck.

[62] In any event, even if I accepted the finding of the Respondent's expert that there had not been enough rock clearance, I fail to see how this would have significantly affected the Appellants' credibility given the evidence that produced on all the projects.

[63] Finally, as the last point in his report, the expert criticizes the fact that the Appellants' work on this project was advancing too slowly.

[TRANSLATION] As part of an experimental development project, the assembly of such a facility could be deemed a support activity, although the need for the entire area would be subject to a scientific study. Based on the documentation consulted, however, the hop field was not used for SR&ED activities in 2001. Moreover, on June 17, 2003, the hop field was still not being used for any activity and was fallow. As well, also on June 17, 2003, the hop field still had not been completed (no steel cable installed, rock clearance not completed) two years after it was started. Based on the documentation and the condition of the site, the RTA found that the hop field, or at least what might be one, has never been used for SR&ED activities.

[64] The Appellants' response to this conclusion: they were waiting to have the necessary financial resources to continue development and ultimate use of the hop field, which is reasonable to my mind. In addition, after viewing the photograph of the hop field (Exhibit A-9, page 1) and if we accept that 132 posts were in fact placed over an area the size of a few football fields, it is quite conceivable that after making all these efforts, the Appellants intended to continue in this direction.

[65] Let's continue with the six IIB inc. projects, some of which have been grouped together by the parties.

1) *Refine a qualitative and quantitative technique for quercetin-3-rutinoside.*

2) *Develop a commercial high-extract value rutin extraction method.*

3) *Assess the optimal production stage for quercetin-3-rutinoside in the cultivation and long-term preservation of Rhinanthus.*

[66] After reviewing these three projects, the Respondent's expert reached three unfavourable conclusions for the Appellants.

[67] The first involves the lack of a standard curve.

[TRANSLATION] ... The RTA asked for an example of a standard curve used during dosing with the spectrophotometer method. Mr. Blais replied that this information was unavailable. Yet the documentation initially submitted with the T661 states that a standard curve was established for rutin. The RTA wishes to note that standard curves are the very basis of the principle of dosing in spectrophotometry. No result can be obtained or justified without them.

[emphasis added]

[68] I once again emphasize the expert's words given that he again reached a categorical conclusion that can no longer stand, following a review of the evidence as a whole and another admission by this expert.

[69] I can understand the confusion of the Respondent's expert, as I too was initially confused by Mr. Blais' cross-examination on this question. However, the difference between me and an expert is that before making a categorical statement in a report or during testimony on a scientific matter, this expert must demonstrate competence in the specific field in question. Failing that, he must refrain, as the Appellants' expert did the day before the hearing, from voicing an opinion on or responding to the question of whether spectrophotometry is possible with digital images. This will be discussed in projects 5 and 6 below.

[70] Furthermore, how can a scientific assumption be dismissed out of hand when it comes from a person with more knowledge in the field than oneself? (Mr. Blais has more than 20 years' experience in using spectrophotometry.) In cases such as these, a scientific appellant is caught in a situation where he must defend his competence in his field.

[TRANSLATION] MR. JEAN-FRANÇOIS BLAIS: In the end, it's because the report undermines my personal credibility and casts doubt on the scientific research. To me, this is quite a stretch, because I have twenty (20) years' experience in spectrophotometry and this is the first time I have heard this type of reasoning from a scientific point of view.

...

JUDGE: Now, are you trying to tell me at this point that this person is incompetent? Is that it?

MR. JEAN-FRANÇOIS BLAIS: Just about, because by the way he has spoken about the spectrophotometry, you are going to understand very clearly what is happening.⁴⁹

[71] It was not until the following day, however, with a spectrophotometer in hand, that Mr. Blais managed to extract the following admission from the expert.

JUDGE: This is calibrated at four hundred sixteen (416)?

MR. JEAN-FRANÇOIS BLAIS: Yes.

