Docket: 2019-1444(IT)G

BETWEEN:

DIANNE L. STACKHOUSE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeals heard on June 13 and 14, 2023, at Fredericton, New Brunswick

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Karen D. Stilwell Romain Viel Benjamin Roizes
Counsel for the Respondent:	Stan McDonald Sam Perlmutter

JUDGMENT

UPON hearing the evidence and submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2014 and 2015 taxation years, by notices dated June 27, 2017, are dismissed with costs to the Respondent.

The parties shall have 60 days from the date of this judgment to agree on costs. If the parties are unable to agree on costs, the Respondent shall have a further 30 days to make submissions on costs not to exceed ten pages and the Appellant shall have a further 30 days after the date of the Respondent's submissions to make submissions in response to the Respondent's submissions not to exceed ten pages.

Signed at Ottawa, Canada, this 8th day of November 2023.

"J.R. Owen"

Owen J.

Citation: 2023 TCC 156
Date: 20231108
Docket: 2019-1444(IT)G

BETWEEN:

DIANNE L. STACKHOUSE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Owen J.

[1] Doctor Dianne Stackhouse (the "Appellant") appeals reassessments under the *Income Tax Act* (the "ITA")[1] of her 2014 and 2015 taxation years (individually, the "2014 Taxation Year" and the "2015 Taxation Year" and, collectively, the "Taxation Years") by notices dated June 27, 2017 (the "Reassessments").

[2] The Reassessments restrict to $17,500 losses from farming incurred by the Appellant in the amounts of $530,363 and $595,904 for the 2014 Taxation Year and the 2015 Taxation Year, respectively. In making the Reassessments, the Minister of National Revenue (the "Minister") relied on subsection 31(1).

I. The Minister's Assumptions

[3] In reassessing the Appellant for the Taxation Years, the Minister relied on the assumptions of fact in paragraph 9 of the Reply, which state:

> a) the facts stated and admitted above;

[1] All statutory references are to the ITA.

b) at all material times the Appellant's chief source of income was from her practice as a medical doctor;

c) in the 2014 and 2015 taxation years, the Appellant reported net professional income from her medical practice in the amounts of $648,605 and $697,050, respectively;

d) in the 2014 and 2015 taxation years, the Appellant reported revenue from her farming activities in the amounts of $176,433 and $31,128, respectively;

e) during the same taxation years, the Appellant claimed expenses relating to her farming activities in the total amounts of $706,796 and 627,032, respectively, primarily related to salaries, capital cost allowance and machinery costs;

f) the Appellant's claimed farm expenses greatly exceeded the reported farm revenue;

g) the Appellant claimed farm losses for every year since 1987 with the exception of 1993 and 1994;

h) the Appellant also claimed restricted farming losses in 1980, 1981, 1982, 1984, 1985 and 1986;

i) the Appellant failed to provide any budget, projection or business plan to turn around the failure of the farming operation to sustain any degree of profitability; and

j) the Appellant did not have a reasonable expectation of profit from farming activity in the 2014 and 2015 taxation years.

[4] Paragraph 9(b) of the Reply states that at all material times the Appellant's chief source of income was from her practice as a medical doctor. Paragraph 9(j) of the Reply states that the Appellant did not have a reasonable expectation of profit during the Taxation Years.

[5] In accordance with the decision of the Supreme Court of Canada in *Johnston v. MNR*, [1948] SCR 486 ("*Johnston*"), the Minister is entitled to make assumptions of fact in support of the assessment or reassessment of a taxpayer. In *Johnston*, Rand J. stated the general rule regarding assumptions by the Minister as follows at 489:

> Notwithstanding that it is spoken of in section 63 as an action ready for trial or hearing the proceeding is an appeal from the taxation and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. **Every such fact found or assumed by the**

> **assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant**.
>
> [Emphasis and double emphasis added]

[6] In *R. v. Anchor Pointe*, 2003 FCA 294, Rothstein J.A., as he then was, explained the current practice regarding assumptions of fact in pleadings at paragraph 2:

> The facts in a tax appeal are peculiarly within the knowledge of the taxpayer. The practice is for the Crown to disclose in its pleadings, assumptions of fact made by the Minister upon which his determination of the tax owing is based.

[7] Section 48 and subsection 49(1) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") set out what the pleadings of the appellant and the respondent, respectively, shall state in an appeal to the Tax Court of Canada.

[8] Section 48 accomplishes this by requiring the notice of appeal to be in the stipulated form (form 21(1)(a) for most appeals) while subsection 49(1) expressly states the required content of a reply as follows:

> 49. (1) Subject to subsection (1.1) every reply **shall** state
>
> (a) **the facts** that are admitted,
>
> (b) **the facts** that are denied,
>
> (c) **the facts** of which the respondent has no knowledge and puts in issue,
>
> (d) **the findings or assumptions of fact** made by the Minister when making the assessment,
>
> (e) any other **material fact**,
>
> (f) the issues to be decided,
>
> (g) the statutory provisions relied on,
>
> (h) the reasons the respondent intends to rely on, and
>
> (i) the relief sought.
>
> [Emphasis added]

[9] Paragraph 49(1)(d) of the Rules expressly requires the respondent to state the findings or assumptions of fact made by the Minister when making the assessment under appeal. Paragraph 49(1)(d) does not authorize the pleading of answers to questions of mixed fact and law.

[10] The requirements regarding pleadings stated in section 48 and subsection 49(1) of the Rules are consistent with two general principles governing pleadings.

[11] The first general principle is that pleadings are to set out facts rather than argument or statements of law.[2] Section 48 and subsection 49(1) of the Rules provide limited exceptions to this general principle by requiring the inclusion of a statement of the issues to be decided, the statutory provisions relied upon, the reasons relied upon, and the relief sought. These additional matters appear under separate headings in the pleadings that follow the statement of the facts.

[12] The second general principle is that a conclusion on a question of mixed fact and law is a conclusion of law[3] because it is a legal inference[4] that is drawn by applying a legal standard to a set of facts.[5]

[13] The first general principle implies that a party cannot plead a conclusion on a question of mixed fact and law because such a conclusion is not an inference of fact but an inference of law. The factual contents of pleadings stipulated by section 48[6] and paragraphs 49(1)(a) to (e) of the Rules and the reference of Rand J. in *Johnston* to "every such fact found or assumed" also indicate such a restriction.

[14] A party may state a legal inference or point of law in the sections of the pleadings that follow the statement of the facts such as in the reasons relied upon.

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[2] Abrams and McGuinness, *Canadian Civil Procedure Law* (2nd ed., 2010) ("CCPL") at paragraphs 10:16 and 10:19 to 10:25. This proposition finds its roots in the Judicature Acts of the 19th century. In *Odgers, The Principles of Pleading, Practice and Procedure in Civil Actions in the High Court of Justice* (3rd ed., 1897), the author states at page 63: "Conclusions of law, or of mixed law and fact, are no longer to be pleaded. It is for the Court hereafter to declare the law arising upon the facts proved before it."

[3] CCPL at paragraph 10:31. The conclusion of law, or legal inference, is the answer to the question of mixed fact and law, which is determined by applying the applicable law to the facts: for example, see *ABB Inc. v. Domtar Inc.*, 2007 SCC 50 at paragraphs 37 and 86.

