

BETWEEN:

DAVE'S DIESEL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Appeal heard on May 10, 2022, at Hamilton, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Counsel for the Appellant: Mark S. Grossman

Counsel for the Respondent: Christopher Ware

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**JUDGMENT**

The appeals from assessments made under the *Income Tax Act* for the Appellant's 2013 and 2014 taxation years are dismissed with costs in accordance with the Tariff.

Signed at Ottawa, Canada, this 10<sup>th</sup> day of June 2022.

“David E. Spiro”

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Spiro J.

Citation: 2022 TCC 62  
Date: 20220610  
Docket: 2018-1618(IT)G

BETWEEN:

DAVE'S DIESEL INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Spiro J.

[1] In trying to find a way to remanufacture used fuel injectors for diesel engines (the “project”), did the Appellant engage in “experimental development” during its 2013 and 2014 taxation years within the meaning of the phrase “scientific research and experimental development” (“SR&ED”) in subsection 248(1) of the *Income Tax Act* (the “Act”)? The Appellant says that it did. The Respondent argues it did not. For the reasons that follow, I agree with the Respondent.

[2] In computing tax for its 2013 and 2014 taxation years, the Appellant deducted investment tax credits of \$26,865 and \$31,134, respectively, on the basis that its work on the project during those years constituted “experimental development”.<sup>1</sup> On assessment, the Minister of National Revenue (the “Minister”) disallowed the deduction of those credits. These are the appeals of those assessments.

#### I. The Legal Test for SR&ED

[3] The term “scientific research and experimental development” is defined in subsection 248(1) of the Act:

248(1) ...

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

- (a) basic research, namely, work undertaken for the advancement of scientific knowledge without a specific practical application in view,
- (b) applied research, namely, work undertaken for the advancement of scientific knowledge with a specific practical application in view, or
- (c) experimental development, namely, work undertaken for the purpose of achieving technological advancement for the purpose of creating new, or improving existing, materials, devices, products or processes, including incremental improvements thereto,

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

- (d) work undertaken by or on behalf of the taxpayer with respect to engineering, design, operations research, mathematical analysis, 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) market research or sales promotion,
- (f) quality control or routine testing of materials, devices, products or processes,
- (g) research in the social sciences or the humanities,
- (h) prospecting, exploring or drilling for, or producing, minerals, petroleum or natural gas,
- (i) the commercial production of a new or improved material, device or product or the commercial use of a new or improved process,
- (j) style changes, or
- (k) routine data collection;

[4] In *Northwest Hydraulic Consultants Ltd. v The Queen*, [1998] 3 CTC 2520 [*Northwest Hydraulic*], Justice Bowman, as he then was, provided guidance on how to interpret and apply the definition of “SR&ED” in subsection 248(1) of the Act. The five criteria set out by Justice Bowman in *Northwest Hydraulic* have been endorsed by the Federal Court of Appeal on several occasions, most recently in *National R&D Inc. v Canada*, 2022 FCA 72, where Justice Rennie confirmed that those criteria “reflect the court’s understanding of what Parliament intended by subsection 248(1).”<sup>2</sup>

[5] *Northwest Hydraulic* teaches that if work is to qualify as “SR&ED” under subsection 248(1) of the Act, the following questions should be answered in the affirmative:

1. Was there a technological risk or uncertainty that could not be removed by routine engineering or standard procedures? The phrase “routine engineering” describes techniques, procedures and data that are generally accessible to competent professionals in the field.
2. Did the person claiming to be doing SR&ED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty?
3. Did the procedures adopted accord with established and objective principles of scientific method, characterized by trained and systematic observation, measurement and experiment, and the formulation, testing and modification of hypotheses?
4. Did the process result in a technological advance?
5. Was a detailed record of the hypotheses, tests, and results kept as the work progressed?

## II. The Nature of the Project

[6] The Appellant called Mr. Rushi Dave as its only witness. Mr. Dave was General Manager of the Appellant in 2013 and 2014. He was one of four individuals who worked on the project.

[7] Mr. Dave did not study mechanical engineering and has no degree, certificate or designation in the field. However, he did study business and

marketing and worked for a large advertising, marketing, and public relations firm before joining the Appellant 15 years ago.

[8] Mr. Dave's father established the Appellant's business in Brampton, Ontario a decade before starting the project. Although Mr. Dave described the Appellant as a fuel injection shop for the diesel engine industry, it was not a mechanic shop as no mechanics worked there.

