Docket: 2009-2184(IT)I

BETWEEN:

1390758 ONTARIO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 21, 2010, at London, Ontario,

By: The Honourable Justice Eric Bowie

Appearances:

Agent for the Appellant:	Peter Tindall
Counsel for the Respondent:	Ashleigh Akalehiywot and Jack Warren

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ORDER

UPON motion by counsel for the Respondent for an Order quashing the purported appeals from assessments made under the *Income Tax Act* for the 2004 and 2005 taxation years;

AND UPON reading the materials filed, and hearing the agent for the Appellant and counsel for the Respondent;

IT IS ORDERED that the Respondent's motion is granted and the purported appeals for the 2004 and 2005 taxation years are quashed.

Signed at Ottawa, Canada, this 4th day of November, 2010.

"E.A. Bowie"

Bowie J.

Citation: 2010TCC572
Date: 20101104
Docket: 2009-2184(IT)I

BETWEEN:

1390758 ONTARIO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appearances:
Agent for the Appellants: Peter Tindall
Counsel for the Respondent: Ashleigh Akalehiywot and Jack Warren

REASONS FOR ORDER

(Delivered orally from the bench on October 28, 2010, at London, Ontario.)

Bowie J.

[1] 1390758 Ontario Corporation appeals from two assessments for income tax under the Court's informal procedure. Before me is a motion brought by the respondent for an order quashing those appeals.

[2] The grounds for the motion are expressed in the Notice of Motion as follows:

(a) The Court has no jurisdiction over the subject matter of this appeal;

(b) The appellant's appeal 2009-2184(IT)I is null and void;

(c) The Minister of National Revenue issued a reassessment dated June 5, 2010 in regards to the 2004 and 2005 taxation years of the

appellant in accordance with executed Minutes of Settlement dated March 5, 2010 pursuant to subsection 169(3) of the *Income Tax Act*;

(d) The assessment under appeal has been replaced by the reassessment dated June 15, 2010 and is a nullity;

(e) Where properly instructed and informed parties enter into Minutes of Settlement, it would be contrary to both court and public policy to foster secondary litigation to overturn that settlement;

(f) Such further and other grounds as counsel may submit.

[3] Obviously the Court does have jurisdiction over the subject matter, as it is an appeal, duly commenced, from an assessment under the *Income Tax Act* (the "*Act*").

[4] The substantive ground for the motion lies in the fact that on March 5, 2010, Peter Tindall, president and the owner of 100% of the issued shares of the appellant, and Jack Warren, counsel for the respondent, executed minutes of settlement whereby the parties agreed to settle these appeals on the terms expressed therein. Since that date Peter Tindall has purported to resile from the settlement. The question I must decide is whether he is free to do so. If he is, then the appeals will proceed to a hearing on the merits; if he is not, then the appeals will be quashed.

[5] As I have mentioned, Peter Tindall owns all the issued shares of the appellant. Peter Tindall personally was reassessed by the Minister of National Revenue (the Minister) for the taxation years 2003, 2004 and 2005. By these reassessments certain business expenses that he had claimed were disallowed, and penalties were assessed in each of the years. His wife, Susan Tindall, was in receipt of Child Tax Benefit (CTB) payments during those years. As a result of the increases to her husband's assessed income, her entitlements to the CTB were redetermined to reduce them by $500.36 for 2003, $233.30 for 2004 and $348.52 for 2005.

[6] 1390758 Ontario Corporation claimed non-capital losses for the taxation years 2004 and 2005. It was originally assessed as filed. On June 15, 2007 it was reassessed for each of these years on the basis that it had net income of $2,400 in each of the two years. The appeals before me are from those reassessments.

[7] Each of Peter Tindall, Susan Tindall and the Corporation duly objected to these reassessments, and following confirmation by the Minister they all filed notices of appeal.

[8] An affidavit of Kevin Williamson, the Minister's assessor, was filed in support of the motion. Kevin Williamson was cross-examined on that affidavit at the hearing of the motion. Peter Tindall also gave evidence. There is no substantial disagreement as to the facts.

