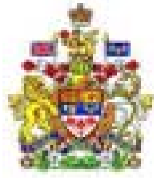
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110331

Docket: A-263-10

Citation: 2011 FCA 120

CORAM: **EVANS J.A.**
DAWSON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEHIGH CEMENT LIMITED

Respondent

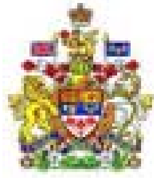
Heard at Vancouver, British Columbia, on March 3, 2011.

Judgment delivered at Ottawa, Ontario, on March 31, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from an interlocutory order of the Tax Court of Canada (Tax Court) rendered in respect of a motion brought by Lehigh Cement Limited (Lehigh). Lehigh moved for an order requiring Her Majesty the Queen (the Crown) to answer a question objected to on discovery and to produce certain documents. The issue raised on this appeal is whether the Judge of the Tax Court erred by ordering the Crown to:

1. Answer the following question: If the shares of CBR Cement Corp. had been owned by the appellant instead of a non-resident company related to the appellant, would the Crown have contested the arrangement (the disputed question).
2. Produce internal memoranda of the Canada Revenue Agency (CRA) from 2000 to July 2007 that specifically relate to the development of a general policy concerning paragraph 95(6)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), not including documents relating to a particular taxpayer (the disputed documents).

A subsidiary issue is raised with respect to the appropriate level of costs to be awarded on this appeal.

[2] The Judge's reasons in support of the order under appeal are cited as 2010 TCC 366, 2010 DTC 1239.

The Facts

[3] The relevant facts and the procedural context are set out succinctly in the following paragraphs from Lehigh's memorandum of fact and law:

1. In 1995 the Respondent, Lehigh Cement Limited ("Lehigh"), borrowed US$100,000,000 in Canada and contributed the US$100,000,000 as a capital investment in CBR Development NAM LLC ("CBR-LLC"), its wholly-owned U.S. subsidiary. Lehigh deducted the interest paid on the said loan pursuant to s. 20(1)(c) of the *Income Tax Act* (the "Act").

2. CBR-LLC in turn lent the US$100,000,000 to CBR Cement Corp. ("CBR-US"), a United States operating company, the shares of which were owned by CBR Investment Corporation of America ("CBR-ICA"), also a United States corporation.

3. In the years 1996 and 1997, CBR-US carried on an active business and paid interest to CBR-LLC of CDN$11,303,500 and CDN$11,305,800 respectively.

4. Lehigh, CBR-LLC and CBR-US were all treated as “related” corporations as that term is defined in the Act. Subparagraph 95(2)(a)(ii) of the Act, as it read at the time, provided that so long as the corporations were *related*, the interest so paid would retain its character as active business income to CBR-LLC, and as such become exempt surplus of CBR-LLC.

5. CBR-LLC paid dividends to Lehigh in 1996 and 1997 of CDN$8,294,940 and CDN$14,968,784 respectively. Paragraph 113(1)(a) of the Act provides that to the extent such dividends were paid out of exempt surplus of CBR-LLC, Lehigh was entitled to deduct such dividends in computing its taxable income, which it did.

[…]

7. Notices of Reassessment for each of the 1996 and 1997 taxation years were issued on November 30, 2004 and on May 3, 2005. The Minister’s primary basis of reassessment was s. 95(6)(b), asserting that the effect of that provision was that the shares of CBR-LLC were deemed not to have been issued, with the result that the deduction under s. 113(1)(a) of the Act should be disallowed. The alternate basis was s. 245 of the Act, the general anti-avoidance rule (the “GAAR”).

8. Lehigh objected to the reassessments. On February 27, 2009 the Minister confirmed the reassessments. Lehigh appealed to the Tax Court of Canada.

<u>The Decision of the Judge</u>

[4] After setting out the background facts, the Judge framed the dispute before her in the following terms:

9. The appellant's objective in bringing this motion is to have a better understanding of the respondent's position on the scope, and object and spirit, of s. 95(6)(*b*). The respondent resists largely on grounds that the information sought is not relevant.

[5] The Judge then noted that the principles applicable to the issues before her had recently been discussed by the Tax Court in *HSBC Bank Canada v. Canada*, 2010 TCC 228, 2010 DTC 1159 at paragraphs 13 to 16. The Judge particularly noted that the purpose of discovery is to provide a level of disclosure so as to allow each party to "proceed efficiently, effectively and expeditiously towards a fair hearing, knowing exactly the case each has to meet." The Judge indicated that while fishing expeditions are to be discouraged, "very little relevance need be shown to render a question answerable." No specific challenge is made to the Judge's statement of general principles.