[9] Before starting the project, the Appellant remanufactured components of used mechanical fuel injection systems for dealers under warranty programs offered by the manufacturers of the injectors. The Appellant went about remanufacturing components of used mechanical fuel injectors in the following way:

The process was to receive the component from an engine shop, like the dealership, then we would disassemble it, do an assessment of its failures, and then reassemble it with brand new components, and put it on a test stand to recalibrate [it] to [the] provided manufacturer specifications.<sup>3</sup>

[10] By 2007 or 2008, electronic fuel injection systems began to replace mechanical fuel injection systems in diesel engines. The Appellant found itself in difficulty as manufacturers would no longer pay the Appellant to remanufacture components of their used fuel injection systems. Presumably, they wanted their customers to purchase new units as replacements. In any event, the Appellant needed a new source of income.

[11] The Appellant, therefore, set out to find a way to remanufacture injectors on its own. Those injectors were found in diesel-powered trucks, generators, marine equipment, and construction and farm equipment. The Appellant studied three types of injectors as part of the project:

- (a) Delphi 4 Pin (an electronic fuel injector used in certain Volvo diesel engines);
- (b) C7 (an electronic fuel injector used in certain Caterpillar diesel engines); and
- (c) ISX (a mechanical fuel injector used in certain Cummins diesel engines).

[12] Four individuals worked on the project in 2013 and 2014: Mr. Dave, his father, and two unskilled labourers employed by the Appellant. Mr. Dave testified that the Appellant “would hire unskilled labourers, train them, and build them into technicians, and we would get them to do this work with myself and my father.”<sup>4</sup> It was never made clear exactly what training was given to these unskilled labourers. What is clear, however, is that none of the individuals involved in the project in 2013 or 2014 were engineers or mechanics.

[13] At trial, Mr. Dave produced a fully-assembled fuel injector as well as a disassembled fuel injector of each type (Exhibits AP-1 to AP-6). He described certain technical differences between each of the three types. None of those differences is material as the process employed by the Appellant was the same for each type. The Appellant appears to have followed a four-step process. The following steps were taken by the Appellant in respect of each type of injector:

Step 1: Taking apart the injector to understand how it worked

[14] The Appellant did not understand how the injectors worked, so it needed to take them apart first. This required the use of tools allowing it to take the injectors apart without breaking them. The Appellant had to fabricate some of its own tools to accomplish this task. After a particular type of injector was taken apart, the Appellant inspected it with a view to understanding exactly how it worked.

Step 2: Simulating the operation of the injector and determining which parts of the injector were likely to fail

[15] The Appellant would place the injector in one of its machines to simulate its operation with a view to ascertaining which of its parts were likely to fail.

Step 3: Purchasing or modifying parts designed to prevent those failures

[16] The Appellant would purchase or modify parts that it thought were likely to fail with a view to meeting, or improving on, the manufacturer’s original specifications.

Step 4: Incorporating those parts into used injectors to be remanufactured by the Appellant

[17] The final step would be the assembly of a remanufactured used fuel injector that met or exceeded the specifications of a new one. The Appellant hoped to remanufacture all three types of injectors with used injectors as “cores”. It hoped to sell the remanufactured injectors at a price below that charged by manufacturers for new ones.

[18] The Appellant did not remanufacture any of the three types of injectors during its 2013 or 2014 taxation years.

The Meaning of “Remanufacturing”

[19] Before reviewing the Appellant’s documents, it is important to understand exactly what the Appellant meant by “remanufacturing”. Mr. Dave described “remanufacturing” in this context as:

... the process of taking a used component, disassembling it, identifying its failure points, rectifying those failure points, and sometimes improving those failure points so it can be a better injector, and putting it back together and being able to sell it to the end user or resellers or engine rebuilders.<sup>5</sup>

III. The Documentary Evidence

[20] Mr. Dave produced a handwritten diary for each of 2013 and 2014 (Exhibits A-3 and A-4). This is how he described the diaries (which he called “notebooks”):

So essentially I keep a notebook for the purposes of SR&ED. And what I do is at the end of every day, if we’ve done any SR&ED work, that I just go and write it down quickly; what was done and what we did, and who did it.<sup>6</sup>

[21] Most of the diary entries are rather concise. The following are some of the more descriptive ones (square brackets indicate the type of injector tested):

January 4, 2013

Broke [Delphi 4 Pin] injector trying to understand how it comes apart.