[4] *Housen v. Nikolaisen*, 2002 SCC 33 (*"Housen"*) at paragraph 26 and *Andrews and Gauthier v. Chaput*, [1959] SCR 7 at 10. For contrast, see the description of factual inferences in paragraphs 19 to 25 of *Housen*.

[5] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 (*"Southam"*) at paragraph 35 and *Housen* at paragraphs 27 and 37.

[6] See paragraph (c) of form 21(1)(a).

However, because a conclusion on a question of mixed fact and law requires facts, any such statement is meaningless and therefore potentially prejudicial if not supported by facts stated in the pleadings.[7]

[15] In *Agracity Ltd. v. R.*, 2015 FCA 288, the Federal Court of Appeal addressed assumptions of mixed fact and law in a manner consistent with the forgoing:

> [38] The Tax Court Judge struck paragraph 14(c) and the first sentence of paragraph (h) from the reply on the basis that this paragraph and this sentence stated conclusions of law.
>
> [39] Paragraph 14(c) and the first sentence of paragraph (h) of the reply are as follows:
>
> > 14. The Deputy Attorney General of Canada further states the following additional facts in support of the reassessments under appeal:
> >
> > . . .
> >
> > c) the series of transactions would not have been entered into between persons dealing at arm's length since no arm's length party would accept the risks of the said series of transactions and yet forego the benefits of the series of transactions given NewAgco-Barbados limited functions, lack of assets and having no employees;
> >
> > . . .
> >
> > h) the series of transactions entered into by AgraCity amounts to a sham or window dressing designed to deceive the Minister into concluding that NewAgco-Barbados, not AgraCity, was undertaking a business and incurring real risks. [. . .]
>
> [40] **It seems to me that both of these provisions are questions of mixed fact and law.** Paragraph c) would require the judge to determine what persons dealing at arm's length would do in this particular situation. This would require a determination of the applicable standard to be used and then the application of that standard to the facts. As well, whether the facts would lead to the conclusion that the series of transactions is a sham is also a question of mixed fact and law. **<u>These statements should not be stated to be facts</u>.**

[7] See *Preston v. R.*, 2023 FCA 178 ("*Preston*") at paragraphs 26, 27 and 34, and *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.J. No. 69 at paragraph 3.

> [41] In *Anchor Pointe Energy Ltd. v. Canada*, 2003 FCA 294, [2004] 5 C.T.C. 98 and *Canadian Imperial Bank of Commerce v. The Queen*, 2013 FCA 122, [2013] 4 C.T.C. 218, **this Court emphasized the requirement that <u>assumptions of fact must be restricted to only the facts and are not to include statements of mixed fact and law</u>**. **The facts are to be extricated from such statements**. Although paragraph 14 of the reply in this case does not state the facts that were assumed by the Minister in reassessing, it is still indicating that what is included in this paragraph are facts. The characterization of statements as statements of fact or mixed fact and law does not change simply because these are stated to be additional facts and not stated to be assumed facts. **The Crown should not be excused from misidentifying statements of mixed fact and law as statements of fact just because it has included these statements as additional facts**.
>
> [Emphasis and double emphasis added]

[16] *Agracity* confirms that assumptions of fact must be restricted to facts and are not to include statements of mixed fact and law. *Agracity* also confirms that simply moving statements of mixed fact and law under a different heading in the pleadings does not excuse identifying such statements as statements of fact.,[8]

[17] In *R. v. Adboss, Ltd*., 2023 FCA 201 ("*Adboss*"), the Federal Court of Appeal reiterates the principles stated in *Agracity*:

> Legal statements or conclusions of law have no place in the Minister's factual assumptions: *Canada v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 at para. 25. Similarly, factual elements in a statement of mixed fact and law should be extricated, so that the taxpayer knows exactly what factual assumptions it must demolish in order to succeed: *Preston* at paras. 8, 25 and 31. That said, not every conclusion of mixed fact and law that appears as an assumption must necessarily be struck: *Preston* at para. 31.[9]

[18] It is not always easy to identify questions of mixed fact and law. For example, there are cases where a legal standard adopted by a statutory provision requires nothing more than a determination of fact. In *Graat v. R.*, [1982] 2 SCR 819 at 839, the Supreme Court of Canada addressed the meaning of "impaired" as used in section 234 of the *Criminal Code*, R.S.C. 1970, c. C-34:

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[8] In *Preston*, the Federal Court of Appeal found in the circumstances of that case that there was no need to extricate the facts from assumptions of mixed fact and law because the facts were not in dispute: paragraph 21. The Court's conclusion on this point discourages motions to strike that serve no substantive purpose. *Preston* does not, however, endorse the pleading of questions of mixed fact and law as assumptions of fact.

[9] *Adboss* at paragraph 17.

> A non-expert witness cannot, of course, give opinion evidence on a legal issue as, for example, whether or not a person was negligent. That is because such an opinion would not qualify as an abbreviated version of the witnesses factual observations. An opinion that someone was negligent is partly factual, but it also involves the application of legal standards. On the other hand, **whether a person's ability to drive is impaired by alcohol is a question of fact, not of law**. It does not involve the application of any legal standard. It is akin to an opinion that someone is too drunk to climb a ladder or to go swimming, and the fact that a witness' opinion, as here, may be expressed in the exact words of the Criminal Code does not change a factual matter into a question of law. It only reflects the fact that the draftsmen of the Code employed the ordinary English phrase: "his ability to drive…is impaired by alcohol" (s. 234).
>
> [Emphasis added]

[19] In *Brutus v. Cozens*, [1973] AC 854 ("*Brutus*"), the Law Lords had previously adopted the same approach. Lord Reid described the approach as follows:

> **The meaning of an ordinary word of the English language is not a question of law.** The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. **It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, <u>not as law but as fact</u>, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved.** If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision.[10]
>
> [Emphasis and double emphasis added]

[20] The question of whether a legal standard requires nothing more than a finding of fact is not always easy to answer. A common area where this arises is with respect to issues of fair market value ("FMV"). FMV is not a question of mixed fact and law notwithstanding that a commonly cited meaning exists in the jurisprudence because that meaning is describing a finding of fact.[11]

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[10] At page 861. The other Law Lords reached essentially the same conclusion on this point.

[11] *Preston* at paragraphs 41, 46 and 47.

[21] This is confirmed by the evidentiary practice in matters involving issues of FMV. If there is a question as to the FMV of something then it is generally answered by expert evidence. The jurisprudence has long held that the opinion evidence of an expert witness consists of one or more factual inferences drawn from facts.[12] Indeed, an expert witness cannot give evidence regarding a legal inference:

> With respect, we do not believe that the witness Claerhout should have been permitted to give an opinion as to when the appropriation occurred. It was a question of law for the judge as to what constitutes an appropriation. It was for the judge to determine, in compliance with the legal definition, if and when an appropriation took place. **This was not something on which an expert witness could give evidence**.[13]
>
> [Emphasis added]

[22] Returning to paragraphs 9(b) and 9(j) of the Reply, a "chief source of income" and a "reasonable expectation of profit" ("REOP") are legal concepts peculiar to tax law[14] rather than terms of ordinary usage with well-understood meanings. Consequently, what constitutes a taxpayer's "chief source of income" and whether a taxpayer has a REOP are questions of mixed fact and law. The statements in paragraphs 9(b) and 9(j) of the Reply therefore do not place an onus on the Appellant as they are conclusions of law (i.e., legal inferences drawn by applying the legal standard to the facts) rather than assumptions of fact, and because there are no extricable facts in the paragraphs.