[9] On March 5, 2010, the appeals were settled. Peter Tindall and Jack Warren executed a consent to judgment in respect of Peter Tindall's appeals. It provides for Peter Tindall to be further reassessed for the years 2003, 2004 and 2005. By those reassessments he is to be allowed additional business expenses in 2004 and 2005, and the penalties for all three years are to be cancelled.

[10] On the same date, Susan Tindall, Peter Tindall and Jack Warren signed Minutes of Settlement in the appeal of Susan Tindall from the redetermination of CTB's. Those Minutes of Settlement provided that the CTB entitlements would be redetermined on the basis of the revised income of Peter Tindall for 2004 and 2005 once he had been reassessed to implement the settlement of his appeals.

[11] Also on March 5, 2010, Peter Tindall, on behalf of 1390758 Ontario Corporation and Jack Warren executed Minutes of Settlement of the Corporation's appeals. The only relief, if it can be called that, for the Corporation in those Minutes of Settlement is that the Minister is to reassess the appellant to carry forward its available prior years' non-capital losses and apply them to the 2004 and 2005 taxation years.

[12] Peter Tindall has now been reassessed in accordance with the consent to judgment. I was told at the hearing that Susan Tindall's CTB entitlements will be redetermined shortly to give effect to her settlement, and that she is content with this settlement.

[13] On June 15, 2010, the Minister reassessed the appellant to give effect to the Minutes of Settlement by applying the prior years' losses. As a result of so doing, the outstanding tax and interest owing, and a failure to file penalty, were all eliminated.

[14] However, Peter Tindall now takes the position, on behalf of the Corporation, that he did not fully appreciate the future ramifications of the settlement and that he, on behalf of the Corporation, wishes to resile from the settlement and have the Corporation's appeals heard and decided on their merits. He does not allege any fraud, undue influence or oppression of any kind. He simply says that he no longer wishes to be bound by the Minutes of Settlement that he signed.

[15] Counsel for the respondent (applicant in the motion) takes the position that the appellant, having voluntarily entered into Minutes of Settlement, and the Minister having given effect to the settlement by reassessing, the appellant's right to pursue the appeal is at an end, and as he refuses to file a notice of discontinuance the appeal should be quashed. In support of that position she referred me to the decision of Lamarre-Proulx J. in *Oberoi v. R.*[1]. She held there, on the authority of the Supreme Court of Canada's judgment in *Smerchanski v. The Queen*[2], that the appellant, who wished to resile from a written agreement to settle, was bound by the agreement.

[16] The question whether the Minister and a taxpayer may enter into a binding settlement agreement in respect of the taxpayer's liability for tax under the *Act* has arisen in at least seven cases since 1972. As has been observed by others, some of the decisions are difficult to reconcile.

[17] *Smerchanski* came before Collier J. in the Federal Court – Trial Division in 1972. The result of an audit revealed that Mr. Smerchanski and his company, Eco Explorations (Eco), had failed to report a substantial amount of income over a 15 year period. An agreement was entered into between Mr. Smerchanski and the Department of National Revenue. Its essential terms were that the Minister would reassess the two taxpayers for the amounts that the audit revealed to be unreported income, together with interest and penalties. Mr. Smerchanski, for himself and Eco, agreed to the amounts that were to be assessed, without particulars of the manner of computing them, and agreed to waive their rights of appeal from the reassessments. Mr. Smerchanski was undoubtedly motivated in some degree to make this settlement by the definite possibility that he might be prosecuted and convicted of tax evasion, but Collier J. found specifically that no threat of prosecution, or promise not to prosecute, was made during the negotiations.

[18] After the time within which the Minister could begin prosecution had expired, Mr. Smerchanski resiled from the agreement by delivering notices of objection, and subsequently notices of appeal.

[19] After 23 days of trial it was agreed among counsel and the trial judge to treat the validity of the agreement as a preliminary matter to be decided, with rights of

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1 2006 TCC 293.