January 23, 2013

Purchased and tested 12 [C7] cores and found all to be operating differently and having leaks from different sections of injector.

February 25, 2013

Received prototype [C7 adapter] from machine shop and installed. The thinner O-ring would not stand up to the pressure and kept breaking.

March 6, 2013

Continued [ISX] trials and documenting results. Not ideal and still not operating as expected. No atomization.

March 15, 2013

Used a thin steel punch and applied pressure from the top of the [Delphi 4 Pin] injector and popped out the terminal insulating sleeve and seal.

March 21, 2013

Ran trials using [C7] cores based on Ray's findings.<sup>7</sup>

May 14, 2013

Diesel in oil leaks at top of [ISX] injector; trial test to better understand faults.

July 17, 2013

Continued to run trials [ISX]; Still trying to determine how it comes apart.

September 12, 2013

Run [Delphi 4 Pin] trials with different shim thicknesses.

September 25, 2013

Spring pressure trials [Delphi 4 Pin].

October 12, 2013

Test 4 [C7] injectors with rebuilt control valves and all leaked badly. There were no leaks before.

October 18, 2013

Created a spring cage pressure test to define a different shim for every [Delphi 4 Pin] injector.

October 23, 2013

Tested again and [Delphi 4 Pin] valve and spool still leaked.

November 15, 2013

Test [C7] injectors; Everything inside seems to always be worn and full of filings.



November 26, 2013

Test [C7] injector with oversized piston and still had internal leaks.

January 13, 2014

Test [C7] valve and still leaking.

April 14, 2014

Test [ISX] injectors with prototype springs.

April 15, 2014

All [ISX] springs failed test and no solution to date.

July 21, 2014

Tried different materials and tested [ISX].

July 22, 2014

Test proved successful after a number of trials [ISX]; Not repeatable.

November 4, 2014

All [ISX] tests failed.

November 24, 2014

Test results proving to work [Delphi 4 Pin].

December 3, 4, 5, 6, 2014

Test and record results [C7].<sup>8</sup>

December 19, 2014

Analyze [C7] results; No consistency.

December 20, 2014

No consistency in [C7] results.

December 23, 2014

Unable to build valve or rebuild [C7] injector at this time.

[22] The Appellant also produced a partial record of a single test performed on a C7 injector in 2013 (Exhibit A-2 reproduced at Appendix “A”) and a partial record of a single test performed on the same type of injector in 2014 (Exhibit A-1 reproduced at Appendix “B”).

[23] As Mr. Dave presented his oral evidence, he showed the Court a series of colour photographs illustrating the machines and tools used in the project. Counsel for the Respondent objected to their admission on the basis that none of the usual notice requirements in subsection 89(1) of the *Tax Court of Canada Rules*

(*General Procedure*) (the “Rules”) had been followed.<sup>9</sup> As Mr. Dave offered each photograph to illustrate his evidence, I identified it for the record and reserved my ruling on its admissibility.

[24] I have now decided that each of those photographs should be admitted into evidence as they satisfy the usual conditions for the admissibility of photographs, namely:

- (a) accuracy in representing the facts;
- (b) fairness and absence of any intention to mislead; and
- (c) verification on oath by a person capable of doing so.<sup>10</sup>

#### IV. Applying the Legal Test to the Facts

[25] Having reviewed all of the evidence in respect of the project, the question is whether the Appellant has demonstrated, on a balance of probabilities, that the work performed satisfies the *Northwest Hydraulic* criteria.

##### **1. Was there a technological risk or uncertainty that could not be removed by routine engineering or standard procedures? The phrase “routine engineering” describes techniques, procedures and data that are generally accessible to competent professionals in the field.**

[26] The Appellant says that the relevant “technological uncertainty” was whether it could successfully develop a process to remanufacture the three different types of injectors.<sup>11</sup>

[27] The fact that a small group of non-engineers and non-mechanics, including two unskilled labourers, did not know whether they could remanufacture three types of used fuel injectors tells us nothing about whether it was “technologically uncertain” that those fuel used injectors could have been remanufactured by a competent professional in the field.

