Docket: 2015-2735(IT)G

BETWEEN:

LEHIGH HANSON MATERIALS LIMITED,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on November 24, 2016 at Vancouver, British Columbia

Before: The Honourable Justice Kathleen Lyons

Appearances:

Counsel for the Applicant:	Edwin G. Kroft, Q.C. and Deborah Toaze
Counsel for the Respondent:	Matthew Turnell

ORDER

UPON motion made by the applicant pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON hearing the evidence and submissions of the parties;

In accordance with the attached Reasons for Order, the motion is dismissed. Costs are awarded to the respondent in any event of the cause.

Signed at Ottawa, Canada, this 6th day of October 2017.

"K. Lyons"

Lyons J.

Citation: 2017 TCC 205
Date: 20171006
Docket: 2015-2735(IT)G

BETWEEN:

LEHIGH HANSON MATERIALS LIMITED,

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Respondent.

REASONS FOR ORDER

Lyons J.

[1] Lehigh Hanson Materials Limited ("Lehigh") brought a motion for the determination of a question, before the hearing of the appeal, pursuant to subsections 58(1) and (2) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*").[1] Rule 58 motions envisage a two-stage process.

[2] Lehigh seeks an order for a determination hearing at stage one for the question to be determined at stage two.[2] At stage one, the motions judge must decide whether the question is appropriate for a determination and has a broad discretion under Rule 58 in deciding whether or not to grant such an order.[3] The

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1 SOR/2014-26, s.6.

2 Justice Owen in *Paletta v Canada*, 2016 TCC 171, 2016 DTC 1145 [*Paletta*] at paras 10-11, notes current Rule 58, effective February 7, 2014, is a consolidation under a singular rule of former Rules 58 to 62. Those amendments regrouped all matters under sections 53 (strike out a pleading) and 58 (determination of questions law, fact or mixed law or fact) resulting in the repeal of Rules 59, 60, 61 and 62.

3 *McIntyre v Canada,* 2014 TCC 111, 2014 DTC 1116 at para 25 [*McIntyre*]; *Suncor Energy Inc. v Canada*, 2015 TCC 210, [2015] TCJ no 171 (QL) at para 16 [*Suncor*]; *Paletta, supra* note 2 at para 22, affirmed by 2017 FCA 33, 2017 DTC 5039; *Rio Tinto Alcan Inc. v Canada,* 2016 TCC 31, 2016 DTC 1033 [*Rio Tinto*] at para 55.

motions judge may set down a question for determination if the statutory conditions in subsections 58(1) and (2) of the *Rules* are satisfied. These provide:

> **58(1)** On application by a party, the Court may grant an order that a question of law, fact or mixed law and fact raised in a pleading or a question as to the admissibility of any evidence be determined before the hearing.
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> **(2)** On the application, the Court may grant an order if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs.

[3] Thus, the following conditions must be met:

1. The question proposed must be a question of law, fact or mixed law and fact or be a question as to the admissibility of any evidence;[4]

2. The question must be raised in a pleading; and

3. It appears that the determination of the question before the hearing may dispose of all or part of the proceeding, result in a substantially shorter hearing or result in a substantial saving of costs.[5]

[4] The first condition embodies "all the possibilities of what form a question could take."[6] The "main focus" is to be placed on the second and third conditions.[7]

[5] The onus is on Lehigh to establish the conditions are met.[8]

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4 In 2004, subsection 58(1) was amended to include questions of fact and mixed law and fact. In 2014, it was further amended to include a proposed question as to the admissibility of evidence.

5 *McIntyre, supra* note 3 at para 23.

6 *Suncor, supra* note 3 at para 14.

7 *Sentinel Hill Productions IV Corp. v Canada*, 2013 TCC 267, 2013 DTC 1217 [*Sentinel Hill*] at para 3. *Suncor, supra* note 3 at para 14.

8 *Rio Tinto, supra* note 3 at para 43.

I. Appeal Background

[6] Lehigh is a private Canadian corporation and a wholly-owned subsidiary of a United Kingdom company.[9]

[7] In each of the taxation years ending December 31, 2009, December 31, 2010 and December 31, 2011 ("relevant years"), Lehigh conducted operations in Canada. Its principal businesses were cement, ready-mixed concrete, aggregates and pipe and cement products. Lehigh's registered office is located in Calgary, Alberta, and it has an office in Vancouver, British Columbia.

