

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20220620**

**Dockets: A-68-21 (Lead)**

**A-65-21**

**A-66-21**

**A-67-21**

**Citation: 2022 FCA 119**

**CORAM: PELLETIER J.A.  
WEBB J.A.  
RIVOALEN J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**LARRY THOMPSON and THOMPSON BROS. (CONSTR.) LTD.**

**Respondents**

Heard by online video conference hosted by the registry on March 22, 2022.

Judgment delivered at Ottawa, Ontario, on June 20, 2022.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
RIVOALEN J.A.**

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**Respondents**

**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] These are appeals from the Order of the Tax Court of Canada (2021 TCC 15) requiring the Crown to respond to a number of follow-up questions posed by Larry Thompson and Thompson Bros. (Constr.) Ltd. (collectively the Thompsons) following the examination for discovery of the Crown's nominee.

[2] The Thompsons had reported losses arising from the alleged trading in certain foreign currency forward contracts involving themselves and ODL Securities Ltd. (ODL). One of the bases upon which the Thompsons were reassessed was that their purported trading was a sham.

[3] One of the main issues in these appeals is whether information contained in the Canada Revenue Agency's (CRA) files related to audits of other taxpayers (who also reported losses arising from trading in foreign currency forward contracts involving Tim Hodgins, John Hodgins and ODL) is relevant, for the purposes of discovery, in the Thompsons' appeals to the Tax Court.

[4] The other main issue is whether the Crown should be compelled to answer follow-up questions related to a report (the RSD Solutions report) prepared for the CRA concerning trading in foreign currency forward contracts.

[5] For the reasons that follow, I would allow these appeals in relation to the issue of whether the Crown should be compelled to disclose the information in the CRA's files concerning audits related to other taxpayers. I would dismiss these appeals in relation to the issue of whether the Crown should be compelled to answer questions concerning the RSD Solutions report. As a result, the Crown will not be required to answer the questions related to the information in the CRA's files concerning the other taxpayers but will be required to answer the questions related to the RSD Solutions report.

[6] The Order dated April 12, 2021 consolidated these four appeals and designated the appeal in file A-68-21 as the lead appeal. These reasons will be filed in file A-68-21 and a copy thereof will be placed in each of the other files.

I. Background / Decision of the Tax Court

[7] The underlying appeals before the Tax Court relate to the Thompsons' 2008 and 2009 taxation years. In those years, the Thompsons claimed significant losses arising from a number of reported trades in foreign currency forward contracts. The losses were allocated to the Thompsons as members of certain partnerships.

[8] According to the Thompsons, the trading took place with ODL, a brokerage based in London, United Kingdom. Tim Hodgins was a trader with ODL. John Hodgins is described as a promoter in the reply filed with the Tax Court.

[9] In reassessing the Thompsons, the Minister of National Revenue asserted that the trading contracts were a sham. In paragraph 7 of the Crown's memorandum, the Crown submits:

that the documents relating to the claimed trading were a sham, in that:

- (a) no trading was ever authorized, contemplated, or actually took place;
- (b) the intention of all the parties involved was to give the appearance that the partnerships were engaged in trading so that the [Thompsons] could claim tax losses;
- (c) there was no offer and no acceptance respecting the trading contracts;
- (d) no business activity was carried on with an expectation of profit; and

- (e) the partnerships were not formed for the purpose of carrying on a business with a view to profit.

[footnotes omitted]

[10] On February 24, 2016, the Crown's nominee, Christine Cheng, was examined on discovery. Ms. Cheng was not the CRA auditor who audited the transactions in question. Zul Lila was the CRA auditor involved in this file. However, he retired from the CRA in September 2014.

[11] The Crown agreed to a number of undertakings at the examination for discovery of Ms. Cheng. In particular, there were three undertakings that are relevant in this appeal – undertakings 12, 18 and 21. These undertakings were described in the transcript of the examination for discovery of Ms. Cheng as follows:

- UNDERTAKING NO. 12:

To produce any previous audit work or documentation relied upon by Mr. Lila in determining that trades were a sham.