2 72 DTC 6117 (FCTD); affirmed 74 DTC 6197 (FCA); affirmed [1977] 2 SCR 23.

appeal. Collier J. found that Mr. Smerchanski and Eco were bound by the agreement that they had signed, and that their waiver of the right of appeal was effective. He found that the revenue officials did not exercise duress or undue influence on Mr. Smerchanski. Most significant for present purposes, Collier J. rejected the contention that it would be contrary to public policy to give effect to an agreement whereby the taxpayer waived his right to appeal. He held that the right to appeal assessments is a private right and, therefore, could be effectively waived.

[20] In the Federal Court of Appeal, Thurlow J.A. (for himself and MacKay D.J.) agreed that the right of appeal is a private right, and one that may be waived. In the course of his judgment he also said:

> It appears to me that, as a general proposition, it is quite correct to say that the *Income Tax Act* is not to be thwarted by the Minister and the subject entering into a contract the tenor of which would be to reduce the taxes properly payable by the subject under the statute. Taxation must indeed be by the letter of the law and any attempt to contract out of it is ineffective in law to reduce or avoid the subject's liability. On the other hand there must be a method of ascertaining and fixing the amount of such tax liability and in the *Income Tax Act* that need is met by provisions which cast upon the Minister the authority and the duty to assess the tax payable by the subject. This he must do on the basis of such relevant information as he has with respect to the subject's income, whether such information is provided by the subject in discharge of the obligation which the statute casts on him to provide information or is obtained by other means. It is inherent in such a system that even after all the pertinent information has been obtained there will often be doubts as to whether particular amounts are properly subject to tax and that there will be disputes, as well, as to whether particular amounts ought to be included. In all such instances the Minister can but act on the totality of such information as he has in determining whether to include or exclude the doubtful or disputed amount. Avenues for objection to him and subsequently for appeal to courts are provided which the taxpayer may follow if he is not satisfied with the assessment so made. But nothing in the statute required the taxpayer to exercise his right to object or to appeal.

[21] In the Supreme Court of Canada, the issue was expressed this way by Laskin C.J.C. in giving the majority judgment:

> Since it is not contested that a taxpayer may validly waive his rights of appeal against a tax assessment and that no question of public policy is involved to preclude such a waiver, the only issue of importance in this appeal is whether the tax authorities, seriously contemplating prosecution, and by indictment as in the present case, are entitled to exact a waiver of rights of appeal as a binding term of settling a clear tax liability when overtures for settlement are made by the taxpayer and, in consequence, to abandon their intention to prosecute.

> There could be no doubt in the present case of the taxpayer's liability to a large amount of tax even if there be some doubt in mind that he owed all that the tax authorities claimed. There is no doubt of the enforceability of compromise agreements on liability for disputed debt as an escape from litigation, absent vitiating circumstances. I return then to the one factor that is said to make the waiver agreements herein voidable, and that is that the threat of prosecution lay behind them. I think that leading counsel for the respondent could not have been more candid on this matter and it is clear to me, on the record, that Smerchanski was in jeopardy of a prosecution, of a conviction and of the likelihood of a gaol term unless he could persuade the tax authorities to accept a settlement in full of their tax claim against him, even if this meant a complete capitulation to the terms that were proposed. He knew, and his advisers knew that he was in deep trouble in respect of his tax obligations. The investigation had gone on for some time and, according to the tax authorities, if there was going to be a settlement it would have to be a final one without further recourse. I may note that a successful tax prosecution would not itself have wiped out the tax liability, whatever be the effect that it would have had on unassessed penalties at that time.
>
> I am content to act on the view, which is perhaps somewhat in between the positions taken on the facts by the respective parties, that the tax authorities held the threat of prosecution over Smerchanski but with good grounds and that the latter was aware of this and knowingly made a settlement, however draconian it may look to him in restropect, which he was only too glad to make to escape the prospect of a conviction and of a gaol term.
>
> Given that the tax department had good grounds for proceeding against Smerchanski and that Smerchanski himself knew it, and indeed acknowledged a tax liability even before the letter of commitment was signed and before the waiver agreement was executed, I cannot agree that the settlement made on the terms of a waiver of rights of appeal is either illegal or voidable. We deal here with a public authority which is under a duty to collect taxes from persons under a duty to pay them and who are subject to penalties for failure to pay and to criminal prosecution for wilful or fraudulent tax evasion. The threat of prosecution underlies every tax return if a false statement is knowingly made in it and, indeed, this is inscribed on the face of the tax form. It cannot be that the tax authorities must proceed to prosecution when faced with a dispute on whether there is a wilful tax evasion rather than being amenable to a settlement, be it a compromise or an uncompromising agreement for payment of what is claimed. Here there was not even such a dispute but an acknowledgement of evasion and the taxpayer's position cannot be stronger when he is a confessed evader that when he has disputed wilful evasion.