[23] I also note with respect to paragraph 9(j) that the application by the Minister of subsection 31(1) to the Appellant's farming losses implies the existence of a farming business (as opposed to a hobby or personal endeavor) and therefore if a REOP was relevant to the existence of a source of income the statement in paragraph 9(j) would contradict the Minister's assessing position.

II. The Agreed Facts

A. The Partial Agreed Statement of Facts and Joint Book of Documents

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[12] See, for example, *R. v. Abbey*, [1982] 2 SCR 24 at page 42.

[13] *R. v. Century 21 Ramos Realty Inc.*, [1987] 1 CTC 340 (OCA), at paragraph 37.

[14] Both the ITA and Part IX of the *Excise Tax Act* employ the concept of an REOP.

[24] At the commencement of the hearing, the parties presented a partial agreed statement of facts (the "PASF"), which states:

1. The Appellant resides at 205 Austin Road, Cambridge-Narrows, New Brunswick.

2. The reassessments that are the subject of this appeal (the "Reassessments") are restricted losses claimed by the Appellant in the 2014 and 2015 taxation years in the total amounts of $530,363 and $595,904, respectively, pursuant to subsection 31(1) of the *Income Tax Act*.

3. The Appellant objected to the Reassessments by Notices of Objection dated September 22, 2017.

4. By Notice of Confirmation dated February 4, 2019, the Minister of National Revenue (the "Minister") confirmed the Reassessments.

5. At all relevant times, the Appellant owned and operated a certified organic beef farm business sometimes referred to as Angus East Organics located in Cambridge-Narrows, New Brunswick (the "Farm").

6. At all relevant times, the Appellant was also a practicing medical doctor.

7. During the taxation years in issue, the Farm employed several full-time employees and various seasonal and part-time employees.

8. In the 2014 and 2015 taxation years, the Appellant reported net professional income from her medical practice in the total amounts of $648,605 and $697,050, respectively.

9. In the 2014 and 2015 taxation years, the Appellant reported revenue from her farming activities in the total amounts of $174,433 and $31,128, respectively.

10. In the 2014 and 2015 taxation years, the Appellant claimed expenses relating to her farming activities in the total amounts of $706,796 and $627,032, respectively, primarily related to salaries, capital cost allowance and machinery costs.

11. The Appellant claimed farming losses for every year since the 1987 taxation year, with the exception of the 1993 and 1994 taxation years.

12. The Appellant claimed restricted farming loses in the 1980, 1981, 1982, 1984, 1985 and 1986 taxation years.

[25] The parties also submitted a joint book of exhibits. The parties agreed that each of the exhibits was authentic and relevant. The parties also agreed that the exhibits are proof of the truth of their contents. I entered the joint book into evidence as Exhibit AR-1, and I will refer to the individual exhibits by their tab number.

III. The Evidence

[26] The Appellant testified on her own behalf. I found the Appellant to be a credible witness.

[27] Mr. Caleb Siu, currently a rulings officer with the Canada Revenue Agency (the "CRA") based in Toronto, testified briefly for the Respondent. Mr. Siu was the appeals officer that reviewed the Appellant's notice of objection and prepared a spreadsheet regarding the income/loss of the Appellant from her medical practice and her farming operation. The contents of the spreadsheet are not in issue.

A. Background

[28] The Appellant grew up on a "mixed farm"[15] located in Long Creek, Queens County, New Brunswick which is approximately 15 miles from the Appellant's farm. The Appellant is the eldest of six children.

[29] As a child, the Appellant would perform various farm related tasks including, when she was about ten, selling surplus eggs to customers, which she described as her little business.

[30] At the age of 17, the Appellant left the family farm to attend Dalhousie University where she earned a medical degree in 1974. During her studies, she would return home during school breaks and work on the family farm as well as in a local nursing home in a non-medical capacity. Following graduation, the Appellant

[15] The Appellant described a mixed farm as one that produces more than one farm product.

carried out a one-year medical internship in Halifax, Nova Scotia and St. John, New Brunswick, which she completed in June 1975.

[31] After completing the internship, the Appellant began her medical practice in the village of Cambridge-Narrows, Queens County, New Brunswick.

B. The Farm

[32] Shortly after starting her medical practice, the Appellant purchased an abandoned farm of approximately 350 acres located near the village of Cambridge-Narrows. At that time, approximately 150 acres of the land was cleared, and the farmhouse and other buildings were in a dilapidated state. The Appellant rented a small house in the village of Cambridge-Narrows while she considered whether the farmhouse was liveable.

[33] The Appellant described her objective in purchasing the farmland as follows:

> To build that farm up to be a viable business opportunity, in conjunction with my medical work in a rural setting.[16]

[34] The Appellant consulted with the New Brunswick Department of Agriculture as to the best way to get the farm producing and they assisted with a management plan. Initially, the Appellant focussed on building the fertility of the soil.

[35] The Appellant started with Christmas trees and apple trees, which required her to register as a professional agriculture producer. Her intention was to see if the trees would develop enough to make a viable farm business. The Appellant also took various steps to get the soil ready to grow hay to feed the three ranch horses she had at the time.

[36] The farm was equipped to handle horses and in the 1980s, the Appellant purchased a purebred Arabian stallion to crossbreed with her ranch horses. The Appellant stopped breeding horses 20 years ago.

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[16] Transcript of hearing held in Fredericton, New Brunswick, on June 13th, 2023 (the "Transcript"), lines 18 to 20 of page 14.

[37] In the 1990s, the Appellant switched her focus to crops of soybeans, oats, buckwheat, winter rye and winter wheat. To that end, the Appellant began to purchase and lease additional farmland.

[38] In the early to mid-1990s, the Appellant acquired a small herd of Highland cattle to start the bovine side of the farming business. The Appellant chose Highland cattle because they had less demanding nutritional needs in comparison to more commercially viable breeds and could forage on grasses and small bushes.

[39] In 1996, the Organic Crop Improvement Agency headquartered in Nebraska certified the Appellant's farm for growing organic grains.

[40] The Registered Professional Agriculture Producers Plan ("RPAP") issued certificates and authorizations to the Appellant.[17] The producer's number and authorization issued by RPAP allowed the Appellant to access provincial agriculture programs and benefits for farming including tax reductions for fuel and lower cost registrations for farm vehicles.

[41] The Appellant's goal during the 1990s was to expand and diversify the farm so it could produce various crops at various times of the year and raise livestock. The Appellant believed that additional acreage and diversity of production would shelter the farm from the risk of losing a single crop or a single livestock.

[42] The Highland cattle were lean and after consumer demand switched to a fattier beef, the Appellant sold the Highland cattle *circa* the year 2000 and in 2002 acquired 103 Aberdeen Angus cattle.

[43] The Appellant's objective was to create a herd of certified organic beef cattle, which took several years to achieve due to the rigorous requirements for the certification of cattle as organic beef. In New Brunswick, the Atlantic Certified Organic Cooperative Limited ("ACOC"), a division of the Canadian Organic Certification Agency, enforced the organic beef certification standards.