[28] The Appellant rests its case on the subjective knowledge of the four non-engineers and non-mechanics who worked on the project. To them, every aspect of the project was a “technological uncertainty”. The “technological uncertainty” standard, however, is not subjective. If it were subjective, a grade school student trying to build a simple electric motor would meet the test. When she was a member of this Court, Justice Monaghan noted that “technological uncertainty”:

. . . does not arise simply because the Appellant does not have the requisite knowledge. The question is whether the uncertainty identified by the Appellant is an uncertainty to those knowledgeable and experienced in the relevant field.<sup>12</sup>

[29] The onus was on the Appellant to demonstrate that it was “technologically uncertain” that the used fuel injectors could have been remanufactured by a competent professional in the field – a mechanical engineer, for example.<sup>13</sup>

[30] But even if I had found the requisite “technological uncertainty”, I would still have no basis on which to decide whether the steps taken by the Appellant were anything other than “routine engineering” for a competent professional in the field. There was no evidence that taking a fuel injector apart without breaking it was anything other than “routine engineering” for such a professional. Similarly, there was no evidence that understanding how the fuel injectors worked was anything but “standard procedure” for a competent professional in the field.

**2. Did the person claiming to be doing SR&ED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty?**

[31] Mr. Dave testified that the Appellant’s hypothesis was:

. . . whether we could develop a remanufacturing procedure and be able to remanufacture these injectors, and that’s the hypothesis.<sup>14</sup>

[32] As noted above, the Appellant also claims that the “technological uncertainty” was whether it could successfully develop a process to remanufacture the fuel injectors. Only in *Alice’s Adventures in Wonderland* could it be argued that one’s hypothesis is the “technological uncertainty” and that the “technological uncertainty” is one’s hypothesis.<sup>15</sup>

[33] The Appellant faces two other challenges. First, as noted above, the Appellant has not adduced any evidence demonstrating that it was “technologically uncertain” that the fuel injectors could have been remanufactured by a competent professional in the field. Second, the Appellant’s single, overarching “hypothesis” is not the type of hypothesis contemplated by the second criterion in *Northwest Hydraulic*.

[34] In *Northwest Hydraulic*, Justice Bowman describes a five-stage process to determine whether the person claiming to have done SR&ED formulated hypotheses specifically aimed at reducing or eliminating the technological uncertainty. According to Justice Bowman, such a person would have engaged in:

- a. the observation of the subject matter of the problem;
- b. the formulation of a clear objective;
- c. the identification and articulation of the technological uncertainty;
- d. the formulation of an hypothesis or hypotheses designed to reduce or eliminate the uncertainty; and
- e. the methodical and systematic testing of the hypotheses.

[35] Justice Bowman uses the plural “hypotheses” throughout *Northwest Hydraulic*, particularly in the second, third, and fifth criteria. The *Northwest Hydraulic* criteria do not contemplate a single, overarching hypothesis, as the Appellant contends, but a discrete hypothesis that precedes each test and that is subject to modification in light of the results of that particular test.

[36] An example will illustrate the point. Here is the diary entry for February 25, 2013:

February 25, 2013

Received prototype [C7 adapter] from machine shop and installed. The thinner O-ring would not stand up to the pressure and kept breaking.

[37] The hypothesis to be tested might have been: “An O-ring 5 mm. thick should withstand pressure of 50 lb/ft. as effectively as an O-ring 7.5 mm. thick”. That hypothesis would have been the subject of the test. The results of the test would

have been recorded and analyzed and modifications made to the hypothesis in light of the test results.

[38] As Justice Sommerfeldt has noted, a hypothesis is “a statement to be tested by an experiment or a trial.”<sup>16</sup>

[39] In respect of any particular test performed in 2013 or 2014, the Appellant has failed to show:

- (a) the formulation of a hypothesis (e.g., in respect of the O-ring on February 25, 2013, or the shim thickness on September 12, 2013, or the spring pressure on September 25, 2013, etc.);
- (b) the testing of that hypothesis; and
- (c) the modification of the hypothesis in light of the results of that test.

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

[40] As noted above, there is no evidence that in respect of any particular test the Appellant formulated a particular hypothesis, tested that hypothesis, and modified that hypothesis in light of the results of that test.

[41] There is no evidence that any of the four individuals involved in the project used “established and objective principles of scientific method” in their testing. Even a cursory review of the diary entries at paragraph 21 above suggests that the project had more in common with “tinkering” or “simple trial and error” than it did with the scientific method.<sup>17</sup>

**4. Did the process result in a technological advance?**

[42] The process might have resulted in an “environmental advance” as used fuel injectors would be remanufactured rather than dumped in landfills. It might have resulted in a “financial advance” for the Appellant as it could fill the hole in income left by the withdrawal of the warranty programs. But, after hearing all the evidence, I still have no idea whether the project resulted in a “technological advance”.