A. Regardless of the machine, the optical density you are going to obtain, with the same machine of course, because it can vary, you will be able to say, well, I had obtained, let's say, an optical density of point five (0.5), so point five (0.5) corresponds to two point five (2.5) because it's half (inaudible) all the proportions.

Q. I am told this directly [...], I do not need this to make an assumption.

A. Have I understood clearly?

Q. Yes, that is right, but it's the assumption of that. In other words, unless...

R. What I have understood, what I understand, now this makes sense, with what Mr. Blais has explained to me...

...

A. But what I understand is that based on a density, based on one, given that the Beer-Lambert law is proportional, knowing that it is proportional, there is a proportion, that is what Mr. Blais means to say.

⁴⁹ Notes for March 2, 2005, at pp. 97 and 99. It must be noted in passing that the practice and standard in general procedure is to challenge the expert's competence before he begins testimony, not during his cross-examination. However, since this involves the informal procedure and since various specialized fields have been raised in these appeals, it was appropriate in my opinion to let Mr. Blais continue his questioning, especially in the absence of objections by counsel for the Respondent.

Q. Yes, yes, yes.

A. Given that it's proportional, because it can be linear in that way, if it's linear, but it's not proportional. So it's linear, proportional, so therefore, the goal is to have a known concentration and from that we can know the optical density, from that we can determine the other concentrations.

Q. Yes.

A. I find that this makes sense, it corresponds, I think, to...

Q. Then if you get, I don't know, you will have a concentration like I was saying a moment ago.

A. That makes sense, sir.

...

A. I agree with that, with what has just been explained to me, the demonstration, it is eloquent.⁵⁰

[72] I agree with the Respondent's expert that the demonstration and cross-examination are eloquent. It was even our impression that the expert was Mr. Blais' student, which is deplorable, given the fact that the Minister relied in large part on the expert's report, which was the reason why the Appellants had to appear in Court.

[73] The reaction to the second conclusion in the report on this project is also eloquent, in my opinion. First I will quote from the report in question.

[TRANSLATION] Moreover, the RTA saw a rutin adsorption spectrum. Since the ordinate is not named and has no units, the RTA asked Mr. Blais to explain what had been measured based on the wave lengths (abscissa). He was unable to answer, noting that this information was unimportant. How can one produce a standard curve by spectrophotometry (see previous paragraph) and yet be unable to interpret an adsorption spectrum?

[emphasis added]

[74] On this point, the following reply by the Appellants' expert in cross-examination convinced me.

⁵⁰ Notes for March 3, 2005, at pp. 16, 19 and 20. For the full context, see pp. 5-20 of the same notes.

Q. But would a disciplined scientist have marked these units?

A. A disciplined scientist who doesn't forget, who never forgets anything, any detail, would have included the...

Q. O.K.

A. ... would indeed have included them. A scientist, there are a lot of... There are writing mistakes in the documents and reports. And this is unavoidable. I do not believe this shows that what is written is false. I accept what is written.⁵¹

[75] The third conclusion involves tables that the Respondent's expert claims are difficult to interpret.

[TRANSLATION] To support the discovery and study activities for the production of rutin based on growth stages (objective b), Mr. Blais submitted three tables showing the humidity percentages, rutin extraction results and rutin dosing results, respectively, using spectrophotometry. Each table shows the analytical results for 40 samples taken from various parts of the plant (leaf, stem, seed and bud), based on the timing (from mid-June to mid-September). Since the tables cannot be interpreted with an explanation, the RTA asked Mr. Blais to explain the significance of each. Mr. Blais was unable to interpret the said tables.

[76] These three tables are found between pages 28 and 40 of Exhibit A-8, and the cross-examination of the Respondent's expert regarding these pages is found at pages 121 to 164.

[77] In light of these many pages, it emerges that the Respondent's expert was criticizing the lack of raw data. Several times, he stated that most of the protocols made sense and could have produced the results presented in the tables in Exhibit A-8. The following excerpt very clearly illustrates the crux of the problem for the Respondent's expert.