[6] With respect to the disputed question, the Judge reasoned:

> 12. […] It is not in the interests of fairness or efficiency for the respondent to resist answering the question on grounds of principle. The answer will help the appellant know what case it has to meet and is within the broad purposes of examinations for discovery.
>
> 13. The purposes of discovery were summarised in *Motaharian v. Reid*, [1989] OJ No. 1947:
>
> (a) to enable the examining party to know the case he has to meet;
>
> (b) to procure admissions to enable one to dispense with formal proof;
>
> (c) to procure admissions which may destroy an opponent's case;
>
> (d) to facilitate settlement; pre-trial procedure and trial;
>
> (e) to eliminate or narrow issues;
>
> (f) to avoid surprise at trial.

[7] The Judge's conclusion with respect to the disputed documents was as follows:

> 15. As for the production of internal CRA memoranda, these documents are potentially relevant because it appears that they directly led to the respondent's position in this appeal. Effectively, these documents are the support for the assessments even though CRA's policy may have been in the formative stages when the assessments were issued. This type of disclosure is proper: *HSBC Bank*, para. 15.

> 16. It is also significant that the appellant's request is not broad. Mr. Mitchell indicated in argument that there are likely only a few documents at issue.
>
> 17. Disclosure will therefore be ordered, except that the formal order will clarify that production will apply only to memoranda that specifically relate to the development of a general policy. It will exclude documents that relate to a particular taxpayer.

The Asserted Errors

[8] The Crown asserts that in making the order under appeal the Judge erred by:

a. failing to observe principles of natural justice by accepting factual assertions made by counsel for Lehigh without providing the Crown with an opportunity to challenge them;

b. making findings of fact unsupported by the evidence and relying on such facts in support of her decision;

c. ordering the production of internal CRA memoranda; and

d. ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position.

Consideration of the Asserted Errors

a. Did the Judge fail to observe principles of natural justice?

[9] The Crown identifies three factual submissions made by counsel for Lehigh that it states were not supported by affidavit evidence. It states that it objected to these "bare assertions" being made because they were unsupported by evidence so that the Crown had no opportunity to challenge the assertions through the cross-examination of a deponent. The three impugned submissions are:

1. During oral discovery, counsel for Lehigh singled out two CRA officers, Wayne Adams and Sharon Gulliver, when questioning on the existence of internal memoranda.
2. Counsel for Lehigh stated at the hearing that the alleged change in CRA policy "was developed between 2000 and July 2007, when the CRA announced the new policy."
3. Counsel for Lehigh stated at the hearing that he did not think there would be many memoranda concerning the new policy. He only expected there to be three or four memoranda.

These assertions are said to have significantly influenced the Judge's decision.

[10] For the following reasons, I conclude that the Judge did not err as the Crown submits.

[11] To begin, the first impugned submission was not made to the Judge. What is complained of is a question asked by counsel for Lehigh on his discovery of the Crown when he sought production of the disputed documents. Counsel stated his request was "specifically but not exclusively" with respect to documents emanating to and from the two named employees. Such a question asked on discovery does not breach principles of natural justice.

[12] The remaining two impugned submissions were made to the Judge by counsel for Lehigh. However, counsel for Lehigh was explicit in his submissions to the Court that "[w]e don't know if there are any documents, to begin with. We are saying, if there are documents that give the context of this assessment we would like to see them." (Transcript of oral argument, Appeal Book page 81 lines 14-19). This makes clear that counsel was not improperly giving evidence about matters

within his knowledge. I read counsel's submissions as being in the nature of supposition as to when any memoranda would have been produced and the number of such memoranda. The Judge's reference to the number of documents reflected counsel's submissions.

[13] Further, counsel's submissions were informed by a memorandum prepared by Sharon Gulliver dated May 2, 2002 (Gulliver memorandum). The Gulliver memorandum was produced by the Crown following oral discovery, but before the hearing before the Judge, and was appended to the affidavit filed in support of Lehigh's motion. It will be described in more detail later in these reasons.

[14] The Crown has not established any breach of the principles of natural justice.

b. Did the Judge make and rely upon findings of fact which were unsupported by the evidence?

[15] The Crown asserts that the Judge based her decision to order the production of the disputed documents on the basis of two allegations which were not substantiated by evidence. The allegations were that:

1. The disputed documents led directly to the Crown's position in the underlying appeal.
2. The disputed documents provided the support for the assessments under appeal, even though the CRA's policy may have been in the formative stages when the assessments were issued.