**5. Was a detailed record of the hypotheses, tests, and results kept as the work progressed?**

[43] The Appellant has not satisfied its onus to demonstrate that it recorded, in respect of any particular test performed in 2013 and 2014:

- (a) the formulation of a hypothesis;
- (b) the testing of that hypothesis; and
- (c) the modification of that hypothesis in light of the results of the test.

[44] Take the shim thickness test of September 12, 2013 or the spring pressure test of September 25, 2013 as examples. What shim thicknesses were tested? What were the results of each test? Which shim thicknesses passed the test? What was the standard selected for passing the test? For the spring pressure test, what pressures were applied and for how long? What were the results of each test at each pressure and for each duration? At what pressure, and at what point, did each spring fail? There is no record of the answers to these questions.

[45] The problem is not only the Appellant's lack of documentation. The problem is that the Appellant's lack of documentation makes it almost impossible for it to meet its onus in respect of the second and third criteria in *Northwest Hydraulic*. A partial record of a single test performed on a C7 injector in 2013 (Exhibit A-2 reproduced at Appendix "A") and a partial record of a single test performed on the same type of injector in 2014 (Exhibit A-1 reproduced at Appendix "B") are insufficient to discharge that onus.

V. Conclusion

[46] The Appellant has failed to meet its onus to show, on a balance of probabilities, that its work on the project in 2013 or 2014 qualifies as "experimental development" within the meaning of "SR&ED" in subsection 248(1) of the Act. Accordingly, the appeals must be dismissed.

[47] At the conclusion of the hearing, I asked each party for their position on costs. The Appellant requested an opportunity to make submissions on costs. The Respondent requested costs in accordance with the Tariff. The appeals for the Appellant's 2013 and 2014 taxation years will, therefore, be dismissed with costs in accordance with the Tariff.

Signed at Ottawa, Canada, this 10<sup>th</sup> day of June 2022.

“David E. Spiro”

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Spiro J.

APPENDIX "A"



C7 / C9

HEUI Injector Output Comparison - Data for HI 2000 Test Stand

RPM	Pulse Width	ICP	1	2	3	4	5	6	7	8
<del>600</del>	<del>2</del>	600		XXXXX		XX				
600	2.5	600	6	2	6.5	5	8			
700	2.5	750	9.5	7	10	0	12			
2000	2	1100	7.5	0	2	2.5	8.5			
2500	2	2100	10.5	0	4.5	8	13			
<del>3600</del>	<del>1.5</del>	<del>1200</del>								
2000	1.9	2450	10	2	9	5	12			
3000	2.5	2450	30	4	28	16.5	29.5			
3000	3.5	2500	48	0	45	32	48			

Value sticking

Value sticking

Does not operate @ parameter

Does not operate @ this parameter

\*Basic Settings:

Strokes: 500

Fuel Supply Pressure: 60 PSI

Test Fluid Temperature: 40° C

Leak Test Pressure: 1100 PSI

Customer Name: 1076444

Date: MAR 21 '18

Injector Part#: 10R4761 - CAT C7

TAX COURT OF CANADA COUR CANADIENNE DE L'IMPÔT	
DAVE'S DIESEL INC. HMR	EXHIBIT PIECE A-2
DATE: MAY 10 2018	
<i>[Signature]</i>	
COURT REGISTRAR - GREFFIER DE LA COUR	
FILE NO. / N° DE DOSSIER 2018-1648(17)G	



APPENDIX "B"



DAVE'S DIESEL

C7 / C9

HEUI Injector Output Comparison - Data for HI 2000 Test Stand

RPM	Pulse Width	ICP	1	2	3	4	5	6	7	8
600	2	600								
600	2.5	600								
700	2.5	750	9	10	10	12.5	13.5			
2000	2	1100								
2500	2	2100								
3600	1.5	1200								
2000	1.9	2450	5.5	5.5	8	14.5	14			
3000	2.5	2450	11	24.5	23.5	32	31			
3000	3.5	2500	21.5	44	43	50	48			

Stabilizing  
Stabilizing

Nozzle stuck open  
Raw fuel into cylinder

*Basic Settings:	
Strokes:	500
Fuel Supply Pressure:	60 PSI
Test Fluid Temperature:	40° C
Leak Test Pressure:	1100 PSI