- UNDERTAKING NO. 18:

(Under advisement) to provide a copy of the RSD Solutions report that Zul quotes from.

- UNDERTAKING NO. 21:

(Under advisement) to produce any records made by the CRA related to any meeting with ODL Securities in London.

[12] Following the Crown's responses to these three undertakings (which included providing a copy of the RSD Solutions report to the Thompsons) the Thompsons posed further questions. This led to further responses and even further questions. Eventually, there were several unanswered questions that were the subject of the motion brought by the Thompsons to the Tax Court. The Tax Court Judge numbered the questions 1 to 8. Question 5 incorporated, indirectly, four other questions. The questions that were the subject of the motion before the Tax Court (using the same numbering and wording of the questions as adopted by the Tax Court Judge) are set out in the Appendix attached to these reasons.

[13] The Tax Court Judge began his analysis by referring to a number of decisions of the Tax Court that confirmed that the question of relevance is to be broadly and liberally construed at the discovery stage and that the threshold is lower than it would be at trial. However, as he also noted, this does not mean that a party can conduct a fishing expedition in the guise of an examination for discovery.

[14] In particular, the Tax Court Judge relied on the earlier decision of the Tax Court in *Paletta v. The Queen*, 2017 TCC 233 (*Paletta*). In that case, the taxpayer was seeking an order compelling the Crown to answer certain questions in relation to a tax appeal also involving trading transactions conducted through ODL. The Tax Court Judge, in relying on *Paletta*, described the factual circumstances in *Paletta*, in paragraph 6 of his reasons, as "having more than passing similarity to the present matter".

[15] The Tax Court Judge found that since the respondent before the Tax Court is the Crown and not the CRA auditor, the questions did not necessarily have to be limited to what the CRA auditor reviewed or relied upon. As a result, the Tax Court Judge ordered the Crown to respond to the questions 1 through 7, as numbered by the Tax Court Judge.

[16] For question number 2, the Tax Court Judge, in his reasons, indicated that the Crown should respond to this question in the following fashion:

[20] Consequently, I direct further that Question 2 should be responded to in the following fashion, if and to the extent not already done. The Respondent should make all reasonable efforts to locate or generate copies of the destroyed emails and produce same to the Applicants, as part of the requested copy of the audit file. These reasonable efforts would include, but not necessarily be restricted to, the searching of relevant CRA computer servers to generate copies of any such emails and provide any such copies to the Applicants. As well, likely CRA recipients and originators of relevant emails from and to the auditor, including team leaders and CRA head office personnel, should be identified and contacted to ascertain if they have (and if so provide to the Applicants) copies of relevant email correspondence. I anticipate but do not know with certainty whether at least some such reasonable efforts already have been expended.

[17] The Crown was not required to answer question number 8.

[18] The Crown is not appealing the part of the Order of the Tax Court requiring it to respond to question number 2, and, therefore, the above guidance on how to respond to this question remains in place. There is also no cross-appeal in relation to the part of the Order stipulating that the Crown is not required to answer question number 8.

[19] As a result, the questions 1, 3, 4, 5, 6 and 7 are in issue in these appeals.

[20] With respect to the questions concerning information obtained or reports prepared in relation to the audits of other taxpayers, the Crown's response was that while Mr. Lila may have been able to access the position papers prepared by other auditors, there is nothing to indicate that he relied on these position papers. The Crown also submitted that Mr. Lila did not have access to the shared drive that contained documents concerning related audits. The Crown also indicated "there was no compiling of information from the various audits into a database containing information regarding ODL ... or the Hodgins ... for example".