[TRANSLATION] Q. You came on June seventeenth (17th), 2003, three years after that. Is it also your understanding that it was probably hard to keep all the crushed samples three years later? Does that cast doubt on statements that this was or was not done? What can raise the question in your mind of whether this was done? The balance between the two.

A. It's the lack of documentation, lack of laboratory log, lack of raw data. Obviously it would be unreasonable of us to ask you three years later whether you still have the

⁵¹ Notes of March 1, 2005, at pp. 152 and 153.

samples in a bag or basins. But the accompanying documentary work, that's what we want to see and that is what I have not seen.

Q. If these data had also been automatically entered in a computer, you know how sometimes, some scientists write things down, keep them, write a sheet, don't write anything more, after that they take it and input it. They input it on a computer to produce... Can we, beyond any reasonable doubt, ask the question and say that this was never done or whether it may be laxity by people who wrote it down, but was never kept to produce documents such as that?

A. Given the warnings issued to Mr. Blais in prior reports, he was asked to keep documentation and we read an example. Fairly eloquent examples were given of what constitutes documentation. In view of this, I am very surprised to arrive on site and find that there is no documentation. So I can't invent something I have not seen.

[...]

Q. But at the same time, you also cannot contradict that this was not done?

A. That is true.

[78] Here is one of the warnings in question, cited in part in the foreword to the report of the Respondent's expert for the General Partnership.

[TRANSLATION] He was also informed that up-to-date documents must be kept indicating the activities conducted and progress achieved in SR&ED for each project submitted to the CRA. Emphasis was placed on the need to have information and evidence (laboratory manuals, progress reports, etc.) to support the work. This is indispensable for the review of each case and granting of the tax credit. These are the technical logs created when the work was performed, not the documents created to submit the application. The logs or documents therefore must be produced as the project proceeds to show that it entails systematic investigation through experimentation (SR&ED). As an indication, here are a few examples of the types of supporting documents the company should have available on its premises.

- Documentation on a project plan
- Copy of the initial research and development plan
- Experiment protocols
- Field test records
- Compendiums of notes
- Comments on experiment procedures
- Project files or quantitative data measured, or both
- Statistical analysis results and findings
- Any other relevant document (photos, etc.) corroborating the SR&ED work
- Staff time sheets and activity reports
- Physical evidence, etc.

[79] Contrary to the Respondent's expert, I see little or no reference in these warnings to draft sheets the taxpayer must keep. And the Appellants have submitted several items from the list of examples to the CRA and, more importantly, to the Court. These documents are kept, among other reasons, so other scientists can repeat the experiments to check the validity of the initial findings. As long as there are enough reliable data to repeat all the experiments in question, that should be sufficient for both the CRA and this Court. I fail to see how keeping handwritten documents, for example, would automatically support a conclusion of greater reliability. Using a pencil instead of a keyboard provides no guarantee of veracity.

4) Improve the cold resistance of hops seedlings through genetic modification.

[80] The first major point related to this project, and not the least, is the insinuation that Mr. Blais lied to the Respondent's expert and another employee of the Respondent about the fact that a certain document was contemporary. Here is the finding of the Respondent's expert on this subject.

[TRANSLATION] ... The RTA asked Mr. Blais whether there were results associated with these two protocols. Mr. Blais replied that the documentation was unavailable because the results were in draft form and had not yet been compiled. The RTA therefore asked to see the draft documents. Since lunchtime was approaching, he agreed that Mr. Blais could show him the said documents after lunch.

When he returned, Mr. Blais had recalled that his wife had compiled the draft documents several months earlier. Mr. Blais therefore showed him an Excel document consisting of three tabs containing the data for 1999, 2000 and 2001 respectively.