[22] In concluding that the waiver was indeed valid and enforceable against *Smerchanski*, Laskin C.J.C. ended his judgment with this observation as to the legality of compromise settlements of tax liability:

> The result to which I would come in this case is encased in broad statutory provisions in both England and the United States. Authorization for pecuniary settlements instead of instituting criminal proceedings has been part of the tax law in England since 1944 and is now found in the *Taxes Management Act*, 1970 (U.K.), c. 9, s. 105. In the United States, ss. 7121 and 7122 of the *Internal Revenue Code* of 1954 authorize settlements and compromises of tax liability as against civil or criminal proceedings prior to reference to the Department of Justice for prosecution or defence. I do not regard these provisions as necessarily pointing to the common law invalidity of all contractual settlements made in the knowledge of probable prosecution and in order to avoid it. **Rather they represent an acknowledgment of practice by seeking to put beyond dispute the power of the tax collector to settle or compromise tax liability, even if there be wilful evasion leaving the taxpayer open to possible or probable prosecution.** (*emphasis added*)

[23] The issue next arose when the parties in *Galway v. M.N.R.*[3] arrived at a compromise settlement of their dispute after the appellant's income tax appeal had been dismissed by the Federal Court – Trial Division and his appeal to the Federal Court of Appeal was pending. The dispute was as to whether a payment of some $200,000 received by the taxpayer was on capital or revenue account. Cattanach J. held that it was income subject to tax.[4] Before the appeal was heard the parties settled the matter and applied to the Court of Appeal to give judgment on consent allowing the appeal and referring the assessment back to the Minister "to reassess the appellant's tax and interest in the total amount of $100,000" in accordance with Minutes of Settlement.

[24] The Court of Appeal gave preliminary Reasons expressing a number of concerns with the proposed consent judgment. Jackett C.J. expressed doubt as to the legality of the settlement, and the proposed consent judgment. He suggested that the Minister could not, under the *Act*, assess one lump sum for tax and interest, and the more so when the period for which interest is being assessed is not specified. As to the issue of the legality of a compromise settlement of the liability for tax, he said:

> This is clearly not a case where there should be a reduction in the amount of the tax in dispute. It is a case where the whole $200,500 was taxable or it was not. In those circumstances, we have grave doubt as to whether the Minister is legally entitled to re-assess for a part of the amount of tax in question. If he is not legally entitled to do so, the Court cannot require him to do so.

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3 74 DTC 6247; 74 DTC 6355.

4 72 DTC 6493.

[25] The matter was fully argued before a different panel of the Federal Court of Appeal some six weeks later. At that time Jackett C.J., for the Court, referred again to the Minister's statutory duty to assess "the amount of tax payable on the facts as he finds them in accordance with the law as he understands it." He then added:

> Is the position any different where the parties consent to a judgment? In ordinary litigation between private persons of full age and mentally sound, the Court has not, in normal circumstances, any duty to question a consent by the parties to judgment. We should have thought that the same statement applies where the Crown, represented by its statutory legal advisors, is one of the parties. There is, however, at least one exception to the unquestioning granting of consent judgments, regardless of who the parties are, namely, that the Court cannot grant a judgment on consent that it could not grant after the trial of an action or the hearing of an appeal. It follows that, as the Court cannot, after a trial or hearing, refer a matter back for assessment except for assessment in the manner provided by the statute and cannot therefore, at such a stage, refer a matter back for re-assessment to implement a compromise settlement, the Court cannot refer a matter back by way of a consent judgment for re-assessment for such a purpose.