[8] Cement production operations were conducted by Lehigh's Cement division with two cement plants located in Canada. One plant is located in Delta, British Columbia ("Delta plant").[10]

[9] Lehigh used alternative fuels in the cement kiln operation at its Delta plant in its Delta Alternative Fuels Project (the "Project").[11] The alternative fuels included construction and demolition waste and mixed plastic and paper. Lehigh experienced issues and obstacles working on the Project and sought to understand and overcome those concerns. During the relevant years, it claimed input tax credits ("Credits") arising from expenditures used in the Project that it alleges constitutes Scientific Research and Experimental Development ("SR&ED").

[10] The Minister of National Revenue reassessed and denied the federal SR&ED Credits, totaling $782,576, claimed by Lehigh in the relevant years on the basis it is common practice for cement kilns to use alternative fuels, thus there were no technological uncertainties nor technological advancements.[12] Any issues that arose while using alternative fuels could be resolved by applying known practices, techniques and methodologies.

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9 HeidelbergCement Canada Holding Limited. HeidelbergCement AG is Lehigh's ultimate parent and a public limited company based in Germany.

10 The Lehigh Cement division operated cement terminals in Manitoba, Saskatchewan, Alberta and British Columbia to facilitate the distribution of its cement products produced at the plants.

11 Affidavit of Brian Ross, paragraph 3.

12 The total amount comprises $59,742, $556,628 and $166,206, respectively, in the relevant years. The Minister also reduced the British Columbia SR&ED non-refundable tax credits by $14,201 in 2009, by $309,238 in 2010 and by $92,337 in 2011.

Parties' positions - appeal

[11] Lehigh's position is that its Project constitutes SR&ED because it was a systematic investigation of the technical uncertainties related to the use of alternative fuels and the "experimental development work undertaken […] was for the purpose of achieving technological advancements to improve its existing processes to manufacture cement at its Delta plant."[13] All expenditures it incurred were undertaken on experimental development and applied research related to Lehigh's business in Canada.[14] Therefore, its activities qualify as "experimental development" pursuant to paragraph (c) of the definition of SR&ED in subsection 248(1) of the *Income Tax Act* (the "*Act*").

[12] The respondent's position is that none of Lehigh's activities meet the definition of SR&ED within the meaning of subsection 248(1), as it failed to meet the criteria in the test ("five-factor test") enunciated in the decision of *Northwest Hydraulic*, the leading authority for determining whether an activity constitutes SR&ED.[15] Lehigh's activities constituted routine engineering and standard practice. Using alternative fuels in its cement kilns was a common practice and any challenges arising therefrom could have been resolved by Lehigh by applying known practices, techniques and methodologies.[16] There was no technological uncertainty nor was technological advancement sought or achieved.

Request to Admit and Response

[13] Subsequent to the close of pleadings, the respondent served on Lehigh's counsel a Request to Admit the truth of certain facts. In the Response to the Request to Admit ("Response"), Lehigh admitted the facts contained in paragraphs 1 and 3, refused to admit the facts in paragraph 2 and denied the facts in paragraphs 4 and 5 as follows:[17]

> 1. and 3. Admitted that cement industry participants, in and outside of Canada, have undertaken work and achieved advancements with respect to

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13 Amended Notice of Appeal, paragraphs 120 and 121.

14 Amended Notice of Appeal, paragraph 117.

15 *Northwest Hydraulic Consultants Ltd v Canada*, [1998] 3 CTC 2520, 98 DTC 1839 at para 16 [*Northwest Hydraulic*]. Appendix I of these reasons sets out the test.

16 Reply, paragraph 22.

17 Affidavit of Elizabeth Goh, Exhibit C - Response to Request to Admit, November 16, 2016.

the use of alternative fuels in cement kilns and those advancements are the same as or similar to those sought by Lehigh in the Project.