The 2001 tab contained the cold-resistance results for 14 varieties of hops (including the four varieties under study) over a period from December 2000 to February 2001. The RTA asked Mr. Blais to explain the meaning of the table. Mr. Blais was unable to provide a precise explanation. When the RTA checked the date the Excel document was created (using the "Properties" function), he noticed that the said document had been created on June 17 at 12:27, thus during the lunch hour on the very day of the review. When the RTA pointed this out to Mr. Blais, the latter could not explain the reason for this. In the presence of the CRA's financial examiner, Mr. Bertrand Nadeau, the RTA informed Mr. Blais that the documentation had to be contemporary with the alleged tests.

[81] Based on all the evidence on this question, I am convinced that the document in question was not created during the lunch hour but was in fact copied from

another, larger document to create another, less bulky document. I cite part of the cross-examination of the Respondent, which is decisive in itself.

[TRANSLATION] Q. Yes. Is it possible that this was extracted from another site, and thus that this document was not actually created during the lunch hour?

A. It is possible that it may have...

Q. Fine. So it is very important to reply to this.

[...]

A. Yes, it is possible this information was extracted from an earlier document and copied/pasted to create a new document; the answer is yes, this is possible.

Ms. CHRISTIANE AURAY-BLAIS:

Q. The intended purpose was to give you the results for 2001. If, for a reason such as... you are a scientist, I have seen, you have many publications; sometimes we search for our papers and oops! We forget to print them out. Lord knows it is not necessarily deliberate, but it can happen. I am sure this has previously happened to you, I mean, it happens to everyone, in any profession. Ultimately, these were fairly elaborate tables with data that, in my opinion, in the space of perhaps an hour, it would be impossible to end up with something scientifically acceptable. Impossible. In any event... So to retrieve the information in a new file to give it to you because you had requested it, do you find that the paragraph you wrote is revealing with regard to the integrity of my husband, Mr. Blais?

A. This paragraph can be interpreted to imply that Mr. Blais created a document over the lunch hour. Can this impugn his integrity? The answer is yes. And if that is the case, I apologize. That was not the intent of my words...⁵²

[82] The second major point is the following.

[TRANSLATION] The project description also mentioned that there was a study of a new hops genotype. No documentation or any other type of evidence on the topic was submitted for consultation by the RTA. Yet this type of study always generates a large quantity of documentation. The RTA points out that a genotype study automatically involves very specific consumable products (restriction enzymes, nucleotides, primers, etc.). The list of materials consumed does not include such products.

⁵² Notes of March 2, 2005, at pp. 203 to 205.

[83] Here is another point that was discredited by the Appellants. After accepting the scientifically recognized premise that the presence of two different phenotypes indicates two different genotypes,⁵³ the expert finally admitted the following.

[TRANSLATION] WITNESS: What determines the colour of a leaf is its genotype, that is true. And the climate as well. Is it dry or not, did it rain the day before?

Ms. CHRISTIANE AURAY-BLAIS:

Q. If you are told that control seedlings were placed in the same conditions, in the same conditions, and that the seedlings treated with colchicine produced this result?

A. If there are control seedlings, that makes sense.⁵⁴

5) *Study and test controlled cultivation of polyporus melanopus squamosus in a synthetic medium.*

6) *Refine a spectrophotometry assessment method for digitalized images of the growth of polyporus melanopus squamosus.*

[84] The only real point in dispute for these two projects arises from the following comments by the Respondent's expert.

[TRANSLATION] On refinement of a spectrophotometry method for digitalized images (project 6), the RTA asked Mr. Blais to explain to him the principle on which this method is based. Mr. Blais' explanation was confusing, mentioning in part the need to use a digital camera, an image processing software (Photoshop) and black and white photographic paper (with silver emulsion). To support the development of the method, photographs of polyporus in a forest environment growing on trees, as well as fungus measurement photographs were produced. The RTA found that this method had no scientific basis. To perform a spectrophotometry analysis, the light source must pass through a solution containing the substance (molecules, bacteria, etc.) to be characterized or dosed. There is no link with the use of image processing software, a digital camera or photographic paper. The photos entered as supporting evidence have no link with the field of spectrophotometry.