[44] By 2006, the Appellant's farm had young calves that the Appellant could market as certified organic beef. However, it was not until 2008 that the closest abattoir - located in Sussex, New Brunswick - agreed to meet the requirements for

[17] Tabs 14 and 15 of the Joint Book are copies of the RPAP certificates for 2014 and 2015.

butchering organic beef. The Appellant's arrangement with the abattoir allowed for the butchering of 6 to 12 certified organic beef cattle per year.

[45] To create a more viable farming operation, the Appellant's boyfriend at the time ("GC") secured an environmental farm plan in 2009,[18] which allowed for expansion of the farm. The Appellant explained that GC was in the construction business and would be doing any construction required by an expansion. This required that GC comply with the applicable environmental standards.

[46] Around 2011, the Appellant began to consider the possibility of constructing a processing facility on the farm to address the limited availability of processing for organic beef and the wasted by-products resulting from that processing. The proposed processing facility would process organic beef for human and pet consumption.

[47] The Appellant paid for a study[19] to determine if a processing operation was viable. The study concluded that there would be a financial benefit to having a processing plant on the farm. GC (through his construction company) started the construction shortly thereafter. The Appellant paid for the construction and was to be the sole owner of the new processing facility when completed.

[48] At all times, the Appellant owned all of her farm's assets and paid all of the expenses of her farm.

[49] In 2014, the Appellant owned 829 certified organic beef cattle bred from the original herd purchased in 2002. In 2015, the herd dropped to 801 due to the sale of over-age cattle.

[50] The 2014 and 2015 applications for ACOC certification identified the farm by the initials DSGC.[20] In chief, the Appellant explained that GC prepared and kept track of many of the PID numbers. GC also dealt with the construction aspects of expanding the farm such as permits.

[51] In cross-examination, the Appellant explained that GC tried to be "super involved" but that one of her employees ("MJ") prepared the ACOC

[18] Tab 13 of the Joint Book.

[19] Subsidized in part through RPAP.

[20] Tabs 3 and 3 of the Joint Book.

application documents and that MJ was responsible for the accuracy of those documents.

[52] Counsel for the Respondent asked the Appellant if GC was more involved in the management of the farm than her testimony in chief suggested and the Appellant responded as follows:

> I can't tell you what happened when I was working in my medical office, but I do know there was a lot of conflict, he might have tried to supervise the employees most of the time. Part of the conflict was they resented that and they took the direction from me.[21]

[53] When further pressed, the Appellant repeated that GC "tried" to act in a managerial role and "tried" to supervise the employees.

[54] In 2014 and 2015:

- the farm consisted of a total of 5,314 acres,[22] the farmhouse where the Appellant lived, a detached garage and three large animal shelter and storage buildings (a 100' by 100' structure, a 60' by 120' structure with an attached 45' by 140' structure and a 108' by 160' structure). In addition, the Appellant had started the construction of two additional storage buildings and the building for processing the organic beef,

- the Appellant's farm equipment consisted of tractors, tillage equipment, haying equipment, wagons, transport vehicles, trailers and farm trucks, and

- the Appellant employed four full-time employees and three seasonal part-time employees to work on the farm. The statements of farm income for 2014 and 2015 show salaries, wages and benefits of $280,483.66 and $240,669.44, respectively.[23]

[55] The Appellant described her typical weekday as waking around 5 a.m., working on the farm until leaving for the 10 km commute to her medical clinic between 7 a.m. and 9 a.m., returning between 2 p.m. and 5 p.m. and working on the farm until 10 p.m. to midnight. The Appellant conservatively estimated that she

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[21] Lines 1 to 6 of page 135 of the Transcript.

[22] The Appellant owned approximately one-half of this acreage and leased the balance.

[23] Tabs 2 and 5 of the Joint Book.

worked on the farm approximately 5 hours each weekday and anywhere from eight to 16 hours per day on weekends depending on the time of year.[24]

C. The Medical Practice

[56] In 2014 and 2015, the Appellant carried on her medical practice in a building located at 2112 Lakeview Road, Cambridge-Narrows. The village of Cambridge-Narrows owned the building and charged the Appellant rent of $250 per annum for the Appellant's use of the building.

[57] The Appellant employed three part-time employees in her medical practice. The Appellant described her typical weekday at the medical practice as starting between 7 a.m. and 9 a.m. and ending between 2 p.m. and 5 p.m. Based on her handwritten appointment book for 2015, the Appellant estimated that she worked approximately 1549 hours in 2015 plus 24 to 32 hours per month for non-appointment work such as urgent or emergency calls. This adds up to a range of 1,837 to 1,933 hours per year.

[58] The Appellant could not find her appointment book for 2014 but believed the hours that she worked in 2014 would be comparable.

[59] The Appellant was also required to complete 45 hours of continuing education every two years, which she would typically accomplish by taking a one-week course bi-annually.

[60] In cross-examination, counsel for the Respondent canvassed several areas relating to the Appellant's medical practice. The following is from that cross-examination.

[61] The Appellant billed the province electronically at a rate per visit fixed by the province. The Appellant stated that only part of her billing records for 2015 were available and that they showed a per-visit billing rate of $43.50.

[62] The three part time employees of the medical practice were clerical personnel with some limited medical expertise with respect to home care and patient-to-patient contact. One of the employees did a major part of the cleaning and did patient charts.

[24] The Appellant describes her farm activities in some detail at pages 74 to 82 of the Transcript.

The other two shared the reception work, did patient charts and filed patient reports. The building had two secure areas for storing patient files.

[63] The Appellant performed all the medical duties associated with her medical practice. The Appellant was subject to periodic review by the Atlantic Provinces Medical Peer Review.

[64] The Appellant's medical practice did not require any significant capital investment and the operating expenses were limited to employee salaries and benefits, insurance premiums, automobile expenses and typical office type expenses such as a telephone line and office supplies.

[65] The Appellant's statements of professional income for 2014 and 2015 show revenue of $805,321.17 and $851,621.05, respectively, and net professional income of $648,605 and $697,050, respectively.[25] The Appellant led a frugal life and used most of her net income to fund the farm.

[66] Mr. Siu testified regarding the income tax reporting history of the Appellant. Mr. Siu prepared a spreadsheet based on the Appellant's tax filings from 2007 to 2015.[26] The purpose of the spreadsheet was to demonstrate trends over this period.

[67] The spreadsheet indicates that from 2007 to 2015 the Appellant earned aggregate revenues of $5,599,554 and aggregate net income of $4,145,580 from her medical practice and earned aggregate revenues of $290,244 and incurred aggregate losses of $4,006,097 from her farming business. For the same period, the Appellant earned dividends of $432,925, interest of $1,488 and other income of $144,542.

[68] In addition, the spreadsheet indicates that the Appellant's net annual income from her medical practice increased from $251,746 in 2007 to $697,050 in 2015.

D. The Submissions of the Appellant and the Respondent

(1) <u>The Appellant</u>

[25] Tabs 1 and 5 of the Joint Book.

[26] Tab 18 of the Joint Book.

[69] The Appellant submits that the issue is whether a combination of farming and some other or a subordinate source of income constitutes the chief source of income of the Appellant.

[70] Parliament amended subsection 31(1) on March 20, 2003 to overrule the interpretation of subsection 31(1) adopted by the Supreme Court of Canada in *Craig v R.*, 2012 SCC 43 ("*Craig*") by adding language to the preamble that was used by the Supreme Court of Canada in *Moldowan v R.*, [1978] 1 SCR 480 ("*Moldowan*").