2. Refused to admit that it is a common practice for cement kilns to use waste fuels, often referred to as Secondary Fuel, Refuse Derived Fuel or Process Engineered Fuel, because the statement is:

(i) imprecise with respect to the meaning of the terms "common practice", "waste fuels", "Secondary Fuel", "Refuse Derived Fuel" and "Processed Fuel";

(ii) does not specify any geographic location to which the statement relates; and

(iii) does not specify a time period to which the statement relates.

4. Denied that the technological advancements sought in its Project were based on known practices, techniques and methodologies accessible to competent professionals in the field;

5. Denied that the Project did not advance the general understanding of cement industry participants and other knowledgeable persons in the field with respect to the use of alternative fuels in cement kilns.

[14] No examinations for discoveries have been held.

Rule 58 Motion

[15] In its Notice of Motion ("motion"), Lehigh seeks a determination of the following proposed question:

> Does "experimental development" as defined in paragraph (c) of the definition of "scientific research and experimental development" ("SR&ED") in subsection 248(1) of the *Income Tax Act* (Canada) (the "Act") constitute SR&ED [even] <u>if other industry participants (located in or outside of Canada) have achieved the particular or a similar "technological advancement" in their particular circumstances</u> [the "Question"]?[18]

[18] Applicant's Written Submissions, paragraph 5. Altered at the hearing, Transcript, page 6.

[16] In the Question, Lehigh asks the Court to determine "the correct legal test" for "experimental development" described in paragraph (c) of the definition of SR&ED in subsection 248(1) of the *Act.* The definition, it submits, appears to be silent about whether "experimental development" exists if other cement industry participants ("industry participants") have achieved the same or similar technological advances in their particular circumstances. Neither term "experimental development" nor "technological advancement" are defined in the *Act.* The debate centers on whether experimental development should be analyzed based on the activities carried on by Lehigh alone or the activities of others in the same industry.[19] Lehigh asserts the former.

[17] The definition of SR&ED permits a taxpayer to claim SR&ED Credits for experimental development work for the purpose of achieving technological advancement. The relevant part of subsection 248(1) reads:

> "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
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> …
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> (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, …

[18] Lehigh characterizes the order sought as a guide, or an aid, to the trial judge and the parties to assist to determine the ultimate issue at the hearing as to whether or not Lehigh's own activities constituted SR&ED based on a common understanding of the legal test. Its position is that the Question meets all the conditions in subsections 58(1) and (2) of the *Rules*. The motion seeking determination of the Question contains two grounds. First, the Question is raised in the pleadings. Second, a determination of the Question will dispose of all of the proceedings or result in a substantial shortening of the hearing of the appeal and/or a substantial costs savings.

[19] The respondent counters that sufficient guidance has been provided in established jurisprudence as to the meaning of SR&ED in the *Act* and the test to determine whether there is a technological uncertainty or technological advance.

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[19] Applicant's Written Submissions, paragraph 12. Transcript, pages 22 and 24.

Determination of the Question would not add anything to the test.[20] The respondent's position is that the Question is flawed as it cannot be answered conclusively, in either direction, without additional facts which have not been admitted by Lehigh and the wording is flawed. It would be inappropriate and prejudicial to the respondent to permit the Question to proceed to a determination. Substantial savings in time or costs will not materialize.

[20] In support of its motion, Lehigh filed the affidavit of Brian Ross; he describes some factual background and highlights excerpts in various documents in the respondent's document production.[21] The respondent filed the affidavit of Elizabeth Goh; she highlights an excerpt from a Canada Revenue Agency ("CRA") letter that outlines the respondent's position in response to Lehigh's notices of objections for the relevant years.[22]

II. Analysis

I. Question of law, fact or mixed law and fact

[21] It is undisputed that the first condition in subsection 58(1) is satisfied as the Question is framed as a question of law. I agree, as framed, it is a question of law.

II. Is the Question raised in the pleadings?

[22] Turning to the second condition in subsection 58(1), as to whether the Question is raised in the pleadings.

[23] In *Sentinel Hill*, Justice Woods interpreted the previous iteration of Rule 58, as requiring "that the Proposed Question must be properly raised as an issue in the pleading" because Rule 58 contemplates that the pleadings raise the issue that is

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[20] The test focuses on whether the alleged technical uncertainty could be resolved using routine engineering or standard procedures accessible to competent professionals in the field.