[26] The application for judgment on consent was dismissed.

[27] The issue next arose in *Cohen v. The Queen*.[5] The taxpayer was reassessed for the taxation years 1961 to 1965 on the basis that gains on the sale of land were income from a business. He alleged that there was an agreement between him and the Minister that he would not appeal the reassessments for 1961 to 1964 and the Minister would treat the gain in 1965 as a capital gain. The trial judge found the gain in 1965 to be profit from a business, and he declined to give effect to the alleged agreement. This decision was affirmed by the Federal Court of Appeal, relying on *Galway*. It is not clear whether the trial judge found that there was such an agreement, but Pratte J.A., for the Court, held that if there was such an agreement it was an illegal one and, therefore, not binding on the Minister. He clearly reached this result on the basis of his conclusion, and that of the trial judge, that on the evidence the 1965 profit was a trading profit.

[28] The issue came only obliquely before Bowman J., as he then was, in *Mindszenthy v. The Queen*,[6] but he noted there that the decisions in *Smerchanski* and *Cohen* were "not readily reconcilable".[7]

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5 78 DTC 6099 (FCTD); affirmed 80 DTC 6250.

6 [1993] 2 C.T.C. 2648.

[29] The issue came before him again four years later in *Consoltex v. The Queen*.[8] This time there was clearly an agreement entered into between the taxpayer and the Crown, represented by the assessor, to settle an issue between them as to the taxpayer's entitlement to deductions for scientific research and experimental development. The Minister issued assessments in the amounts agreed upon, but the taxpayer subsequently filed notices of objection, and in due course notices of appeal.

[30] After discussing the *Smerchanski* and *Cohen* cases, Bowman J. cited the following two paragraphs from *Canadian Income Tax Law*[9]:

> The effect of the *Smerchanski* and *Cohen* cases is that the taxpayer is bound by a settlement agreement, but the Minister is not. Of course, a settlement of litigation that was implemented by a formal entry of judgment would then have the force of a court judgment, which is binding on both parties. However in *Galway v. M.N.R.* (1974), the Federal Court of Appeal refused an application for a consent judgment to implement the terms of a settlement agreement between the Minister and a taxpayer. According to the Court, the Minister has no power to assess in accordance with a "compromise settlement", and the Court should not sanctify an *ultra vires* act. The Minister's duty is to assess in accordance with the law, and the only kind of settlement that the Court would be prepared to implement by a consent judgment would be one in which the parties were agreed on the application of the law to the facts.
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> The attitude of the Federal Court of Appeal in *Cohen* and *Galway* is far too rigid and doctrinaire. If the Minister were really unable to make compromise settlements, he or she would be denied an essential tool of enforcement. The Minister must husband the Department's limited resources, and it is not realistic to require the Minister to insist on every last legal point, and to litigate every dispute to the bitter end. Most disputes about tax are simply disputes about money which are inherently capable of resolution by compromise. Presumably, the Minister would agree to a compromise settlement only on the basis that it offered a better net recovery than would probably be achieved by continuance of the litigation. It seems foolish to require the Minister to incur the unnecessary costs of avoidable litigation in the name of an abstract statutory duty to apply the law.

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7 *Ibid*. at p. 2650.

8 97 DTC 724.

9 the same passage appears in Hogg, Peter W., Joanne Magee and Jinyan Li, *Principles of Canadian Income Tax Law* 5th ed - pages 843-4.