[71] The new wording of subsection 31(1) uses the terms "source", "chief source" or "subordinate source". The ITA does not define these terms.

[72] The concept of a "source of income" is fundamental to the scheme of the ITA. In *Stewart v. R.*, 2002 SCC 46 ("*Stewart*"), the Supreme Court of Canada explained a business source of income as follows:

> 51 Equating "source of income" with an activity undertaken in pursuit of profit accords with the traditional common law definition of "business", i.e., "**anything which occupies the time and attention and labour of a man for the purpose of profit**" (…)
>
> [Emphasis added by Appellant]

[73] *Stewart* rejected the notion that, in order to have a source of income that is a business, a taxpayer had to have a reasonable expectation of profit.

[74] Subsection 31(1) must be interpreted in a manner that is consistent with the finding in *Stewart* that a business source of income is "anything which occupies the time and attention and labour of a man for the purpose of profit" with no further inquiry into whether the taxpayer's expectation of profit is reasonable.

[75] The essential characteristics of a "chief source" are that it (i) occupies the bulk of the taxpayer's time, attention, labour, and resources, or forms the center of the taxpayer's work routine; and (ii) generates the bulk of the income that the taxpayer relies upon for his or her livelihood.

[76] If one of a taxpayer's sources of income exhibits both essential characteristics of a chief source of income, that source stands alone as the taxpayer's chief source of income. If the taxpayer does not have a standalone chief source of income but has two sources of income that each meet one of the essential characteristics, the taxpayer's chief source of income will be a combination of the two sources. In that

scenario, the taxpayer's "subordinate source" is the source that occupies the lesser portion of the taxpayer's time, attention, and labour or that does not form the centre of the taxpayer's work routine.

[77] The history of subsection 31(1) indicates that Parliament was distinguishing between farmers and individuals whose principal occupation was not farming. Parliament was not distinguishing between successful and unsuccessful farmers. If Parliament had intended that a "subordinate source" be determined solely with reference to reasonable or actual profitability, it could have enacted clear statutory language to that effect. An example of such language is found in subparagraph 110.6(1.3)(a)(ii).

[78] The Appellant had two sources of income – the farm and the medical practice – that each satisfied one of the two essential characteristics of a chief source of income. However, only the farm constituted the Appellant's main preoccupation and the centre of her work routine as evidenced by the commitment of her time, capital, energy and dedication.

(2) The Respondent

[79] The Respondent submits that the issue is whether farming is the Appellant's chief source of income in combination with some other subordinate source. In making this determination, the Court should apply amended subsection 31(1) in a manner that honours Parliament's intention to restores the legal test adopted in *Moldowan*.

[80] Parliament materially changed the combination question raised by subsection 31(1) by imposing a requirement that farming be the predominant source of income, in combination with another subordinate source. By adding the explicit requirement that the second source of income be subordinate to farming, Parliament directly addressed the criticism of *Moldowan* in paragraph 39 of *Craig* addressing the requirement in *Moldowan* that farming must be the predominant source of income when viewed in combination with another source.

[81] Parliament's changes to subsection 31(1) reflect the three classes of farmers described in *Moldowan*. The *Moldowan* test for "chief source of income" is both a relative and objective test, not a pure quantum measurement, and requires the Court to consider, with respect to each of the Appellant's sources of income, the amount of time spent, the capital invested, and the profitability, both actual and potential. The distinguishing features of a "chief source" are the Appellant's reasonable

expectation of income from either a single source of income or a combination of various sources, and ordinary mode and habit of work.

[82] The Tax Court has previously found with respect to the Appellant's 1997 and 1998 taxation years that her chief source of income was a combination of farming and her medical practice. The Appellant's net income from her medical practice has since increased from $73,984 and $88,991 in 1997 and 1998 to $648,480 and $697,050 in 2014 and 2015.

[83] The evidence establishes that at all relevant times farming alone was not the Appellant's chief source of income and that in accordance with the ordinary meaning of "subordinate" farming was subordinate to the Appellant's medical practice as a source of income. Consequently, the Appellant's chief source of income was her medical practice as her predominant source in combination with farming as a subordinate source.

[84] Because farming was neither the Appellant's chief source of income, nor her predominant source in combination with a subordinate source, the Appellant may deduct only $17,500 of her losses from farming in each of the Taxation years.

IV. Analysis

A. The Meaning of Subsection 31(1)

[85] For taxation years ending prior to March 21, 2003, the introductory text of subsection 31(1) stated:

> 31. (1) Where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income, for the purposes of sections 3 and 111 the taxpayer's loss, if any, for the year from all farming businesses carried on by the taxpayer shall be deemed to be the total of

[86] I will refer to this version of subsection 31(1) as the "original version".

[87] For taxation years ending after March 20, 2013, Parliament amended the introductory text of subsection 31(1) to state:

> 31.(1) If a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income that is a subordinate source of income for the taxpayer, then for the purposes of sections 3 and 111 the

> taxpayer's loss, if any, for the year from all farming businesses carried on by the taxpayer is deemed to be the total of . . .

[88] I will refer to this version of subsection 31(1) as the "amended version".

[89] As with any appeal dealing with the meaning of a statutory provision, I must apply the approach to statutory interpretation mandated by the Supreme Court of Canada. The Court recently reiterated the required approach in *R. v. Breault*, 2023 SCC 9 at paragraph 25:

> Every statutory interpretation exercise involves reading the words of a provision "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" . . .

[90] The Supreme Court also recently reiterated that the "particularity and detail of many tax provisions … lead [the Court] to focus carefully on the text and context in assessing the broader purpose" (*R. v. Loblaw Financial Holdings Inc.*, 2021 SCC 51 at paragraph 41).

[91] The text of subsection 31(1) is deceptively straightforward. The restriction on the deductibility of farm losses in subsection 31(1) applies to a taxation year of the Appellant if the Appellant's chief source of income for that taxation year was neither farming alone, nor a combination of farming and another source of income that was subordinate to the farming source of income.

[92] The difficulty lies in what Parliament meant by the words "chief source of income" and "subordinate source of income" and on what basis a court is to determine whether farming, or farming and some other subordinate source of income, is the Appellant's chief source of income. Before embarking on an analysis of these issues, however, it is helpful to consider why Parliament amended subsection 31(1).

[93] In *Craig*, the Supreme Court of Canada held that the original version did not require that the other source of income be subordinate to the farming source of income to be included in the combination of farming and another source. The Supreme Court of Canada thereby expressly overturned its decision in *Moldowan* on this narrow point.