[21] Affidavit of Brian Ross, Exhibits C, A and B - CRA letter dated January 30, 2014 to Blakes with attached SR&ED 2009 and 2010 Review Report for the taxation years ended December 31, 2009 and December 31, 2010 plus a SR&ED Review Report for the taxation year ended December 31, 2011. "Perspective and limits for cement kilns as a destination for RDF" from waste management (2008); and Offsetters, "Lafarge Cement Plant", respectively.

[22] Affidavit of Elizabeth Goh, Exhibit A – CRA Appeals Division letter, pages 5 and 6, to Blake, Cassels & Graydon LLP, dated October 29, 2014.

the subject of the proposed question.[23] In *Suncor*, Chief Justice Rossiter noted that "[i]n *Sentinel Hill* ... Justice Woods held that a proposed question must be properly raised as an issue in the pleadings; it is insufficient for the question to be merely referred to in the pleading. It is not an appropriate use of s. 58(1)(a) to raise a new issue."[24] This was endorsed in the context of current Rule 58 in considering proposed questions from both parties, three of which failed to satisfy the second condition. The reasons for that included a mere reference to the question and a few words alone in the pleadings do not amount to properly raising the proposed question as an issue in the pleadings.

[24] In *Paletta*, Justice Owen indicates that "Rule 58 does not provide a means to address such questions that are not raised in the pleadings."

[25] The second condition in subsection 58(1) serves to bring into a clear focus in the pleadings the proposed question that is the subject of a Rule 58 motion. That was not done in the present case. As noted by Justice Woods, the rationale for properly raising the issue in the pleadings is "[f]or reasons of fairness, issues in an appeal are generally limited to those that are raised in the pleadings. The language used in paragraph 58(1)(a) ensures that this principle is not by-passed by bringing a motion under this provision. It is not an appropriate use of s. 58(1)(a) to raise a new issue through this procedure."[25]

[26] I observe that the Question, as framed, is not raised as an issue in either pleading in any of the sections.

[27] Lehigh argues that this second condition should not be interpreted narrowly, otherwise the issues section of any pleading that contemplates a Rule 58 motion would become prolix and absurd requiring litigants to break down the relevant provision into "multiple, multiple issues" and contrary to the expectation that pleadings are to be pithy and concise.[26] Lehigh suggests that the Question is

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23 *Sentinel Hill, supra* note 7 at para 31. Sentinel Hill acknowledged its question was not raised as an issue in a pleading but argued a reference in the pleading suffices and claimed it satisfied the condition because the Replies stated the Minister's conclusion as to the non-existence of the partnership.

24 *Suncor, supra* note 3 at para 17.

25 *Sentinel Hill, supra* note 7 at paras 27-31.

26 Transcript, pages 88 and 89.

properly raised in the pleadings based on various points pled in the Reply combined with the main issue in its pleading.

[28] Paragraph 113 of its pleading describes the overall issue as "Did the activities undertaken by the Appellant in the conduct of its experimental trials with alternative fuels at its Delta cement plant constitute "SR&ED" as that term is defined in subsection 248(1) of the *Act*?"[27] Whilst paragraph 113 refers generally to some elements of the Question, it cannot be construed, in my view, as satisfying the condition that the Question is properly raised in the pleadings. As in *Suncor*, at best, there is a remote nexus between paragraph 113 of Lehigh's pleading and the Question.[28]

[29] In the grounds for its motion, Lehigh points to paragraph 117 of its pleading, in the reasons section, in support of its position that the Question is raised in the pleadings.[29] It states "All of the expenditures incurred by the Appellant in the course of the Delta Alternative Fuels project were necessary for, and directly in support of, the work undertaken on experimental development and applied research related to the business of the Appellant, carried on in Canada and directly undertaken by the Appellant." That paragraph merely connects the expenditures to the purported SR&ED activity, it does not, however, properly raise the issue that is the subject of the Question in the pleadings.