⁵³ The Respondent's expert summarizes what constitutes a genotype and phenotype at p. 169 of the Notes for March 2, 2005 as follows: [TRANSLATION] "Genotype, genotyping is the genetic characteristic of an organism as opposed to the phenotype, which is the expression seen in the plant. The genotype is focused on characterizing a plant's genes at the molecular level. Quite simply," and at p. 172 of the same Notes: "The phenotype is the expression of the genes. It is what we see. Once the gene has expressed itself, the seedling has been used, we are seeing a phenotype. This is what can be observed, that is the phenotype. [On the next page, the expert accepts that seedling colour is a phenotype.]"

⁵⁴ Notes for March 2, 2005, at pp. 176 and 177.

[85] First, it will be remembered that Mr. Blais has more than 20 years' experience in spectrophotometry while the Respondent's expert has far less.

[86] Second, even the Respondent's expert was open to the Appellants' assumption on this question and showed honesty in direct examination regarding his limited qualifications in this field.

[TRANSLATION] Q. And to your knowledge, is there literature or publications on the possibility of conducting spectrophotometry with digitalized images? Is that a technique you know about, that you see regularly, or even that you have seen before?

A. Without making promises, I could find you examples of something where plant growth is observed through analysis of digital images.

Q. Do you know if this is possible or not? Are you able to make a judgment on this?

A. I can say it is a good idea, that the assumption is sound. Based on the fact that it would be useful to know precisely the growth level of a particular fungus. Did I know, do I know whether or not this will work? No, I cannot say, I do not know. In that context, no, I cannot state an opinion.⁵⁵

[87] Third, I believe that the following part of the cross-examination of the Respondent's expert by Ms. Auray-Blais is highly relevant.

[TRANSLATION] A. Given that I have answered several questions with "I don't know," I am unable to draw a link with what Mr. Blais has just explained to us. Excuse me, but I... it's my area of incompetence, digital cameras. I know nothing about digital cameras. I'm sorry.

Q. Then, if you know nothing about them, how were you able to reach the extremely clear and specific conclusion [that all the devices in question cannot be considered a spectrophotometer]?⁵⁶

[88] The Appellants therefore cast doubt on the conclusion reached by the Respondent's expert in his report.

[89] Finally, on the point of the materials said to be consumed, I find that the Appellants consumed them all for their relevant projects. Between the Appellants' credibility and that of the Respondent's expert, I lean more toward the Appellants. Not only was the Respondent's expert more flexible on this point at the hearing, but I

⁵⁵ Notes for March 1, 2005, at pp. 206 and 207.

⁵⁶ Notes for March 2, 2005, at pp. 186 and 187. For the context of this response, see pp. 177 ff.

also believe that his credibility on all the projects has been greatly diminished. In passing, I also note that this question regarding materials consumed was not raised in the Minister's assumptions. However, this did form part of the many foundations for the Respondent's report, which I reject almost in its entirety.

e) Other points raised on May 11, 2005

[90] Of all the points raised during this day, only those related to costs merit a few comments, as the issue of the interests was dropped by the Appellants, while the points raised about the pension plan and RRSP, respectively, have no basis in fact on which the Appellants can rely. Section 96 of the *Act* cited in respect of these last two points provides no assistance to the Appellants in this case.

[91] All told, given the divided success in these appeals, the parties must pay their own costs, except those incurred by the Appellants for their expert, which must be paid by the Respondent due to the serious shortcomings in the report of its expert. Despite the fact the Respondent offered the Appellants the option of seeking the opinion of another expert, I do not deem this offer sufficient. The Appellants state that what the Respondent offered was an expert from the same regional office or an expert with a potential link to that office. Instead, the Minister should have offered to retain the services of an expert from another regional office to avoid creating an appearance of partiality. I share the Appellants' concern on this point.

Signed at Ottawa, Canada, this 25th day of October 2005.

"Paul Bédard"

Justice Bédard

CITATION: 2005TCC417

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DATE OF JUDGMENT: October 25, 2005

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