The Crown points to paragraph 15 of the Judge's reasons, quoted above, to argue that the Judge made and relied upon these assumptions.

[16] In my view, the Judge's reasons, read fairly, fall well short of a finding of fact that the disputed documents either led directly to the Crown's position on the appeal or provided the support for the assessment. I reach this conclusion for the following reasons.

[17] First, as set out above, Lehigh was explicit that it did not know if the disputed documents existed. At paragraph 6 of her reasons, the Judge correctly stated that it was an assertion made by Lehigh, not an established fact, that the CRA's policy concerning the application of paragraph 95(6)(*b*) was developed between 2000 and July 2007 when the CRA announced the new policy.

[18] Second, the Judge noted in paragraph 15 of her reasons that the disputed documents were "potentially relevant because it appears that they directly led […]." No determination was made by the Judge that the documents existed, had led to the Crown's position on this appeal or had provided support for the assessment.

[19] Third, the Gulliver memorandum was in evidence before the Judge. This memorandum provided a basis for the Judge's conclusion by way of inference that any subsequent memoranda were potentially relevant. From the content of the Gulliver memorandum it was at least arguable that subsequent memoranda expressed the basis for the assessments at issue. As explained below,

the Crown's disclosure of the Gulliver memorandum evidenced the Crown's position that it was relevant to Lehigh's appeal.

[20] The Crown has not persuaded me that any of the impugned findings of fact were indeed made by the Judge.

[21] The Crown also argues that Lehigh had specific knowledge of documents relating to a change in policy "but chose not to adduce any evidence which might have shed light on the nature, volume and relevance of these documents." I agree with Lehigh's responsive submission that only the Crown possessed the knowledge of whether the disputed documents exist or if any existing documents are relevant. In such a circumstance it is difficult to see how Lehigh could have provided better affidavit evidence that shed light on these points.

c. Did the Judge err by ordering the production of internal CRA memoranda?

[22] I begin by noting that while the Judge ordered the production of internal CRA memoranda prepared from 2000 to July 2007, during oral argument counsel for Lehigh significantly narrowed the relevant timeframe to be from the date of the Gulliver memorandum (May 2, 2002) to the date of the assessments (November 30, 2004 and on May 3, 2005).

[23] The Crown argues that in ordering the production of internal memoranda the Judge erred because:

1. Opinions expressed by CRA officials outside of the context of a particular taxpayer's situation are irrelevant.
2. Official publications issued by the CRA are relevant only where a taxpayer seeks to establish that the CRA's interpretation of the Act, expressed in an official publication, is correct and contradicts the interpretation upon which the assessment in issue was made.

[24] The scope of permissible discovery depends upon the factual and procedural context of the case, informed by an appreciation of the applicable legal principles. See *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2007 FCA 379, 162 A.C.W.S. (3d) 911 at paragraph 35. In the words of this Court in *Eurocopter v. Bell Helicopter Textron Canada Ltd.*, 2010 FCA 142, 407 N.R. 180 at paragraph 13, while "the general principles established in the case law are useful, they do not provide a magic formula that is applicable to all situations. In such matters, it is necessary to follow the case-by-case rule."

[25] It follows from this that the determination of whether a particular question is permissible is a fact based inquiry. On appeal a judge's determination will be reviewed as a question of mixed fact and law. Therefore, the Court will only intervene where a palpable and overriding error or an extricable error of law is established. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Bristol-Myers Squibb Co. v. Apotex Inc.*, as cited above, at paragraph 35.

[26] In this case, consideration of whether a particular question is permissible begins with Rule 95 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a which governs the scope of oral discovery. Rule 95(1) states:

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that	95. (1) La personne interrogée au préalable répond, soit au mieux de sa connaissance directe, soit des renseignements qu'elle tient pour véridiques, aux questions pertinentes à une question en litige ou aux questions qui peuvent, aux termes du paragraphe (3), faire l'objet de l'interrogatoire préalable. Elle ne peut refuser de répondre pour les motifs suivants :
(*a*) the information sought is evidence or hearsay,	*a*) le renseignement demandé est un élément de preuve ou du ouï-dire;
(*b*) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or	*b*) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;
(*c*) the question constitutes cross-examination on the affidavit of documents of the party being examined. [emphasis added]	*c*) la question constitue un contre-interrogatoire sur la déclaration sous serment de documents déposée par la partie interrogée. [Non souligné dans l'original.]