[30] Lehigh also points to paragraph 5 of the Reply, the statement of facts section, which contains 11 subparagraphs that summarizes the respondent's admissions, denials and statements in response to paragraphs 13 to 90 (containing facts pled by Lehigh) of the Amended Notice of Appeal. Lehigh reproduced the subparagraphs below in its motion in support of its position that the Question is properly raised as an issue in the pleadings:

a) "the Appellant sought to use alternative fuels at its cement plant in Delta" (paragraph 5(i));

b) "it is common practice for cement kilns to use alternative fuels" (paragraph 5(ii));

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27 Similarly, paragraph 19 of the Reply expresses the issue as "Did the Appellant undertake any activities with the alternative fuels at its Delta cement plant in its 2009, 2010 and 2011 taxation years that qualify as SR&ED?"

28 *Suncor*, *supra* note 3 at paras 22-23.

29 During the oral hearing, Lehigh did not explain how paragraph 117 raises the issue Question in the pleading.

c) "there were no technological uncertainties in using the alternative fuels at the Delta plant" (paragraph 5(iv));

d) "the activities claimed by the Appellant to be scientific research and experimental development ("SR&ED") were routine engineering and standard practice" (paragraph 5(v));

e) "the process interruptions which arose were resolvable by applying known practices, techniques, and methodologies" (paragraph 5(vi)); and

f) "the Appellant did not achieve technological advancement in using the alternative fuels" (paragraph 5(viii)).

[31] The two terms "technological advancement" and "SR&ED" referred to in the subparagraphs are included in the Question. However, no mention is made in the subparagraphs to features such as other industry participants, in or outside Canada, that have achieved the particular or a similar technological advancement in their particular circumstances nor are such features prominent elsewhere in the Reply. Lehigh did not raise these features in its pleading notwithstanding that these are germane to the Question.[30] Its pleading focuses exclusively on its activities and how it meets the definition of SR&ED in alleging technological uncertainty existed and technological advancement was sought.[31] My view is that the two terms referenced in the subparagraphs do not fulfil the condition in subsection 58(1) that the Question is properly raised as an issue in the pleadings. I was unable to glean from the pleadings a clear focus as to the issue that aligns with the Question in the motion.

III. Does it appear that the determination of the Question may dispose of all or part of the proceeding, result in a substantially shorter hearing or substantial costs savings?

[32] As to the third condition in subsection 58(2), whether it appears that the determination of the proposed question may dispose of all or part of the proceeding, shorten the hearing or save costs.

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30 "Common practice" is referenced in the Reply, subparagraph 5(ii) and paragraph 18(kk), and in paragraphs 4 and 125 of the Amended Notice of Appeal.

31 Lehigh contends that the practices of other industry participants are not relevant to a determination of the validity of Lehigh's SR&ED; conceivably, this is the basis for pleading in the manner it did.

[33] Relying on the decisions in *McIntyre* and *Kwok*, in *Suncor*, the Court held that the third condition is not satisfied if only one of two possible answers would lead to the desired results (that the proposed question may dispose of all or part of the proceeding or substantially shorten the hearing or save costs) or where it will do so only if it is answered in a particular way.[32]

[34] The respondent contends that the only way the Question will dispose of the appeal is if Lehigh elects to discontinue the appeal if the Question is answered in the negative. Further, the Question is flawed structurally and fundamentally. Consequently, no conclusive answer can be given to the Question – affirmatively or negatively - based on the wording and without additional material facts necessary to determine the activity's eligibility for SR&ED. At best, the only possible answer the Court could give to the (closed ended) Question would be "it depends".

[35] Lehigh submits that should the Court ultimately determine the Question be answered: (a) in the negative, Lehigh will discontinue its appeal and it will then dispose of the appeal and result in costs savings; or (b) be answered in the affirmative, the issues in the hearing will likely be narrowed and the discovery/trial process will likely be shortened. The proceeding will then focus solely on whether Lehigh's activities constituted SR&ED based on its own products and processes. As such, this will likely shorten the proceedings and/or trial time plus save costs. I do not agree.