[94] Parliament quickly responded to *Craig* by amending subsection 31(1). The technical notes that accompanied the 2013 amendment state:

> Subsection 31(1) of the Act restricts the farming losses deductible by a taxpayer against income from other sources in a taxation year unless the taxpayer's chief source of income for the year is farming or a combination of farming and some other source of income. This restriction ensures that taxpayers for whom farming is not the principal occupation are limited in their ability to deduct from their non-farm income losses from farming. . . .
>
> . . .
>
> Subsection 31(1) is amended to codify the interpretation of subsection 31(1) set out in the Supreme Court of Canada's decision in *Moldowan v. The Queen*, [1978] 1 SCR 480. Specifically, the amendment clarifies that a taxpayer will be limited to the deduction in respect of farm losses set out in subsection 31(1) if the taxpayer does not look to farming, or to farming and some subordinate source of income, for their livelihood. This amendment replaces the interpretation placed on section 31 by the Supreme Court of Canada in its decision in *The Queen v. Craig*, 2012 SCC 43, and applies to taxation years that end after March 20, 2013.
>
> [Emphasis and double emphasis added]

[95] Since the reason stated for amending subsection 31(1) was to codify the interpretation in *Moldowan* of the original version,[27] I will start my analysis of the amended version with the decision of the Supreme Court of Canada in *Moldowan*. I note, however, that since *Moldowan* did not interpret the amended version, strictly speaking, the decision in *Moldowan* is not a precedent for the interpretation of the amended version.

[96] In *Moldowan*, the Court addressed a claim for farm losses by an individual engaged in maintaining horses for racing, which is an activity included in the definition of "farming" in subsection 248(1). If it were not for the statutory definition, one might reasonably question whether raising horses for racing is "farming" within the ordinary meaning of that term.

[97] Writing for a unanimous Court, Dickson J., as he then was, identified early in his reasons the problematic nature of the text of the original version:

> The next thing to observe with respect to s. 13(1) is that it comes into play *only* when the taxpayer has had a farming loss for the year. That being so, it may seem strange that the section should speak of farming as the taxpayer's chief source of income for the taxation year; if in a taxation year the taxpayer suffers a loss on his farming operations it is manifest that farming would not make any contribution to

[27] See, also, Stavropoulos, Canada: Tax Policy Bewilderment - Moldowan Is Reincarnated In Budget 2013.

> the taxpayer's income in that year. On a literal reading of the section, no taxpayer could ever claim more than the maximum $5,000 deduction which the section contemplates; the only way in which the section can have meaning is to place emphasis on the words "source of income".[28]
>
> [Emphasis in bold added]

[98] Dickson J. goes on to observe that in the case of farming the phrase "source of income" contemplates the existence of a business.[29] In *Stewart*, the Supreme Court of Canada stated:

> 50 It is clear that in order to apply s. 9, the taxpayer must first determine whether he or she has a source of either business or property income. . . . [I]t is clear that some taxpayer endeavours are neither businesses nor sources of property income, but are mere personal activities. As such, the following two-stage approach with respect to the source question can be employed:
>
> (i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?
>
> (ii) If it is not a personal endeavour, is the source of the income a business or property?
>
> The first stage of the test assesses the general question of whether or not a source of income exists; the second stage categorizes the source as either business or property.
>
> 51 Equating "source of income" with an activity undertaken "in pursuit of profit" accords with the traditional common law definition of "business," i.e., "anything which occupies the time and attention and labour of a man for the purpose of profit": *Smith*, *supra*, at p. 258, *Terminal Dock*, *supra*. …
>
> . . .
>
> 52 We emphasize that this "pursuit of profit" source test will only require analysis in situations where there is some personal or hobby element to the activity in question. … Where the nature of an activity is clearly commercial, there is no need to analyze the taxpayer's business decisions. Such endeavours necessarily involve the pursuit of profit. As such, a source of income, by definition, exists, and there is no need to take the inquiry any further.

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[28] Page 485.

[29] Ibid.

> . . .
>
> 60 In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the activity contains no personal element and is clearly commercial, no further inquiry is necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a sufficiently commercial manner to constitute a source of income. However, to deny the deduction of losses on the simple ground that the losses signify that no business (or property) source exists is contrary to the words and scheme of the Act. Whether or not a business exists is a separate question from the deductibility of expenses. . . .[30]

[99] In *Brown v. R.*, 2022 FCA 200, the Federal Court of Appeal rephrased the test adopted by the Supreme Court of Canada as follows:

> The approach to determine if a person has a source of income can therefore be rephrased as follows:
>
> Is there a personal or hobby element to the activity in question?
>
> - If there is a personal or hobby element to the activity in question, the next enquiry is whether "the activity is being carried out in a commercially sufficient manner to constitute a source of income" (*Stewart*, at para. 60).
>
> - If there is no personal or hobby element to the activity in question, the next enquiry is whether the activity is being undertaken in pursuit of profit.[31]

[100] With respect, this rephrasing does not reflect the test stated in *Stewart*, nor is it justified by the approach taken by Noël, C.J. in *R. v. Paletta*, 2022 FCA 86 (*"Paletta"*).

[101] In *Paletta*, Noël, C.J. questioned the proposition that "where an activity appears to be inherently commercial, it is a source of income even where the activity is not in fact carried on for commercial reasons or with a view to profit".[32]

[102] The Tax Court judge had found as a fact that the taxpayer did not pursue the transactions in issue for profit. With respect to that finding, Noël, C.J. states:

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[30] *Stewart* at paragraphs 50 to 52 and 60.

[31] *Brown* at paragraph 25.

[32] *Paletta* at paragraph 33.

> *Stewart* teaches that, in the absence of a personal or hobby element, where courts are confronted with what appears to be a clearly commercial activity **and the evidence is consistent with the view that the activity is conducted for profit**, they need go no further to hold that a business or property source of income exists for purposes of the Act. However, where as is the case here, **the evidence reveals** that, despite the appearances of commerciality, **the activity is not in fact conducted with a view to profit**, a business or property source cannot be found to exist.
>
> [Emphasis added]

[103] The assumption underlying the test in *Stewart* is that a commercial activity is undertaken for profit.[33] Consequently, unless there is some reason to question this assumption in the circumstances of a particular case, an activity that is on its face clearly a commercial activity as opposed to a personal undertaking is considered a source of income.

[104] In *Paletta*, Noël, C.J. found that because the evidence revealed that there was no pursuit of profit notwithstanding the apparently commercial nature of the transactions there could not be a business source of income.

[105] Noël, C.J. was not proposing an additional layer of inquiry into whether a commercial activity was in pursuit of profit. Rather, Noël, C.J. recognized that the peculiar facts of the *Paletta* case called into question the validity of the assumption underlying the test in *Stewart*. Noël, C.J. simply found that the transactions in *Paletta* had the "appearance" of being commercial but in fact were not "clearly commercial" when one considered all the circumstances.

[106] The second step suggested in *Brown* adds to the test in *Stewart* a separate inquiry into whether a taxpayer pursues a commercial activity for profit. This approach would return the test to its state prior to the decision in *Stewart*, where the "pursuit of profit" aspect of a business was the focus even for clearly commercial activities. As stated in *Stewart*:

> . . . Where the activity contains no personal element and **is clearly commercial**, **no further inquiry is necessary**.[34]

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[33] See, for example, *Stewart* at paragraph 51.

[34] *Stewart* at paragraph 60. See, also, paragraph 52.

[Emphasis and double emphasis added]

[107] During the Taxation Years, the Appellant's farm was clearly a commercial activity of the Appellant.[35] For many years prior to and including the Taxation Years, the Appellant invested heavily in her farming activities to build up a herd of organically certified cattle for sale and the infrastructure needed to support and grow that herd. The Appellant employed four full-time workers year-round and additional part time workers on a seasonal basis in the pursuit of her farming activities. When faced with obstacles such as a lack of processing capacity, the Appellant took commercially reasonable steps to address the obstacles.