[21] The "RSD Report" is a report prepared for the CRA by RSD Solutions Inc. on foreign currency transactions undertaken by various Canadian partnerships. A copy of this report is attached as Exhibit C to the affidavit of Doreen Prasad that was filed by the Thompsons as part of their motion record. The conclusions are set out at the end of this report:

The trading strategy undertaken by the partnerships cannot be to hedge an expected currency transaction or series of transactions incidental to an enterprise's business (e.g. purchase of oil in US dollars or sale in Euros to a German customer) as there is no business other than foreign currency forward trading in the partnerships.

Nor can the strategy be considered as part of a currency speculation business. The transactions are undertaken in offsetting pairs with cash payments upon value dates deferred such that the pairs act as hedges for each other. Hedging can have a place with currency speculators, but that would generally be ongoing management of changing positions subsequent to initial trading; it would not be done for all trades on the trade dates in the way the partnerships have done. That would be incompatible with an expectation of profit.

Cash settlement for amounts of losses has not been made by payment from the partnerships to the brokers on value dates. This is contrary to our experience of market practice when there would be full exchange of currencies at the contracted exchange rates on the value date or, depending on agreement between the parties, a cash payment representing the difference between the contracted and spot rates on the value date. For the subject transactions, amounts due are carried forward as owing to the broker until there are offsetting gains from transactions with later value dates.



The strategy is only ever likely to break even (less the relatively small cost of a bid/ask spread). Thus the only apparent purpose of the strategy is to create timing differences between the recognition of profits and losses. The reversal of the losses can be deferred as long as the trading strategy continues, but discontinuation will result in the recognition of profits by the time that all contracts mature.

Our examination of the documentation and trades we have seen revealed no reason to believe there are any major deficiencies rendering the documentation ineffective (although this would need to be confirmed by a legal opinion). There are a number of anomalies (e.g. cancelled or replaced contracts, items appearing on statements for different dates than the trade dates) that may be due to clerical errors, unusual in our experience to this extent from a professional brokerage, or backdating/replacing trades.

The trading is all done in Canadian dollars, US dollars and Euros, all strong and highly liquid. They are also relatively stable currencies in terms of interest rates and spot and forward rate fluctuations. Therefore, the scheme under examination could be fairly reliably structured to produce the desired result fairly closely with adjustments made as necessary over the life of the forward instruments. The desired result is to create losses of a certain magnitude in one or more particular accounting periods followed by nearly corresponding gains in later periods, the difference being remuneration to the broker facilitating the trading.

[22] In responding to the questions concerning the RSD Solutions report, the Crown stated that it did not intend to rely on this report and that the RSD Solutions report did not deal with the transactions at issue in the Thompsons' appeals.

## II. Issue and Standard of Review

[23] The issue in these appeals is whether the Tax Court Judge erred in compelling the Crown to answer the questions that are still in issue in these appeals. In particular, the issue is whether the Tax Court Judge failed to address the relevance of the questions in relation to the only underlying issue that the parties indicated was relevant in this matter, *i.e.* whether the transactions were a sham.

[24] Any question of fact or mixed fact and law (where there is no extricable question of law) will be reviewed on a palpable and overriding error standard. Any question of law will be reviewed on the correctness standard (*Housen v. Nikolaisen*, 2002 SCC 33).

### III. Analysis

[25] In this case, the only issue arising from the pleadings filed with the Tax Court that the parties identified as being relevant in relation to the unanswered questions is the allegation of the Crown that the transactions in issue in the Thompsons' tax appeals were a sham. Neither party suggested nor argued that the issue of relevance of the questions is to be decided in light of any other issue that may be raised in their pleadings.

[26] The Tax Court Judge correctly determined that a key issue in relation to whether a party should be compelled to answer a question is the relevance of the question. However, there is no analysis or discussion in the Tax Court Judge's reasons of how the questions that are the subject of this motion are relevant in relation to the only issue that was identified by the parties – whether the transactions were a sham.

