

Docket: 2018-2699(IT)G

BETWEEN:

9158-1629 QUÉBEC INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on April 27 and 28, 2022, at Granby, Quebec; transcript  
received by the Court on May 24, 2022

Before: The Honourable Justice Gaston Jorré, Deputy Judge

Appearances:

Agent for the Appellant: Andrzej Borzym

Counsel for the Respondent: Christina Ham

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**JUDGMENT**

In accordance with the attached reasons, the appeal made under the *Income Tax Act* with respect to the 2015 taxation year is dismissed, without costs.<sup>1</sup>

Signed at Ottawa, Canada, this 4th day of November 2022.

“G. Jorré”

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Jorré D.J.

Translation certified true  
on this 26th day of January 2024.

Melissa Paquette, Jurilinguist

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<sup>1</sup> As this case was transferred to the Informal Procedure by order dated June 28, 2021, costs are awarded to the Respondent only in certain circumstances, in accordance with subrule 10(2) of the *Tax Court of Canada Rules (Informal Procedure)*.

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Date: 20221104  
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### **REASONS FOR JUDGMENT**

Jorré D.J.

#### Introduction

[1] The Appellant is appealing an assessment in respect of the 2015 taxation year.<sup>2</sup>

[2] Andrzej Borzym is the sole shareholder and director of the Appellant. He is also the Appellant's sole employee.

[3] Andrzej Borzym testified for the Appellant. Philippe Desmarais and Dr. Karim Mimoune testified for the Respondent.

[4] In 2015, the Appellant spent a total of \$131,104 in connection with two projects; it claimed that these were expenditures related to scientific research and experimental development activities (the "experimental development expenditures"). The Appellant asserted that it was therefore entitled to a \$32,451 investment tax credit.

[5] The first project involved developing a propane tank vending machine.

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<sup>2</sup> This appeal started as a General Procedure appeal. An order dated June 28, 2021 directed that this appeal would be governed by the Informal Procedure.

[6] It should be noted that the Appellant had previously developed a completely mechanical propane tank vending machine that only accepted coins.

[7] Patent applications relating to the mechanical vending machine were filed in 2007 and 2006 in the United States and Canada, respectively. A patent was granted for this mechanical vending machine in 2011 in the United States and in 2015 in Canada.<sup>3</sup>

[8] The proposed vending machine in question in this case was to run on electricity and accept credit cards.

[9] The second project involved building a machine that could manufacture rollers. The goal was to significantly reduce roller manufacturing costs.

[10] Nearly all of the expenses incurred during the year for these two projects were paid to Automation Machine Design, the company that performed the work.<sup>4</sup>

[11] The Canada Revenue Agency claims that these were not experimental development expenditures within the meaning of the *Income Tax Act* (the “Act”), and it denied the Appellant’s investment tax credit.

### The law

[12] Section 248 of the Act defines “scientific research and experimental development activities” as follows:

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

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<sup>3</sup> See exhibits I-2 and I-3 and the pages to 35 of Tab 4 of Exhibit I-5. I note that the patents were granted to Mr. Borzym.

<sup>4</sup> The tenders, contracts and invoices are at tabs 3 to 7 of Exhibit I-1. There are a few invoices from other companies at Tab 8 of the exhibit.

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, 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,

but does not include work with respect to

(e) . . .

[13] The work at issue here is neither basic research nor applied research. The issue is whether this is experimental development within the meaning of the above definition.

[14] Five criteria have been set out in the case law in order to assess whether a particular activity constitutes experimental development within the meaning of the above definition. These criteria were summarized as follows by the Federal Court of Appeal in *CW Agencies Inc.*:<sup>5</sup>

1. Was there a technological risk or uncertainty which could not be removed by routine engineering or standard procedures?
2. Did the person claiming to be doing SRED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty?
3. Did the procedure adopted accord with the total discipline of the scientific method including the formulation testing and modification of hypotheses?
4. Did the process result in a technological advancement?
5. Was a detailed record of the hypotheses tested, and results kept as the work progressed?

[Emphasis added.]

### Main argument of the Appellant

[15] I will proceed in a somewhat unusual order because the Appellant's approach can be summarized as follows:

1. The Canada Revenue Agency officers who reviewed its claim were not qualified to do so.

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<sup>5</sup> *CW Agencies Inc. v. Canada*, 2001 FCA 393 (CanLII), at paragraph 17.

2. The Respondent's expert witness was not qualified to provide an expert opinion.
3. Accordingly, the Appellant's appeal must be allowed.

