

BETWEEN:

ALGOMA CENTRAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 12, 2011 at Toronto, Ontario

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant: David Malach

Counsel for the Respondent: Thang Trieu

ORDER

UPON motion by the appellant for an order to compel answers to questions asked on examinations for discovery, and for ancillary relief;

THE MOTION is granted in part, and it is ordered that:

1. the respondent shall provide to the appellant any material relating to the valuation by Mr. Fournier that is contained in specific files of the appellant that were kept by any of the following individuals: Martine Bathurst, Don Beamish, Bob Boyer, Laurie Davidson, Reinhard Hoffman, Arun Khanna, Yvon Lamontagne, Lise Malette, Gerard Martineau, Tim Matthews, Richard St. Denis, and Karen Wiemer;

2. the respondent shall provide to the appellant the information relating to the contract with Mr. Fournier that was provided to Paul Lynch and Fred O’Riordan;
3. the respondent shall provide to the appellant the material relied upon by Mr. Fournier in preparing his valuation;
4. the examinations for discovery, including undertakings, shall be completed by February 17, 2012;
5. the parties shall communicate with the Hearings Coordinator, in writing, on or before March 30, 2012 to advise the Court whether or not the case will settle, whether a settlement conference would be beneficial or whether a hearing date should be set. In the latter event, the parties shall file a joint application to fix a time and place for the hearing in accordance with section 123 of the *Tax Court of Canada Rules (General Procedure)* by said date; and
6. each party shall bear their own costs in respect of this motion.

Signed at Vancouver, British Columbia this 3rd day of November 2011.

“J. M. Woods”

Woods J.

Citation: 2011 TCC 514
Date: 20111103
Docket: 2009-411(IT)G

BETWEEN:

ALGOMA CENTRAL CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] The appellant, Algoma Central Corporation (“Algoma”), brings a motion for an order to compel answers to questions asked on examinations for discovery, and for ancillary relief.

[2] By way of background, the appeal concerns a sale of forested land by Algoma in 1997. A significant capital gain was realized. The issue in the appeal is whether the appellant, in computing the capital gain, properly determined the fair market value of the land on December 31, 1971 (“V-Day”). The Minister valued the land on V-Day at \$11,295,802. Algoma valued it at \$33,825.331.

[3] This motion concerns questions on discovery relating to a formal appraisal that was obtained by the Canada Revenue Agency (CRA) from an outside valuator, Marco Fournier. The appraisal was very expensive, but it was considered to be necessary because the CRA had concerns with their prior valuations.

[4] The questions at issue were raised during an examination of the respondent’s representative on July 22, 2010. The representative was Judy Dakers, the appeals

officer who had reviewed Algoma's notice of objection.

[5] On August 24, 2011, the respondent provided written responses to many items that were outstanding from the examination of Ms. Dakers.

[6] In this motion, Algoma seeks answers to four questions that the respondent has not answered, or has not fully answered.

[7] The general limits of examinations for discovery were recently described by the Federal Court of Appeal in *The Queen v Lehigh Cement Ltd.*, 2011 FCA 120. Justice Dawson stated:

[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.

[8] The appellant seeks answers to these four questions.

1. Who else in the CRA, including Deputy Ministers and Ministers, would have known that Mr. Fournier had determined that the CRA figures for the valuation were closer to the reasonable amount before the contract with Mr. Fournier was entered into?
2. Provide the files of the individuals at the CRA who the respondent had identified as being involved in this matter, and the files of any anyone else involved, including all emails, notes, memoranda, letters, voice-

mail, etc., and similar documents in the CRA files with respect to Mr. Fournier's valuation.

3. Who was the highest person in the CRA who knew about the contract with Mr. Fournier and what information was provided to that person?
4. Provide all of the materials Mr. Fournier relied upon in preparing his valuation.

[9] The respondent objects to these questions on several grounds. With respect to the first three questions, the respondent submits that enough information concerning this line of inquiry has already been provided, that the questions are too broad and that they amount to a fishing expedition.

[10] The respondent also submits that the questions are improper because they are intended to attack the credibility of a CRA official. Counsel relies on *Lucenti v Progressive Casualty Insurance Co. of Canada*, [2000] OJ No 1777 (OSCJ).

[11] As for the fourth question, the respondent objects on the ground that there was no formal refusal. It appears from the transcript that both counsel simply forgot that the question was outstanding. The respondent states that it does not have to answer the question in these circumstances, and relies on *Merchant Law Group v The Queen*, 2008 TCC 49, [2008] GSTC 20, para. 17.

[12] I will consider the first three questions together. The fourth question will be discussed separately because the objection is quite different.