[36] The Question essentially asks does experimental development constitute SR&ED if other industry participants, located in Canada or globally, "have achieved the *particular or a similar* "technological advancement" in their particular circumstances." The wording is awkward. It expressly refers to other industry participants and then alludes indirectly to an industry participant (such as Lehigh) by virtue of the phrase italicized in which it is implied that technological advancement was similarly achieved by an industry participant (such as Lehigh). However, the respondent clearly disputes that Lehigh sought and achieved

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[32] *Suncor*, *supra* note 3 at para 29. In *Kwok v Canada*, 2008 TCC 238, 2008 DTC 3520 [*Kwok*], the Court did not permit a question to proceed to stage two in circumstances where it would dispose of all or part of the hearing only if it were answered in the negative, whereas if answered in the affirmative, a full trial would be required and in such circumstances the proposed question would neither shorten the hearing nor result in any costs savings.

technological advancement and she posits that the determination of that issue and the issue of whether technological uncertainty existed, is "the factual crux" of the case.[33] I will return to this later in these reasons.

[37] Another difficulty is that the Question cannot be answered in the affirmative because it presumes all other requirements for claiming SR&ED have been met. To be eligible for SR&ED, each of the questions in the five-factor test must be answered in the affirmative. Therefore, no affirmative answer can be given to the Question unless all five questions in the test can also be answered in the affirmative. I agree with the respondent and find that the structure and wording of the Question – *does* experimental development constitute SR&ED [even] *if* – is structurally flawed.

[38] Apart from those difficulties, a fundamental concern with the Question is it does not address the five-factor test (for the reasons noted below) established in jurisprudence interpreting what constitutes SR&ED. The Question is not determinative of the five factors in that test as enunciated by Justice Bowman, as he then was, in *Northwest Hydraulic* which, again, was designed to determine eligibility for SR&ED. That decision has been applied extensively at the trial and appellate levels. As such, the Question cannot be dispositive of any of the elements of the SR&ED definition.

[39] Whether other industry participants have achieved a particular or similar advancement is a relevant fact that would be considered in determining the first and fourth questions (technological uncertainty and technological advancement, respectively) in the five-factor test. However, that alone is not determinative of those questions. In drawing from Justice Bowman's analysis of the first question, the respondent sums up the principles for this factor as "The fact other industry participants have achieved a particular or similar advancement might well be indicative that there is no technological uncertainty. However, the ultimate determination of the legal test depends on whether the identified uncertainty can be resolved by "routine engineering or standard practices", being the "techniques, procedures and data that are generally accessible to competent professionals in the field."[34] A substantial body of jurisprudence confirms the importance of determining whether the sought advancement was based on routine engineering or

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33 Transcript, page 55.

34 Respondent's Written Submissions, paragraph 50.

standard procedures in interpreting the meaning of SR&ED.[35] This aspect is a common factual thread running throughout the Reply in the present case, however, it is not apparent as to how this factors into the Question.

[40] In his analysis of the fourth question, Justice Bowman discusses an example involving a technological advance in Canada and notes that that does not cease to be one merely because of a theoretical possibility that a researcher outside of Canada may have made the same advance but that researcher's work is not generally known. I agree with the respondent that this highlights the flaw in Lehigh's Question that "A technological advance made by a taxpayer does not cease to be one merely because other industry participants may have achieved the particular or similar advancement *unless* that other participant's work in achieving that advancement is known or available to persons knowledgeable."[36] Given that, I find that the Question has no reasonable prospect of success.

[41] In *Paletta*, the Court affirmed that the prospect of success factor remains relevant as one of several factors at stage one of a Rule 58 analysis in the exercise of the Court's discretion.[37] In *Sentinel Hill,* the Federal Court of Appeal upheld Justice Woods' dismissal of a Rule 58 motion because the proposed question had no reasonable chance of success and therefore would not dispose of the proceeding, shorten the hearing, or save costs and should not be set down for hearing.[38]

[42] Ultimately, the resolution of the first and fourth questions of the five-factor test depends on relevant facts. Lehigh has admitted in its Response that industry participants, in Canada and globally, have undertaken work and achieved advancements with respect to the use of alternative fuels in cement kilns and those

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35 *Highweb & Page Group Inc. v Canada*, 2015 TCC 137, 2015 DTC 1143 at para 18; *Tacto Neuro Sensory Devices Inc. v Canada*, 2004 TCC 341, [2004] TCJ no 328 (QL); *Blue Wave Seafoods Inc. v Canada*, 2004 TCC 553, 2004 DTC 3066 at para 54; *Hypercube Inc. v Canada*, 2015 TCC 65, 2015 DTC 1089 at paras 44 and 45; *Zeuter Development Corp. v Canada*, 2006 TCC 597, 2007 DTC 41 at para 22 and *R&D PRO-Innovation Inc. v Canada*, 2015 TCC 186, 2015 DTC 1170, aff'd 2016 FCA 152.