Date: Dec 3, '14

Customer Name: M724/M72

Injector Part#: 241-3238 - CAT C7

TAX COURT OF CANADA COUR CANADIENNE DE L'IMPÔT	
NAME DAVE'S DIESEL INC. HMQ	EXHIBIT PIÈCE A-1
DATE: MAY 10 20 22	
<i>Col. O'Neil</i>	
COURT REGISTRAR - GREFFIER DE LA COUR	
FILE NO. / N° DE DOSSIER 2015-1618 (T) G	

CITATION: 2022 TCC 62  
COURT FILE NO.: 2018-1618(IT)G  
STYLE OF CAUSE: DAVE'S DIESEL INC. AND HER MAJESTY THE QUEEN  
PLACE OF HEARING: Hamilton, Ontario  
DATE OF HEARING: May 10, 2022  
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Spiro  
DATE OF JUDGMENT: June 10, 2022

APPEARANCES:

Counsel for the Appellant: Mark S. Grossman  
Counsel for the Respondent: Christopher Ware

COUNSEL OF RECORD:

For the Appellant:

Name: Mark S. Grossman

Firm: Shuh Cline & Grossman  
Kitchener, Ontario

For the Respondent:

François Daigle  
Deputy Attorney General of Canada  
Ottawa, Canada

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<sup>1</sup> The investment tax credits were claimed under a combination of subsection 127(5), subsection 127(9), and subparagraph 37(1)(a)(i) of the Act. The disallowed “SR&ED” expenditures were \$56,065 for the 2013 taxation year and \$69,604 for the 2014 taxation year.

<sup>2</sup> *National R&D Inc. v Canada*, 2022 FCA 72, at para 12.

<sup>3</sup> Transcript, page 21, lines 9-14.

<sup>4</sup> Transcript, page 39, lines 20-23.

<sup>5</sup> Transcript, page 73, lines 15-21.

<sup>6</sup> Transcript, page 64, lines 12-16.

<sup>7</sup> Ray was one of the unskilled labourers who worked on the project. Exhibit A-2 (reproduced at Appendix “A”) relates to this diary entry and constitutes a partial record of one of the tests performed on March 21, 2013.

<sup>8</sup> Exhibit A-1 (reproduced at Appendix “B”) relates to this diary entry and constitutes a partial record of one of the tests performed on December 3, 2014.

<sup>9</sup> Subsection 78(1) of the Rules provides:

78 (1) In sections 78 to 91, document includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device.

[Emphasis added]

Subsection 89(1) of the Rules provides:

89 (1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless

(a) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,

(b) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or

(c) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.

<sup>10</sup> See *R. v Creemer*, [1968] 1 CCC 14, [1967] NSJ No 3 (NSCA) as cited in Lederman, Bryant & Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) at §2.22. I would, therefore, direct that Exhibits I-1 to I-12 now be marked as Exhibits P-1 to P-12 for the record.

<sup>11</sup> See the cross-examination of Mr. Dave at page 154, lines 17-21 of the transcript where he testified that the “technological uncertainty” was “whether we could successfully develop a process to remanufacture the injector[s].”

<sup>12</sup> *Logix Data Products Inc. v The Queen*, 2021 TCC 36 at para 69.

<sup>13</sup> In referring specifically to a mechanical engineer, I do not intend to exclude the possibility that the perspective of a knowledgeable and experienced diesel engine mechanic could have been helpful. The point here is that the Appellant called neither a mechanical engineer nor a duly qualified diesel engine mechanic in respect of this critical question.

<sup>14</sup> Transcript, page 159, line 25 to page 160, line 3.

<sup>15</sup> Lewis Carroll, *The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking-Glass*, 150th Anniversary ed. by Gardiner & Burstein (New York: W.W. Norton & Company, 2015). In this context, the following passage is à propos (at pp. 84-85):

“Then you should say what you mean,” the March Hare went on.

“I do,” Alice hastily replied; “at least – at least I mean what I say – that’s the same thing, you know.”

“Not the same thing a bit!” said the Hatter. “Why, you might just as well say that ‘I see what I eat’ is the same thing as ‘I eat what I see’!”

<sup>16</sup> *Joel Theatrical Rigging Contractors (1980) Ltd. v The Queen*, 2017 TCC 6 at para 26 citing *Advanced Agricultural Testing Inc. v The Queen*, 2009 TCC 190 at paras. 30-31.

<sup>17</sup> By “simple trial and error” I mean testing without the prior formulation of a hypothesis.