[108] The nature of the Appellant's undertaking (raising organically certified cattle for sale) and the manner of pursuing that undertaking were both consistent with a clearly commercial activity. There is no evidence that calls into question the assumption underlying the test in *Stewart* that the Appellant pursued her clearly commercial farming activity for profit.

[109] Quite the contrary, the intention of the Appellant, supported by the objective evidence, was to create a "viable farming business"[36] and she diligently put all her available time, effort and money towards that objective. Unfortunately, the Appellant has not yet achieved her objective. Nevertheless, the Appellant's farm is clearly a commercial activity and therefore under *Stewart* a source of business income.

[110] The next question is whether the Appellant's farming business is her "chief source of income" either alone or in combination with a source of income that is subordinate to her farming source of income. The adjective "chief" is used in subsection 31(1) in the sense of "most important", "principal" or "greatest".[37] The adjective "subordinate" is used in subsection 31(1) in the sense of "secondary to some other (chief or principal) thing."[38]

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[35] *Craig* at paragraph 39.

[36] The Appellant defined a viable farm business as one that earned a profit.

[37] The *Oxford English Dictionary* (online), entry 3, defines the adjective "chief" as follows: "At the head or top in importance; most important, influential, or active; principal, foremost, greatest . . ."

[38] The *Oxford English Dictionary* (online), entry 1, defines the adjective "subordinate" as follows: "Dependent upon, subservient to, or secondary to some other (chief or principal) thing."

[111] The French version of subsection 31(1) does not refer to a "chief source of income". Instead, the French text of the original version and the amended version states, respectively:

> Lorsque le revenu d'un contribuable, pour une année d'imposition, ne provient principalement ni de l'agriculture ni d'une combinaison de l'agriculture et de quelque autre source
>
> And
>
> Si le revenu d'un, pour une année d'imposition, ne provient principalement ni de l'agriculture ni d'une combinaison de l'agriculture et d'une autre source qui est une source secondaire de revenu pour lui

[112] As with the English text, the French text is phrased as a negative (i.e., the taxpayer's income is neither from farming, nor from etc.). The French text of the old version and the new version starts by focusing the inquiry on the taxpayer's income for a taxation year. The French text of the amended version then asks if that income is neither derived mainly (or primarily or chiefly) from farming, nor from a combination of farming and another source which is a secondary source of income.

[113] Neither *Moldowan* nor *Craig* address the French text of the original version. It is apparent, however, that the French text raises the same basic concern identified by Dickson, J. in *Moldowan* that arises because subsection 31(1) comes into play only when the taxpayer has had a farming loss for the year. Therefore, a literal reading of the French text would mean that no taxpayer could ever claim more than the maximum deduction provided by the subsection. Common sense dictates that this cannot have been Parliament's intention as such a result is nonsensical and absurd.

[114] To address this concern, Dickson J. adopts an approach that is not based purely on the quantum of income from each relevant source. Dickson J. states:

> Whether a source of income is a taxpayer's "chief source" of income is both a relative and objective test. **It is decidedly not a pure quantum measurement. A man who has farmed all of his life does not cease to have his chief source of income from farming because he unexpectedly wins a lottery.** The distinguishing features of "chief source" are the taxpayer's reasonable expectation of income from his various revenue sources and his ordinary mode and habit of work. **These may be tested by considering, *inter alia* in relation to a source of income, the time spent, the capital committed, the profitability both actual and potential.** A change in the taxpayer's mode and habit of work or reasonable

> expectations may signify a change in the chief source, but that is a question of fact in the circumstances.
>
> . . .
>
> The reference in s. 13(1) to a taxpayer whose source of income is a combination of farming and some other source of income . . . **contemplates a man whose major preoccupation is farming.** But it recognize [sic] that such a man may have other pecuniary interests as well, **such as income from investments, or income from a side-line employment or business.** The section provides that these subsidiary interests will not place the taxpayer in class (2) and thereby limit the deductibility of any loss which may be suffered to $5,000. **While a quantum measurement of farming income is relevant, it is not alone decisive. The test is again both relative and objective, and one may employ the criteria indicative of "chief source" to distinguish whether or not the interest is auxiliary.** A man who has farmed all of his life does not become disentitled to class (1) classification simply because he comes into an inheritance. On the other hand, a man who changes occupational direction and commits his energies and capital to farming as a main expectation of income is not disentitled to deduct the full impact of start-up costs. [39]

[Emphasis and double emphasis added]

[115] Dickson J. identifies the distinguishing features of a "chief source" of income as the taxpayer's reasonable expectation of income from various revenue sources and the taxpayer's ordinary mode and habit of work. Both of these features may be tested by considering, among other things, the time spent, the capital committed, and the actual and potential profitability of the source. The list of factors identified by Dickson J. is not exhaustive because all the facts and circumstances must be considered.

[116] The general approach adopted by Dickson J., and the factors and examples he identifies, indicate that a chief source of income is the main source to which the individual looks for his or her livelihood. This source of income may have existed for a period of time and be a well-established source of income, or it may be a new source of income that has taken over the role of a former source as the main source of income because of a change in occupation. In every case, the objective facts and circumstances will dictate the characterization of each source of income of the individual.

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[39] *Moldowan* at pages 486 and 488.

[117] The farming source of income need not exist in isolation; it may exist with other sources of income, and it may be the combination of these sources that the individual relies upon for his or her livelihood. However, unlike in *Craig*, in all cases, the farming source of income must be the main source of income of the individual. The individual may supplement the farming source of income with other sources of income such as investment income or income from a side employment or side business, but any supplemental source of income must be subordinate, or secondary, to the farming source of income. Again, the objective facts and circumstances will dictate the characterization of each source of income of the individual.

[118] Dickson J.'s references to a reasonable expectation of income and to potential profitability highlight the need for an objective assessment of the income generating history and income generating potential of the sources of income of the taxpayer. The question is whether past income and expected future income from the sources of income of the taxpayer support the conclusion that the farming source of income, or the farming source of income in combination with other subordinate sources, is the main source to which the taxpayer looks for his or her livelihood.

[119] Subsection 31(1) does not impose a reasonable expectation of profit requirement and does not require a court to second guess the taxpayer's business judgment because the farming source of income has losses. The analysis of past and future income is an objective analysis of what has occurred and what is expected to occur. As an objective assessment, any expectation of future income must be consistent with all the facts and circumstances.

[120] Contrary to the able submissions of counsel for the Appellant, the income producing history and potential of the farming business is not ignored when considering the farming source of income in the context of other sources of income. This is demonstrated by Dickson J.'s approach in *Moldowan*:

> . . . He devoted considerable effort towards launching new ventures. Horseracing consumed only several hours of his day and that for part of the year only. His commitment of capital was cautious. The nature of the enterprise is risky. It is difficult reasonably to plan to devote energies to it principally in the expectation of a steady living. **He suffered constant and increasing losses with the exception of two years in which minor profits were made**. Although none of the above is

> alone determinative, together they suggest only one business venture of several, with nothing distinguishing in the way of "a chief source of income." [40]
>
> [Emphasis added]

[121] The general approach in *Moldowan* interpreted in the foregoing manner is consistent with the text, context and purpose of the new version. I will therefore analyze the Appellant's circumstances with the foregoing considerations in mind.