[27] The Supreme Court of Canada in *Minister of National Revenue v. Cameron* (1972), [1974] S.C.R. 1062, at page 1068, and in *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at page 572 adopted the following definition of sham as stated by Lord Diplock in *Snook v. London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 (C.A.), at page 528:

... it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of

creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

[28] Therefore, in the Thompsons' appeals to the Tax Court, the issue will be whether the trading transactions "are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create". The focus will be on the transactions completed, or purported to be completed by the Thompsons, and not on transactions completed, or purported to be completed, by other taxpayers.

[29] The scope for questions on discovery in an appeal to the Tax Court is set out in Rule 95 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (*Tax Court Rules*):

#### **Scope of Examination**

**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

(a) the information sought is evidence or hearsay,

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or

(c) the question constitutes cross-examination on the affidavit of

#### **Portée de l'interrogatoire**

**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) le renseignement demandé est un élément de preuve ou du oui-dire;

b) la question constitue un contre-interrogatoire, à moins qu'elle ne vise uniquement la crédibilité du témoin;

c) la question constitue un contre-interrogatoire sur la déclaration sous

documents of the party being  
examined.

serment de documents déposée par la  
partie interrogée.

[emphasis added]

[Non souligné dans l'original]

[30] In *Canada v. Lehigh Cement Limited*, 2011 FCA 120, this Court determined that a question is relevant for discovery purposes if the answer might assist the asking party in advancing its case or damage the case of the other party:

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....

[31] This principle was reiterated in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19, at paragraph 23.

[32] The questions that are in issue in this appeal can be divided into two groups. The questions numbered 1, 3, 4, 6 and 7 all request additional documents or information obtained or prepared by the CRA in relation to audits of other taxpayers who claimed trading losses arising as a result of alleged transactions involving ODL. The questions arising under question number 5 are all related to the RSD Solutions report.

A. *Questions that Request Documents in the Files for Other Taxpayers*

[33] The Crown's nominee, in response to the questions that requested the additional documents in the CRA files maintained for other taxpayers, confirmed that none of those

documents were considered by or relied upon by the CRA auditor in this matter. The position papers that are referenced in the questions were prepared by the Edmonton Tax Services Office (TSO) and the Vancouver TSO. These position papers were not prepared in relation to the transactions involving the Thompsons, but rather in relation to transactions involving other taxpayers. There is no indication that the auditor in this particular case had accessed either one of these position papers or that he had relied on them.

[34] At the hearing of this appeal, when questioned as to why a document related to another taxpayer would or could be relevant to the issue of whether the transactions involving the Thompsons and ODL were a sham, the only response from counsel for the Thompsons was that the Thompsons would like to know if any of the other taxpayers, who had claimed losses arising from similar transactions with ODL, had stated that the transactions were a sham. However, if such a document existed, it presumably was not disclosed by the Crown in its list of documents. Otherwise, the Thompsons would know that it exists.

[35] If such a document exists and it is not disclosed by the Crown in its list of documents, the Crown would need either a direction from the Tax Court or the consent of the Thompsons to introduce such a document at the Tax Court hearing, as provided in Rule 89 of the *Tax Court*

*Rules:*

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

89 (1) Sauf directive contraire de la Cour, ou sauf si les autres parties ont renoncé au droit d'obtenir communication de documents ou ont consenti par écrit à ce que des documents soient utilisés en preuve, aucun document ne doit être utilisé en

preuve par une partie à moins, selon le cas :

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

a) qu'il ne soit mentionné dans les actes de procédure, ou dans une liste ou une déclaration sous serment déposée et signifiée par une partie à l'instance;

(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

b) qu'il n'ait été produit par l'une des parties, ou par quelques personnes interrogées pour le compte de l'une des parties, au cours d'un interrogatoire préalable;

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

c) qu'il n'ait été produit par un témoin qui n'est pas, de l'avis de la Cour, sous le contrôle de la partie.

(2) Unless the Court otherwise directs, subsection (1) does not apply to a document that is used solely as a foundation for or as part of a question in cross-examination or re-examination.

(2) Sauf directive contraire de la Cour, le paragraphe (1) ne s'applique pas au document utilisé uniquement comme fondement ou comme partie d'une question dans un contre-interrogatoire ou en réinterrogatoire.