Bowman J. went on to say:

> In general, I agree with their observations, subject to one qualification. I do not think that the *Smerchanski* and *Cohen* cases, read together, can be taken to justify a conclusion that the taxpayer is bound by a settlement agreement but the Minister is not. It is unconscionable enough that the Minister should be able to renege on settlements that he or she has made. It would be doubly indefensible that a taxpayer should be unilaterally bound to honour agreements that the Minister is free to repudiate. Neither the Minister nor the appellant is bound by the agreement of January 15, 1992. Of course the Minister acted on the agreement by assessing in accordance with it, but this does not distinguish the case from *Cohen*, because Mr. Cohen as well implemented the agreement by refraining from objecting to the first assessment. There are three possible alternative and inconsistent results of the *Cohen*, *Galway* and *Smerchanski* decisions: (a) the taxpayer and the Minister are both bound by such agreements; (b) neither is bound; and (c) the taxpayer is bound but the Minister is not. Assuming that *Cohen* is correct in law, so that (a) cannot apply, the least unacceptable result of the two remaining alternatives is (b).[10]

[31] In *Garber v. The Queen*[11] the question came once more before then Chief Justice Bowman in the context of an agreement to settle that had been negotiated over a long period of time on behalf of a very large number of litigants. After an agreement had been reached, counsel for the Attorney General of Canada repudiated the settlement, apparently to avoid a perceived risk that it might jeopardize the prosecution of the promoters of the O.C.G.C. partnerships. At paragraphs 23 and 24 of his Reasons for Judgment, Bowman C.J. said this:

> 23. In my view there was nothing illegal in the settlement reached between Shibley Righton on behalf of the investors and Wayne Lynn on behalf of the Department of National Revenue. The Department of Justice counsel undoubtedly believed that on the basis of the decision of Pratte J. in *Cohen v. The Queen*, 80 DTC 6250, he was entitled to repudiate the settlement agreed to by the Department of National Revenue at the level of Assistant Deputy Minister. Although I am bound by the *Cohen* decision (*Consoltex v. The Queen*, 97 DTC 724) if it is taken as meaning that the Crown (and therefore the taxpayer) is never bound by any agreement to settle a case, whether legal or illegal, it runs counter to fundamental precepts of commercial morality. Here a carefully constructed settlement that is not contrary to the law and that took over two years of intense negotiation to conclude is, with a snap of

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[10] I might add as an aside that it is not entirely clear to me why Bowman C.J. was not prepared to assume that *Smerchanski* was correct in law.

[11] 2005 TCC 635.

> the fingers, nullified. If it is the law that the Crown should never enter into agreements to settle tax litigation and that if it does it can renege on all settlements so that all tax disputes must be litigated in this Court, the system breaks down. Far more tax disputes are settled at the pre-assessment, objection and appeal level than are ever litigated.

[32] He then referred to the Judgment of the Federal Court of Appeal in *The Queen v. Enterac Property Corporation*.[12]

[33] He concluded his judgment saying that the Crown was legally, if not morally, entitled to repudiate the agreement and that there was no remedy available in the context of the proceeding before him, and suggested that:

> If the appellants wanted to have the validity of the settlement tested they might have moved for judgment on the basis of the agreement.[13]

[34] The judgment in *Enterac Properties* is very brief. It affirmed the decision of a motions judge who declined to strike out of a notice of appeal an allegation of an agreement to settle, saying that the issue whether the Minister was bound by such an agreement should be left for trial. In the concluding paragraph MacDonald J.A., for the Court, said this:

> By proceeding to trial this would also give counsel an opportunity to ask the Court to revisit the jurisprudence in *Nathan Cohen, et al v. Her Majesty the Queen*, 80 DTC 6250 (F.C.A.), *David Ludmer, et al. v. Her Majesty the Queen*, 95 DTC 5311 (F.C.A.) leave to appeal refused, [1995] 4 S.C.R. vii, in light of the comments of Judge Bowman in *Consoltex Inc. v. The Queen*, [1980] C.T.C. 318 (F.C.A.) and the statement of Chief Justice Laskin in *Smerchanski and Eco Exploration Co. Ltd. v. Minister of National Revenue*, 76 DTC 6247 (S.C.C.)