B. Application of the Law to the Facts

[122] The Appellant commenced her medical practice in 1975 in the village of Cambridge-Narrows and shortly thereafter purchased the nearby farm. The farm was not a producing farm at the time of purchase. The Appellant continued to practice medicine full time while she undertook a long and varied journey toward achieving her goal of creating a self-sustaining farming business. To the end of 2015, that goal had not been achieved.[41]

[123] The Appellant continued to practice medicine full-time up until and throughout 2014 and 2015 committing by her own estimate somewhere between 1,837 and 1,933 hours per year to her profession.[42] The Appellant employed three-part time employees in her medical practice. The medical practice required little capital and produced almost all of the Appellant's net income in 2014 and 2015.[43]

[124] The Appellant testified that she worked approximately 2,500 hours on her farm per year. In addition, the Appellant employed four full-time and three part-time employees on the farm. The Appellant led a frugal life and devoted most of her income to her farm. No doubt the Appellant worked very hard to make a financial success of her farm and devoted all available financial resources to accomplish that goal.

[125] For 2014 and 2015, respectively, the Appellant earned gross revenues from her medical practice of $805,321.17 and $851,621.05 and earned gross revenues

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[40] *Moldowan* at pages 488 to 489.

[41] The farm earned a small net profit in two years in the 1990s.

[42] The Appellant estimated her hours, which included 24 to 32 unscheduled hours a month. The range is created by the estimate of unscheduled hours.

[43] According to the spreadsheet at tab 18 of the Joint Book, the contents of which were not contested, in 2014 and 2015, respectively, in addition to the net income from her medical practice, the Appellant also earned $9,800 and $26,933 of dividends and in 2015 the Appellant also earned $289 of interest and $1 of other income.

from her farming activities of $176,433.23 and $31,128.50. The Appellant earned net income from her medical practice of $648,605.35 and $697,050.77 and incurred net losses from her farming activities of $530,363.12 and $595,904.29.

[126] The Appellant testified that her only source of income for her medical practice was the amounts paid to her by the province of New Brunswick. Using the per-visit billing rate of $43.50 provided by the Appellant, the Appellant had approximately 18,500 patient visits in 2014 and 19,500 patient visits in 2015.[44]

[127] Based on the 1549 hours per year the Appellant determined she spent on appointments this would require seeing a patient approximately every five minutes for every hour worked. It is therefore unclear whether the Appellant's estimation of the hours spent seeing patients is entirely accurate notwithstanding the Appellant's best efforts to reconstruct her hours from her handwritten appointment book for 2015.

[128] I have no doubt that in 2014 and 2015 the Appellant had expectations of increased revenue from farming in future years, but the objective facts indicate that there were still substantial expenditures needed to bring any such expectations to fruition. As well, the Appellant provided no projections of farming income for years after 2015 and the 2012 business case,[45] which assumed that the processing plant would be online in 2013, was not reflective of the actual situation in 2014 and 2015. In short, there is no objective evidence that as of 2015 the farm would become a self-sustaining business in the foreseeable future notwithstanding the best efforts of the Appellant.

[129] There is no doubt that the Appellant was committed to both her role as a medical doctor in a rural community and to her farming business. However, the Appellant's farm activities took place before and after normal working hours and gave way to her medical practice if a medical issue arose that required the Appellant's attention. This is hardly surprising given the professional obligations that accompany a full-time medical practice. It is clear that the Appellant took her professional obligations, and her role as a medical doctor for the rural community of Cambridge-Narrows, very seriously.

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[44] The number of visits is calculated by dividing 43.50 into the Appellant's medical practice revenue for 2014 and 2015, respectively.

[45] Exhibit A-2.

[130] The Appellant testified that she would attend medical outcalls as required. However, as to the functioning of her farm in her absence, the Appellant observed:

> I can't tell you what happened when I was working in my medical office, but I do know there was a lot of conflict, he might have tried to supervise the employees most of the time. Part of the conflict was they resented that and they took the direction from me.

[131] Based on the foregoing, I find as a fact that the centre of the Appellant's work routine was her medical practice, which she attended not only during normal working hours but also as needed to address unscheduled matters such as emergencies. The volume of scheduled patient visits in 2014 and 2015 reinforces this finding.

[132] I recognize that the Appellant invested millions of dollars in her farm. However, the Appellant acquired the farm only after she commenced her medical practice, the farm was not a going concern at the time of purchase, all of the Appellant's investment in the farm has been funded by the net income from the Appellant's medical practice and despite the Appellant's best efforts the farm requires the financial support of that income to survive as a business.

[133] The objective evidence is that in 2014 and 2015 and in all but two prior years only the medical practice produced net income and, based on the trends shown in the spreadsheet at tab 18 of the Joint Book, as of 2015 only the medical practice could reasonably be expected to produce material amounts of net income in the foreseeable future.

[134] In summary, for the Taxation Years and for all prior taxation years in which the Appellant carried on the farming business, the Appellant's work routine centered around her medical practice. The Appellant looked to her medical practice for her livelihood and used the net income from her medical practice to fund her farming business, which could not survive without that funding. The farming business has always been subordinate to the medical practice as a source of income of the Appellant and there is no evidence that that will change in the foreseeable future.

[135] I therefore conclude that the Appellant's chief source of income in 2014 and 2015 was her medical practice and that the Appellant's farming business was a subordinate source of income. Consequently, pursuant to subsection 31(1), the Appellant's loss from farming for each of the 2014 Taxation Year and the 2015 Taxation Year is restricted to $17,500.

[136] The result in this appeal is most unfortunate. The amended version of the rule has the effect in this case of precluding the operator of a *bona fide* farming business from deducting losses that would be available to the operator of any other type of business.[46] The facts amply demonstrate how difficult it is to build a viable farming business from scratch even if one dedicates an inordinate amount of time and capital and has the assistance of government programs. Yet the amended version of the rule punishes such efforts to the detriment of those willing to commit that time and capital – a result that in *Craig* the Federal Court of Appeal and the Supreme Court of Canada were no doubt attempting to avoid. Unfortunately, the Tax Court of Canada is not a court of equity,[47] and I must apply the law as it is written without regard to the fairness of the result.[48]

[137] For the foregoing reasons, the appeal of the Reassessments is dismissed with costs to the Respondent. The parties shall have 60 days from the date of this judgment to agree on costs. If the parties are unable to agree on costs, the Respondent shall have a further 30 days to make submissions on costs not to exceed ten pages and the Appellant shall have a further 30 days after the date of the Respondent's submissions to make submissions in response to the Respondent's submissions not to exceed ten pages. I observe without deciding the matter that this would appear to be an appropriate case for costs in accordance with Tariff B in Schedule II of the Rules.

Signed at Ottawa, Canada, this 8th day of November 2023.

"J.R. Owen"

Owen J.

[46] The losses from the same quantum of expenditures may be different for an accrual basis taxpayer.

[47] The Tax Court of Canada is a statutory court the jurisdiction of which is determined by the *Tax Court of Canada Act*.

[48] *Singh v. R.*, 2020 FCA 146 at paragraph 9 and *Atlantic Owl (PAS) Limited Partnership et al v. President of the Canada Border Services Agency*, 2022 FCA 214 at paragraph 7.

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DATE OF JUDGMENT:	November 8, 2023

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