[27] The Crown correctly observes that prior to its amendment in 2008, Rule 95(1) required a person examined for discovery to answer any proper question "relating to" ("qui se rapporte à") any matter in issue in the proceeding. A question was said to relate to any matter in issue if it was demonstrated that "the information in the document may advance his own case or damage his or her adversary's case". See *SmithKline Beecham Animal Health Inc. v. Canada,* 2002 FCA 229, 291 N.R. 113 at paragraphs 24 to 30. At paragraph 31 of its reasons this Court characterized this test to be substantially the same as the train of inquiry test.

[28] The Crown submits, however, that it "is doubtful that the 'train of inquiry' test, in its present form, will survive the amendment" of Rule 95(1) in 2008. The Crown argues that the jurisprudence relied upon by Lehigh does not address the impact of the narrower wording of Rule 95(1).

[29] In my view, the 2008 amendment to Rule 95(1) did not have a material impact upon the permissible scope of oral discovery. I reach this conclusion for the following reasons.

[30] First, I believe that the general purpose of oral discovery has not changed. Justice Hugessen described that purpose in the following terms in *Montana Band v. Canada,* [2000] 1 F.C. 267 (T.D.) at paragraph 5:

> The general purpose of examination for discovery is to render the trial process fairer and more efficient by allowing each party to inform itself fully prior to trial of the precise nature of all other parties' positions so as to define fully the issues between them. It is in the interest of justice that each party should be as well informed as possible about the positions of the other parties and should not be put at a disadvantage by being taken by surprise at trial. It is sound policy for the Court to adopt a liberal approach to the scope of questioning on discovery since any error on the side of allowing questions may always be corrected by the trial judge who retains the ultimate mastery over all matters relating to admissibility of evidence; on the other hand any error which unduly restricts the scope of discovery may lead to serious problems or even injustice at trial.
>
> [emphasis added]

[31] That the amendment of Rule 95(1) was not intended to effect a change in the scope of permissible questions is supported by the Regulatory Impact Analysis Statement (RIAS) accompanying the *Rules Amending the Tax Court of Canada Rules (General Procedure)*, SOR/2008-303, *Canada Gazette*, Part II, Vol. 142, No. 25 at pages 2330 to 2332. The RIAS

describes the amendment to Rule 95(1) to be a "technical amendment". Courts are permitted to examine a RIAS to confirm the intention of the regulator. See *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 at paragraphs 45 to 47 and 155 to 157.

[32] Second, in *Owen Holdings Ltd. v. Canada* (1997), 216 N.R. 381 (F.C.A.) this Court considered and rejected the submission that the phrase "relating to" (as then found in Rule 82(1) of the *Tax Court of Canada Rules (General Procedure)*) encompassed the concept of a "semblance of relevance." The Court indicated that "relating" and "relevance" encompassed similar meanings. At paragraphs 5 and 6 of its reasons the Court wrote:

> 5. With respect to the appeal, counsel for the appellant argues that the judge erred in holding that only documents which are relevant, that is to say which may advance the appellant's case or damage that of the respondent, should be disclosed. Rule 82(1),[1] counsel says, uses the phrase "relating to" not "relevant to," a basic distinction clearly confirmed and acted upon by this Court in *Canada (Attorney-General) v. Bassermann*.[2] At this stage, submits counsel, relevance should be of no concern; a "semblance of relevance," if necessary, should suffice, an abuse of process being the only thing to be avoided.
>
> 6. We indicated at the hearing that we disagreed with counsel's argument. Although obviously not synonyms, the words "relating" and "relevant" do not have entirely separate and distinct meanings. "Relating to" in Rule 82(1) necessarily imparts an element of relevance, otherwise, the parties would have licence to enter into extensive and futile fishing expeditions that would achieve no productive goal but would waste judicial resources. The well established principles that give rise to the relatively low relevance threshold at the stage of discovery, as opposed to the higher threshold that will be required at trial for the admission of evidence, are well known. We simply do not believe that the Tax Court ever had the intention of abandoning those principles any more than this Court could have had such an intention when, in 1990, it changed the word "related" to "relevant" in revising its corresponding provisions, namely subsections (1) and (2)(a) of Rule 448.[3] [emphasis added and footnotes omitted]

[33] Finally, there is an abundance of jurisprudence from this Court which has interpreted the permissible scope of examination under Rule 240 of the *Federal Courts Rules*, SOR/98-106. Like Rule 95(1), Rule 240 incorporates the test of whether a question is "relevant" to a matter which is in issue. Rule 240 states:

A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that (*a*) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or (*b*) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action. [emphasis added]	La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui : *a*) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge; *b*) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action. [Non souligné dans l'original.]