[35] I agree with Bowman C.J. and the authors Hogg, Magee and Li that there are sound policy reasons to uphold negotiated settlements of tax disputes freely arrived at between taxpayers and the Minister's representatives. The addition of subsection 169(3) to the *Act* in 1994 is recognition by Parliament of that. It is not for the Courts to purport to review the propriety of such settlements. That task properly belongs to the Auditor General.

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12 98 DTC 6202.

13 *Ibid*., para. 25.

[36] The reality is that tax disputes are settled every day in this country. If they were not, and every difference had to be litigated to judgment, unmanageable backlogs would quickly accumulate and the system would break down.

[37] The Crown settles tort and contract claims brought by and against it on a regular basis. There is no reason why it should not settle tax disputes as well. Both sides of a dispute are entitled to know that if they invest the time and effort required to negotiate a settlement, then their agreement will bind both parties.

[38] I have come to the conclusion, contrary to the views of Bowman C.J. and Professor Hogg to which I have referred, that it is possible to reconcile the decision in *Smerchanski* and *Cohen*.

[39] The decisions in *Galway* and *Cohen* are grounded in the perceived illegality of the assessments that the Minister would have to make in order to consummate those settlements. In *Smerchanski* there was no suggestion that the assessments were anything other than the result that flowed from the application of the law to the facts that were revealed by the audit. It is obvious, surely, that in the course of the litigation process additional facts may come to light, and some facts that the Minister may have thought to be true turn out not to be. It is even possible that the Minster may, in the course of negotiations, be persuaded that his initial view of the law was not totally correct.

[40] In the present case, I have no reason to believe that the reassessments that the Minister has already made of both the corporation and Peter Tindall, or the redeterminations that will be made of Susan Tindall's CTB entitlements, are not justifiable on the facts and the law. Put another way, the results agreed to are results that could be arrived at following the trial of all three cases on their merits. That being so, it is *Smerchanksi*, and not *Cohen* and *Galway*, that applies.

[41] A question arose during the hearing of the motion before me as to whether there was consideration for the settlement in this case. The appellant was entitled by subsection 111(1) of the *Act* to carry forward its prior years' losses. The elimination of the interest and the failure to file penalty were, as I understand it, eliminated by the application of those losses to the years under appeal.

[42] However, it is clear from the affidavit of Kevin Williamson that the appeals of Peter Tindall, Susan Tindall and the Corporation were settled on an all-or-nothing basis. It was a package deal, as is often the case. Although 1390758 Ontario Corporation got nothing in the reassessments to which it was not already entitled,

there was consideration in the resolution of the other two cases which satisfies the requirement: see *Loranger v. Haine*s.[14]

[43] Had the Minister not already reassessed the appellant in accordance with the Minutes of Settlement, I would have allowed the appeals and referred the reassessments that are under appeal back to the Minister for reconsideration and reassessment in accordance with the Minutes of Settlement. As he has already made those reassessments the proper remedy is an order quashing the appeals.

[44] The motion is allowed. The appeals herein of 1390758 Ontario Corporation from reassessments for the 2004 and 2005 taxation years issued on June 15, 2007 are hereby quashed.

Signed at Ottawa, Canada, this 4th day of November 2010.

"E.A. Bowie"

Bowie J.

[14] *Loranger v. Haines* (1920) 50 O.L.R. 268 (Ont. App. Div.).

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COURT FILE NO.:	2009-2184(IT)I
STYLE OF CAUSE:	1390758 ONTARIO CORPORATION AND THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	September 21, 2010
REASONS FOR ORDER BY:	The Honourable Justice E.A. Bowie
DATE OF ORDER:	November 4, 2010

APPEARANCES:

Agent for the Appellant:	Peter Tindall
Counsel for the Respondent:	Ashleigh Akalehiywot and Jack Warren

COUNSEL OF RECORD:

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Name:	
Firm:	
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