[13] Part of the respondent's objection to the first three questions is based on lack of relevance. Pursuant to the test of relevance as described in *Lehigh*, I agree with Algoma that the first three questions are relevant.

[14] In general terms, Algoma wishes to probe whether the value of the land as determined by Mr. Fournier was influenced by the CRA. Algoma's theory, as I understand it, is that since the CRA was incurring significant expense, approximately \$400,000, the CRA may have expected a certain result from Mr. Fournier. The material before me indicates that this theory is not purely fanciful (Affidavit of Marni Pernica, Tab 10). The line of inquiry is therefore relevant for purposes of the discovery process.

[15] The respondent submits that the questions are also improper because they

challenge the credibility of CRA officials. It is submitted that the respondent already provided information to Algoma which shows that Mr. Fournier was not influenced to give a particular result.

[16] I do not agree with this submission. Algoma is entitled to further probe whether there might have been influence. The questioning on this line of inquiry has not been excessive.

[17] The judicial decision relied on by the respondent in support, *Lucenti*, does not support the objection. In *Lucenti*, questions were considered to be improper if they are a collateral attack and only relevant to credibility. In this case, the questions are not collateral. They go to a matter of substance in this appeal, whether Mr. Fournier's opinion is biased or not. It is not simply a matter of credibility.

[18] It remains to be considered whether the Court should step in to disallow the questions on the ground that they are a fishing expedition (*Lehigh*, para. 35).

[19] It is appropriate to cut back the inquiry somewhat on this basis, in my view.

[20] The first question, for instance, is too far-reaching. It is not a request for documents but for knowledge, and encompasses a very large group of persons. It appears that over 30 individuals have had some involvement with this file. The request is too broad.

[21] The third question goes to the same line of inquiry but the scope is more limited. There are two parts to the question. Although objecting on the grounds of relevance, the respondent answered the first part of the question and provided the names of two high level officials who may have knowledge of the Fournier contract. The respondent should also answer the second part of the question. It should disclose what information was provided to the high level officials about the Fournier contract.

[22] As for the second question, it requests the files of anyone involved with Mr. Fournier's valuation. The inquiry is very broad, considering that over 30 individuals have already been identified as having had some involvement. It is reasonable, though, that there should be disclosure concerning the files of individuals who likely had significant involvement. Information was previously provided to Algoma through an access to information request but this information was not responsive enough because it did not identify the source from which the documents came.

[23] At the hearing, I asked each of the parties for their position on a middle ground

so that this request could be limited. The respondent took the position that it had already provided sufficient information; it was not willing to provide a possible middle ground. Counsel for Algoma did provide a more limited list of names.

[24] It is unfortunate that the material from the access to information request did not identify its source. Some further inquiry is reasonable, and I will accept the appellant's middle ground with a few modifications. The respondent shall provide material which relates to the Fournier valuation from the files of the appellant that were kept by the following individuals: Martine Bathurst, Don Beamish, Bob Boyer, Laurie Davidson, Reinhard Hoffman, Arun Khanna, Yvon Lamontagne, Lise Malette, Gerard Martineau, Tim Matthews, Richard St. Denis, and Karen Wiemer.

[25] As for the fourth question, the respondent objects to this question because there was not a formal refusal at the discovery. This is not a satisfactory basis to object in the circumstances of this case.

[26] The information that is sought is materials relied upon by Mr. Fournier in preparing the valuation. This information may be important for Algoma in order to know the case that it has to meet. It is not sufficient for the respondent to object on such a technicality. It appears that this question was simply overlooked by both counsel. Accordingly, if Algoma had sought to reopen the examination to ask this question again, I would allow it. The respondent will be required to answer this question.

[27] The respondent relies on *Merchant Law Group*, an oral decision of ACJ Rossiter which disallowed two questions for this reason. I do not think that a hard and fast rule should apply in these circumstances. A decision should be made on a case by case basis taking into account fairness for both parties.

[28] The appellant also asked for an extension of the pre-trial steps. This will be provided for in the formal order.

[29] As for costs, as success was mixed, each party shall bear their own costs of this motion.

Signed at Vancouver, British Columbia this 3rd day of November 2011.

“J. M. Woods”

Woods J.

CITATION: 2011 TCC 514

COURT FILE NO.: 2009-411(IT)G

STYLE OF CAUSE: ALGOMA CENTRAL CORPORATION and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 12, 2011

REASONS FOR ORDER BY: Hon. J.M. Woods

DATE OF ORDER: November 3, 2011

APPEARANCES:

 Counsel for the Appellant: David Malach

 Counsel for the Respondent: Thang Trieu

COUNSEL OF RECORD:

 For the Appellant:

 Name: David Malach

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