[36] If such a document exists and it is disclosed as a result of the examination for discovery then there would be no restriction under Rule 89 (as a result of paragraph (1)(b)) on the Crown introducing such document at the hearing.

[37] The Thompsons, in their memorandum, submitted that:

A question is relevant when:

(i) 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

(ii) The question 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 satisfied will depend on the allegations the questioning party seeks to establish or refute.

[38] It is far from clear how a statement by another taxpayer that their transactions involving ODL were a sham (if such a statement exists) would assist the Thompsons or damage the case of the Crown.

[39] Counsel for the Thompsons was unable to provide any other rationale or explanation for why documents involving other taxpayers would be relevant in determining whether the transactions in issue were a sham.

[40] This case can also be distinguished from *Paletta*. In *Paletta*, the taxpayers were also seeking an order compelling the Crown to disclose certain documents and answer certain questions related to other taxpayers who were involved with ODL. First, it should be noted that in *Paletta*, the relevant issue from the pleadings was not restricted to simply the argument that the transactions were a sham. There were other issues that were relevant in *Paletta*.

[41] The Tax Court Judge in *Paletta* also noted, in paragraph 37, that the CRA auditor “had significant interaction with officials at CRA headquarters in Ottawa and with CRA auditors at other local CRA offices” and, in paragraph 51, the auditor “indicates in her Audit Report that when drafting the paper she relied heavily on positions developed by the Vancouver TSO”. There is no indication that the CRA auditor who was auditing the Thompsons had any significant interaction with officials at CRA headquarters or that he had relied on positions developed by other TSOs.

[42] If the requested documents were in the CRA auditor's files or considered in the audit of the Thompsons, then the relevance of the documents would have been established (*Canada v. Superior Plus Corp.*, 2015 FCA 241, at para. 8). However, since the requested documents were not in the CRA auditor's files nor considered by him, the relevance of the documents must be otherwise established. Furthermore, the request cannot simply be a fishing expedition.

[43] Counsel for the Thompsons submitted that the Thompsons were searching for a possible admission by another party to similar transactions that their transactions were a sham. In light of this submission, there is no basis to find that the questions seeking disclosure of documents acquired in the audits of other taxpayers or prepared in relation to those audits would elicit a response that would assist the Thompsons in advancing their case or damage the case of the Crown. If such a document exists, it would not assist the Thompsons in advancing their case or damaging the case of the Crown but rather, if it could assist any party, the only party it could assist would be the Crown. It would also be expected that if the Crown had such a document and wanted to use it, it would be disclosed in the Crown's list of documents. This line of questioning is a fishing expedition.

[44] It also should be noted that it is far from clear on what basis the questions following undertaking number 12 (of which one remains in dispute in these appeals) arise from that undertaking. The undertaking was to produce any audit work that the particular auditor relied upon in determining that the trades were a sham. As part of the follow-up questions, the Thompsons noted that "[w]e have reason to believe (i.e. *Paletta v. R.*, 2017 TCC 233) that CRA headquarters and the Commissioner's office were involved in the CRA's audit project with



respect to foreign currency forward contract trading, of which the audit of [the Thompsons] is but one”.

[45] The nominee of the Crown was examined on February 24, 2016, and the decision in *Paletta* was released on November 23, 2017. The questions do not arise as a result of the response to the undertaking provided by the Crown, but rather from other information which was acquired by the Thompsons approximately 21 months after the examination for discovery was completed. Rule 93(1) of the *Tax Court Rules* provides that an adverse party may only be examined once, except with leave of the Tax Court. Therefore, leave of the Tax Court would have been required to allow questions arising following the release of the decision in *Paletta*, as these questions amount to a second examination of the witness.

[46] The Thompsons were unable to identify a sufficient link between the transactions involving other taxpayers and ODL with the transactions involving the Thompsons and ODL that would make such line of inquiry relevant to the issue of whether the transactions involving the Thompsons and ODL were a sham. This line of inquiry is a fishing expedition.