36 Respondent's Written Submissions, paragraphs 51 and 52.

37 In *Suncor, supra* note 3 at para 28, the prospect of success factor is considered dispositive.

38 *Sentinel Hill, supra* note 7, aff'd 2014 FCA 161, 2014 DTC 5089 (FCA) at paras 3 and 6. The proposed question was predicated on an unproven assumption, involving the existence of a partnership that needed to be settled before answering the proposed question and proved to be fatal.

advancements are the same as or similar to those sought by Lehigh in its Project. This maybe explains why Lehigh suggests that no facts are in dispute for the purpose of the Question. Other critical material facts, however, have been denied. Namely, Lehigh has denied the technological advancements sought in its Project were based on known practices, techniques and methodologies accessible to competent professionals in the field. It has also denied that the Project did not advance the general understanding of cement industry participants and other knowledgeable persons in the field with respect to the use of alternative fuels in cement kilns. All of which remain in issue and form "the factual crux" of the case.

[43] The existence of factual disputes does not preclude the granting of a Rule 58 motion, however, this remains a relevant consideration to a Court's consideration as to whether a determination of a proposed question may substantially shorten the hearing or save costs.[39]

[44] In *McIntyre*, *HSBC* and *Suncor*, the Court held in each instance that there should never be a dispute as to a material fact underpinning a question of law.[40] In addition to the above disputed material facts, the respondent denies the facts in paragraphs 20 to 28 of Lehigh's pleading which were pled by Lehigh in support of its position that technological advancement was sought and achieved and technological uncertainty existed. The respondent has also denied a substantial number of other facts pled by Lehigh. Lehigh disagrees with various assumptions of fact made by the Minister including those that relate to routine engineering and standard practice. There are disputed material facts underpinning the Question of law which require *viva-voce* evidence, including expert evidence and documentary evidence.

[45] The Court is also being asked to answer the Question without additional material facts that are necessary to formulate a dispositive Question and no examinations for discovery have been conducted. It would be inappropriate, in my view, to determine the Question in the abstract in a factual vacuum isolated from the overall determination of whether Lehigh's activities satisfied the definition of SR&ED as Lehigh seeks to do. Facts relating to experiments are critical to a SR&ED analysis. Without such facts, I find it is unlikely that an affirmative or negative answer could be given to the Question.

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39 *Suncor*, *supra* note 3 at para 25.

40 *McIntyre*, *supra* note 3 at para 27. *HSBC Bank Canada v Canada*, 2011 TCC 37, 2011 DTC 1071 at para 11 [*HSBC*] and *Suncor*, *supra* note 3 at para 26.

[46] Based on the foregoing, I conclude that it appears that a determination of the Question may not dispose of all or part of the proceeding, result in a substantially shorter hearing or result in substantial costs savings, therefore, the Question fails to satisfy the condition in subsection 58(2) of the *Rules*.

IV. Other considerations and the circumstances

[47] The repetitive and permissive language in Rule 58 confirms that the motions judge is not limited to considering only the statutory conditions in subsections 58(1) and (2) of the *Rules.*[41] The motions judge has the discretion to consider other factors, together with all the circumstances of the case, in order to decide whether the proposed question is appropriate for a Rule 58 determination.[42]

[48] In *Banque National,* former Chief Justice Bowman considered a motion that was based on a previous iteration of Rule 58. He expressed concern about determining a question of law without evidence when defining a legal test and held that a question of law cannot be decided in a vacuum and must be based on a proper evidentiary foundation with factual underpinnings.[43]

V. Is the determination of the Question best left to the trial judge?

[49] The respondent argues that the determination of the Question, structured as a question of law, is essentially a question of fact which should be left to the trial judge because the Question "really comes down to a determination of the facts."[44] A similar strategy was employed in the decision in and by *HSBC* involving a Rule 58 motion.[45] The respondent further argues that using Rule 58 to limit the scope of the respondent's discovery and the evidence that will be presented to the trial judge, on a factual matter, is inherently unfair.