[16] According to the Appellant, a valid review of its claim for a tax credit can only be performed by an engineer who is a member of the Ordre des ingénieurs du Québec, and what is more, this engineer must be a mechanical engineer.

[17] For the following reasons, these allegations have no merit.

[18] Firstly, these allegations do not account for the fact that, with respect to the facts taken for granted by the Agency as part of its assessment, it is the Appellant who has the burden of proving the contrary, which was not done in this case. I will return to the Appellant's evidence later in these reasons.<sup>6</sup>

[19] Secondly, Mr. Desmarais, a Research and Technology Advisor at the Canada Revenue Agency, testified as a fact witness and not as an expert witness.

[20] I would note that Mr. Desmarais received his bachelor's degree in mechanical engineering from Université de Sherbrooke and obtained additional training in plastics processes.<sup>7</sup>

[21] Mr. Desmarais described the work that he did and the information that he obtained. It is appropriate to consider the evidence that he provided as a fact witness.

[22] Thirdly, with respect to the Respondent's expert witness, Dr. Mimoune, I had no hesitation in characterizing him as an expert witness during the hearing given his education and experience.

[23] His general education is as follows: a mechanical engineering degree from École polytechnique d'Alger's *grande école* of engineering; a master's degree in mechanical engineering from École polytechnique de Montréal; and a doctorate in mechanical engineering from Université Laval. He is a member of the Ordre des ingénieurs du Québec.<sup>8</sup>

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<sup>6</sup> These allegations also do not take into account the fact that it is ultimately this Court that must decide whether the assessment is valid or not.

<sup>7</sup> He had been a member of the Ordre des ingénieurs in the past, but he had not been a member of the Ordre for several years at the time when he performed his work in this case.

<sup>8</sup> See page 135 of the transcript of the first day of the hearing and Exhibit I-4.

[24] Dr. Mimoune's first job in Quebec was with a small- to medium-size business in Beauce, where he was hired to design a type of panel that could be used to build houses or other structures. He was responsible for designing the machinery needed to create these panels and for ensuring that this machinery was built. These machines were subsequently exported to Costa Rica. He was also responsible for designing and building a factory with these machines, which were exported to Argentina.

[25] Subsequently, he worked for a company specializing in robotic systems that helped manufacturing companies solve manufacturing problems by modifying the systems that they had or by designing new manufacturing systems.

[26] Just before joining the Canada Revenue Agency, Dr. Mimoune worked at JDS Uniphase, where he designed and built an optical lens manufacturing line for fibre optics. This line uses robot-supported micromechanics.

#### Facts and analysis

[27] Mr. Borzym provided a general description of both projects. He testified about some of the difficulties and uncertainties encountered during the projects.

[28] However, his testimony was quite general. In particular, there was no detailed testimony and detailed documentation<sup>9</sup> showing that the Appellant, or Automation Machine Design, had:

- (i) systematically formulated hypotheses specifically aimed at overcoming uncertainties;
- (ii) made a systematic effort to verify and, if necessary, modify, the hypotheses; and
- (iii) provided a detailed record of this work.

[29] Absent such detailed evidence, I find that such systematic efforts were not made. Without such efforts, problems must be solved using commonly known procedures and basic knowledge.

[30] Dr. Mimoune's opinion can be summed up as follows: the difficulties encountered in these two projects did not constitute technological uncertainties because they could be resolved with basic knowledge and procedures commonly

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<sup>9</sup> This documentation was very limited. There were T661 forms, which mentioned certain tests, but there were no detailed notes regarding the tests that were performed.

used in mechanical engineering. This was not work undertaken to resolve a scientific or technological uncertainty.

[31] I agree with Dr. Mimoune's opinion.

[32] Considering all the evidence, I am not persuaded that the Appellant attempted to resolve technological uncertainties using the scientific method in order to achieve technological advancement or progress, and that these uncertainties could not be removed through routine engineering or standard procedures.

[33] Consequently, there was no experimental development within the meaning of the *Income Tax Act*.

### Conclusion

[34] The appeal made under the *Income Tax Act* with respect to the 2015 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 4th day of November 2022.

“G. Jorré”

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Jorré D.J.

Translation certified true  
on this 26th day of January 2024.

Melissa Paquette, Jurilinguist

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REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré, Deputy Judge

DATE OF JUDGMENT: November 4, 2022

APPEARANCES:

Agent for the Appellant: Andrzej Borzým

Counsel for the Respondent: Christina Ham

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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