B. *The RSD Solutions Report (Question Number 5)*

[47] The RSD Solutions report has been disclosed to the Thompsons. The Thompsons posed a number of follow-up questions related to the RSD Solutions report. This report can be distinguished from the other documents that are being sought, as the auditor (who was auditing the Thompsons) relied on this report and he included excerpts from it in his position paper.

[48] From the reasons of the Tax Court Judge, it is far from clear what information the Thompsons were seeking in relation to the RSD Solutions report. In order to understand the exact questions that are unanswered, it is necessary to examine the context in which the final questions as cited by the Tax Court Judge, were posed. The first unanswered question under this category is 5a(ii):

#5(a)(ii) Does the [Crown] disagree with the answer provided by RSD? If so what are all of the reasons why the [Crown] disagrees?

[49] The question posed by the CRA and the answer provided by RSD to which the Thompsons are referring are as follows:

**Question:** What types of contracts, derivatives or trades are being entered into with ODL? Discuss and explain.

**Answer:** As noted above, from the evidence provided to us, the contracts have the characteristics of OTC forward contracts. They are straightforward (“plain vanilla”) in this respect with no complex or exotic features.

[50] The second unanswered question is 5(b)(ii):

#5(b)(ii) Does the [Crown] agree with RSD's response that ODL was able to act as broker and counterparty in the context of the foreign currency forward contract trading being examined in the Report? If not, what are all of the reasons why the [Crown] disagrees?

[51] This question does not require any further explanation or reference to any other question and answer.

[52] The third question in this group is as follows:

#5(c)(ii) Does the [Crown] agree with RSD's response? If not, what are all the reasons why not?

[53] This question arose in relation to the following question that was posed by the Thompsons:

c(i) At page 8 of Appendix I, do you agree that RSD states their understanding that it is permitted by the UK Securities Commission for a broker such as ODL to act as a counterparty in the context of the foreign currency forward contract trading? If not, why not?

[54] The last question in this group is the following:

#5(d)(ii) Does the [Crown] disagree with the answer provided by RSD? If so, what are all of the reasons why the [Crown] disagrees?

[55] The question and answer which gave rise to this follow-up question are the following:

**Question:** The taxpayers in dealing with ODL close-pout [*sic*] an open position by entering into an opposite position have [*sic*] the same contract value and value date. The forward rate may be different because the opposite contract is entered into at a subsequent time.

**Answer:** It is common practice to close a position economically by doing an opposite transaction in this way. A company may want to [*sic*] this, for example if a previously forecast currency need is no longer likely. They may also do it because their view on future exchange rates indicates it would be advantageous.

For forwards with the same currencies, amounts and value dates, a profit or loss is locked in upon execution of the second contract [*sic*]. Normally the profit or loss would be settled upon the value (or settlement) dates of the contracts. The amount of settlement would be based upon market spot rates 1 or 2 days before the value date as appropriate. In the event of upfront or earlier settlement, the expectation would be that the amount would be discounted an applicable interest rate from the value date back to the settlement date to reflect the time value of money. This would be equivalent to the net mark to market valuation of both contracts at the earlier date. See Appendix V regarding marking to market for further explanation.

[56] All of the questions included under number 5 are in relation to certain answers provided in the RSD Solutions report. This report addresses transactions similar to those that the Thompsons claim were entered into with ODL. Since the RSD Solutions report was relied upon

by the auditor in this case, the Crown should be compelled to provide the answers to these questions. To the extent that the questions include questions of law, as noted in *Canada v. CHR Investment Corporation*, 2021 FCA 68, the discovery rules in the *Tax Court Rules* permit questions on discovery to explore a particular party's position on the law.