[34] The jurisprudence establishes that a question is relevant when there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the party seeking the answer to advance its case or to damage the case of its adversary, or which fairly might lead to a train of inquiry that may either advance the questioning party's case or damage the case of its adversary. Whether this test is met will depend on the allegations the questioning party seeks to establish or refute. See *Eurocopter* at paragraph 10, *Eli Lilly Canada Inc. v. Novopharm Ltd.,* 2008 FCA 287, 381 N.R. 93 at paragraphs 61 to 64; *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraphs 30 to 33.

[35] Where relevance is established the Court retains discretion to disallow a question. The exercise of this discretion requires a weighing of the potential value of the answer against the risk that a party is abusing the discovery process. See *Bristol-Myers Squibb Co. v. Apotex Inc.* at paragraph 34. The Court might disallow a relevant question where responding to it would place undue hardship on the answering party, where there are other means of obtaining the information sought, or where "the question forms part of a 'fishing expedition' of vague and far-reaching scope": *Merck & Co. v. Apotex Inc.*, 2003 FCA 438, 312 N.R. 273 at paragraph 10; *Apotex Inc. v. Wellcome Foundation Ltd.*, 2008 FCA 131, 166 A.C.W.S. (3d) 850 at paragraph 3.

[36] This Court's comment at paragraph 64 of the *Eli Lilly* decision is of particular relevance to the Crown's submission that the 2008 amendment effected a material change. There, the Court wrote:

> 64. Furthermore, the Prothonotary's reference to a fishing expedition in paragraph 19 of her Reasons was one where a party was required to disclose a document that might lead to another document that might then lead to useful information which would tend to adversely affect the party's case or to support the other party's case. In my view, limiting the "train of inquiry" test in this manner is consistent with the test described in *Peruvian Guano, supra*, and applied by this Court in *SmithKline Beecham Animal Health Inc. v. Canada*, [2002] 4 C.T.C. 93 (F.C.A.), where, at para. 24 of her Reasons for the Court, Madam Justice Sharlow wrote:
>
>> [24] The scope and application of the rules quoted above depend upon the meaning of the phrases "relating to any matter in question between ... them in the appeal" and "relating to any matter in issue in the proceeding". In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 (C.A.), Brett, L.J. said this about the meaning of the phrase "a document relating to any matter in question in the action" (at page 63):
>>
>>> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains

> information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences. [emphasis in original]

[37] As can be seen, when interpreting relevance under the *Federal Courts Rules* the Court quoted with approval its prior articulation of the train of inquiry test in *SmithKline Beecham.* That decision concerned the proper interpretation of the pre-2008 version of Rule 95(1) of the *Tax Court of Canada Rules (General Procedure)*. Thus, the train of inquiry test has been found to be appropriate both under the pre-2008 *Tax Court of Canada Rules (General Procedure)* and the current *Federal Courts Rules* where the test is relevance.

[38] Turning to the application of these principles, in the present case the Crown had disclosed the Gulliver memorandum to Lehigh. The memorandum was produced in response to a request that the Crown provide "all correspondence and memoranda within head office, the district office, and between head office and the district office, giving instructions or dealing with their advisement on the GAAR issue."

[39] The Gulliver memorandum makes the following points:

1. The CRA was "pursuing cases coined 'indirect loans' whereby a Canadian company invests money into the equity of a newly created company in a tax haven and those funds are then lent to a related but non-affiliate non-resident company."

2. With respect to subsection 95(6) of the Act:

> While subsection 95(6) has been amended for taxation years after 1995, in nearly all of the "indirect loan" cases reviewed, the structure was in place prior to the amendments. We did consider whether paragraph 95(6)(*b*), as it then read, could apply to the "indirect loan" issue with respect to the incorporation of the tax haven company and its issuance of shares to CANCO. However, it was concluded from its wording that it was contemplated that the foreign affiliate or a non-resident corporation that issued the shares already existed before the series of transactions. In addition, without the use of the tax haven company, there was no certainty that CANCO would have otherwise transferred fund [*sic*] to the non-resident borrower so that there would be "tax otherwise payable". Therefore, subsection 95(6) was not proposed but in our view, this provision demonstrates that it is not acceptable to insert steps to misuse the foreign affiliate rules.[11] [emphasis added]

3. Footnote 11 to the above passage stated:

> [11] We have no written legal opinion on the matter at the present time. It is possible that Appeals or Litigation might see merit in arguing subsection 95(6). [emphasis added]

[40] In my view, the inference may be drawn from the Gulliver memorandum and the subsequent reassessment of Lehigh on the basis of subsection 95(6) that there may well be subsequent memoranda prepared within the CRA that considered whether subsection 95(6) of the Act could be argued to be a general anti-avoidance provision. Such documents, if they exist, would be reasonably likely to either directly or indirectly advance Lehigh's case or damage the Crown's case.