[50] Mindful of the 2004 amendments to Rule 58, Justice C. Miller in *HSBC* nevertheless noted that a Rule 58 motion should never be a substitute for a trial. One concern was the complexity of the issues necessitating many conclusions on

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41 *Paletta, supra* note 2 at para 22.

42 *McIntyre, supra* note 3 at para 25 and *Delso Restoration Ltd. v Canada,* 2011 TCC 435, 2011 DTC 1315.

43 *Banque Nationale du Canada v Canada,* 2006 TCC 363, [2006] TCJ no 264 (QL) at para 9 [*Banque Nationale*]

44 Transcript, page 82.

45 *HSBC, supra* note 41 at paras 12, 13 and 14.

facts in the context of the motion. The Court held that a trial is more appropriate to afford a fair hearing with evidentiary protections for both parties.[46] In *Suncor*, the Court endorsed the principles in *McIntyre* and *HSBC* and noted that although a Rule 58 motion is very much like a trial, an actual trial has the benefits of a fair hearing with evidentiary protections.[47] In concluding in *HSBC* that the 12 questions of law failed to meet the conditions, the Court states:

> 13 … The CDIC issue as framed in the Reply is a question of fact: … Interestingly, the Appellant has framed its question for Determination as a question of law - … The answer to the legal question can only be determined by answering the factual question, and that notwithstanding the new wording of *Rule 58*, is a finding so fundamental to the overall appeal that only a full-blown trial with all the benefits of trial rules and procedures is the appropriate place for such an adjudication."[48]
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> …
>
> 14 … the Appellant is attempting to resolve the Respondent's major contentious issue. This goes to the very heart of what a trial judge, with all the evidentiary rules and procedures at his or her disposal, is to hear. No, I find the Appellant's request for the resolution of the CDIC issue is an attempt to bifurcate the trial, with the result a Motion's Judge may be forced to reach conclusions on facts which should, and must, go to trial for a fair hearing, and to reach those conclusions without the benefit of the evidentiary protections afforded to both sides at a trial. …

[51] In the present case, the pleadings reveal a complex case. Material facts are disputed by both parties, a substantial number of facts pled by Lehigh have been denied by the respondent and no discovery has taken place. Extensive findings of fact will need to be made. Determining the relevance and weight to be given to the practices of other industry participants is best left to the trial judge tasked with determining the overall issue so as to consider the evidence in the context of the overall SR&ED analysis. In my view, such circumstances warrant a trial with the benefit of the evidentiary protections afforded to both sides at a trial to obtain a fair hearing.

[52] For these reasons, I am of the view that the proposed Question was not properly raised in the pleadings thus fails to satisfy the condition in subsection

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46 *McIntyre*, *supra* note 3 at para 10.

47 *Suncor*, *supra* note 3 at para 26. *Paletta*, *supra* note 2 at para 34.

48 *HSBC*, *supra* note 41 at para 13.

58(1). Also, the Question cannot be answered conclusively, in either direction, and has no reasonable prospect of success, therefore, does not satisfy the conditions in subsection 58(2) in that it appears that the determination may not dispose of all or part of the proceeding, result in a substantially shorter hearing or result in substantial costs savings.

[53] I conclude that it is not appropriate that the Question be set down for determination under the Rule 58 process.

[54] The motion is dismissed.

[55] Costs are awarded to the respondent in any event of the cause.

Signed at Ottawa, Canada, this 6th day of October 2017.

"K. Lyons"

Lyons J.

Appendix I

1. Is there a technical risk or uncertainty? …

2. Did the person claiming to be doing SRED 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, that is to say an advancement in the general understanding? …

5. Although the Income Tax Act and the Regulations do not say so explicitly, it seems self-evident that a detailed record of the hypotheses, tests and results be kept, and that it be kept as the work progresses.

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COURT FILE NO.:	2015-2735(IT)G
STYLE OF CAUSE:	LEHIGH HANSON MATERIALS LIMITED and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 24, 2016
REASONS FOR ORDER BY:	The Honourable Justice K. Lyons
DATE OF ORDER:	October 6, 2017

APPEARANCES:

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