IV. Conclusion

[57] As a result, I would allow the appeal in relation to questions 1, 3, 4, 6 and 7 and dismiss the appeal in relation to number question 5. I would set aside the Order provided by the Tax Court Judge and, giving the order that the Tax Court Judge should have given, I would order the Crown to answer questions 2 and 5 and I would otherwise dismiss the motion of the Thompsons to compel the Crown to answer questions 1, 3, 4, 6, 7 and 8. Since the result is mixed, I would not award costs at the Tax Court or on this appeal.

“Wyman W. Webb”

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J.A.

“I agree  
J.D. Denis Pelletier J.A.”

“I agree  
Marianne Rivoalen J.A.”

## Appendix

### **Questions Classified as Arising from Undertaking Number 12:**

Question Number:	Question
1.	Did CRA headquarters or the Commissioner's office maintain a file or files regarding these [FCF] contract trading audits? If CRA headquarters or if the Commissioner's office maintained a file or files regarding the series of audits of [FCF] contract trading involving [ODL], Tim Hodgins or John Hodgins, of which the audit of the appellants here was but one, please produce the complete files.
2.	In general, we note that the audit file provided appears as though it may not be complete. Please confirm that you have provided us with the complete audit file with respect to the appellants, including any electronic portion of the file or communications and, if you have not done so, please provide us with those documents.

### **Questions Classified as Arising from Undertaking Number 18:**

Question Number:	Question
3.	Please provide us with a copy of the documents maintained on the shared drive.
4.	In preparing his position paper regarding the appellants, did the auditor have access to a position paper guideline prepared by David LeBlanc out of the Edmonton TSO, working papers or position papers prepared by auditors on other files involving ODL or Tim and John Hodgins, or a lengthy foreign exchange position paper prepared by the Vancouver TSO? Please provide these documents to the extent they are not part of the shared drive.
5.	<p>With respect to your Answers 5a(ii), 5b(ii), 5c(ii) and 5d(ii), the questions posed are relevant and the RSD report was plainly relied on by CRA and the auditor in issuing the reassessments at issue in these appeals. What is irrelevant is whether the respondent now intends to rely upon the RSD Report. Please answer the questions posed.</p> <p style="padding-left: 40px;">#5(a)(ii) Does the respondent disagree with the answer provided by RSD? If so what are all of the reasons why the respondent disagrees?</p> <p style="padding-left: 40px;">#5(b)(ii) Does the respondent agree with RSD' [<i>sic</i>] response that ODL was able to act as a broker and counterparts [<i>sic</i>] in the context of the</p>

	<p>[FCF] contract trading being examined in the Report? If not, what are all of the reasons why the respondent disagrees?</p> <p>#5(c)(ii) Does the respondent agree with RSD's response? If not, what are all the reasons why not?</p> <p>#5(d)(ii) Does the respondent disagree with the answer provided by RSD? If so, what are all of the reasons why the respondent disagrees?</p>
6.	Aside from information or documents already provided, please provide any information or documents received by CRA in respect of this audit or the related [FCF] forward trading audits, regarding whether the trading activities undertaken by ODL, Tim or John Hodgins were a sham or regarding whether the [FCF] trading contracts were legally effective.

**Questions Classified as Rising from Undertaking Number 21:**

Question Number:	Question
7.	Please provide any documents or information in possession of the respondent from ODL, John or Tim Hodgins regarding foreign currency trading audits undertaken by CRA, other than trading statements or account opening statements.
8.	Please provide any position papers or proposal letters in respect of audits involving foreign currency trading in ODL, John or Tim Hodgins.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA  
DATED FEBRUARY 26, 2021, CITATION NO. 2021 TCC 15**

**DOCKET:** A-68-21

**STYLE OF CAUSE:** HER MAJESTY THE QUEEN v.  
LARRY THOMPSON et al.

**PLACE OF HEARING:** HEARD BY ONLINE VIDEO  
CONFERENCE HOSTED BY  
THE REGISTRY

**DATE OF HEARING:** MARCH 22, 2022

**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
RIVOALEN J.A.

**DATED:** JUNE 20, 2022

**APPEARANCES:**

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