In my view, the Judge did not err in ordering their production. The trial judge will be the ultimate arbiter of their relevance.

[41] In so concluding, I have considered the Crown's arguments that the opinions of CRA officials outside the context of a particular taxpayer are irrelevant and that official publications of the CRA are of limited relevance. Those may well be valid objections in another case. However, in the factual and procedural context of this case, the Crown has already disclosed as relevant the Gulliver memorandum. For Lehigh to proceed expeditiously towards a fair hearing, knowing exactly the case it has to meet, it should receive any subsequent memoranda relating to the development of a general policy concerning paragraph 95(6)(*b*) of the Act.

d. Did the Judge err by ordering the Crown to answer a hypothetical question aimed at eliciting the Crown's legal position?

[42] The Crown argues that the Judge erred in ordering it to answer the disputed question because:

1. The question is hypothetical.
2. The purpose of the question is to elicit from the Crown details pertaining to its legal argument.
3. The question is a pure question of law.

[43] Lehigh responds that the purpose of the question is to determine if in reassessing Lehigh, paragraph 95(6)(*b*) of the Act was applied because the shares of CBR-US were owned by CBR-ICA, a non-resident corporation and not by Lehigh, a Canadian resident corporation.

[44] The Judge ordered the question to be answered in order to help Lehigh know the case it has to meet. In the context of this proceeding the question is not a pure question of law, nor does it elicit details of the Crown's legal argument. Lehigh is entitled to know the basis of the reassessment and what led the CRA to conclude it had acquired its shares in CBR-LLC for the principal purpose of avoiding the payment of taxes that would otherwise have been payable. In the factual and procedural context before the Court, the Crown has not demonstrated that the Judge erred in concluding that the disputed question should be answered.

[45] For all of the above reasons I would dismiss the appeal.

<u>Costs and Conclusion</u>

[46] Should this appeal be dismissed, Lehigh seeks an award of costs fully indemnifying its expenses in bringing the motion in the Tax Court and in opposing this appeal. Such an award is estimated to be in excess of $125,000.00.

[47] Lehigh concedes that such an award is commonly made where a party is found to have acted in a reprehensible, scandalous, or outrageous manner. Lehigh acknowledges that no such conduct has occurred in the present case. It submits, however, that such an award is justified in

this case because the discoveries were held on November 11, 2009 and Lehigh has been put to delay and considerable expense “all for no just cause.”

[48] Rule 400 of the *Federal Courts Rules* provides that the Court has full discretionary power over the award of costs. Rule 407 provides that unless the Court orders otherwise, party-and-party costs are to be assessed in accordance with column III of the table to Tariff B of the Rules. This reflects a policy decision that party-and-party costs are intended to be a contribution to, not an indemnification of, solicitor-client costs.

[49] Lehigh has not established exceptional circumstances that would warrant departure from the principle that solicitor-client fees are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 77. The willingness of one party to incur significant expense on an issue cannot by itself transfer responsibility for that expense to the opposing party. The question then becomes, what is the appropriate contribution to be made to Lehigh’s costs if the appeal is dismissed?

[50] If successful, the Crown seeks, in lieu of assessed costs, costs here and in the Tax Court fixed in the amount of $5,000.00. Having particular regard to the complexity of the issues, I see nothing in the record to make this an unreasonable quantification of party-and-party costs. As Lehigh was awarded its costs in the Tax Court, on this appeal I would dismiss the appeal and

order the appellant to pay costs to Lehigh in the Tax Court and in this Court fixed in the amount of $5,000.00, all-inclusive, in any event of the cause.

"Eleanor R. Dawson"
J.A.

"I agree
John M. Evans J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-263-10
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LEHIGH CEMENT LIMITED
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 3, 2011
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	EVANS J.A. LAYDEN-STEVENSON J.A.
DATED:	March 31, 2011

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