Docket: 2013-1603(IT)G

BETWEEN:

CBS CANADA HOLDINGS CO.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on January 25, 2018 at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Edwin G. Kroft, Q.C., Jeffrey Trossman and Jeffrey M. Shafer
Counsel for the Respondent:	Naomi Goldstein

ORDER

Upon the appellant's motion to enforce ("Motion") the terms of the Minutes of Settlement, including Schedule A, ("Minutes") reached by the parties pursuant to subsection 169(3) of the *Income Tax Act* ("*ITA*");

And upon hearing the parties' representations and reading the materials filed;

THIS COURT ORDERS that the appellant's Motion is granted with costs to the appellant and the appeals from the reassessments for the taxation years ended March 7, 2007 and December 31, 2007 are allowed and the reassessments are

referred back to the Minister of National Revenue for reconsideration and reassessment, under paragraph 171(1)(b) of the *ITA*, in accordance with the terms of the signed Minutes.

Signed at Ottawa, Canada, this 12th day of September 2018.

"K. Lyons"

Lyons J.

Citation: 2018 TCC 188
Date: 20180912
Docket: 2013-1603(IT)G

BETWEEN:

CBS CANADA HOLDINGS CO.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Lyons J.

[1] CBS Canada Holdings Co., the appellant ("CBS"), brings an enforcement motion (the "Motion") against the respondent requesting an order allowing the appeals and referring the reassessments back to the Minister of National Revenue for reconsideration and reassessment, pursuant to paragraph 171(1)(b) of the *Income Tax Act*, in accordance with the terms of the Minutes of Settlement, including Schedule A, concluded by the parties (the "Minutes"). Immediately after, the Court was notified a settlement had been reached pursuant to subsection 169(3) of the *Income Tax Act*.

[2] CBS says the Minutes constitute a legally valid and binding settlement agreement after eight months of negotiations and the Minister is obligated to reassess CBS' taxation years ended March 7, 2007 and December 31, 2007 (collectively the "2007 Years"), December 31, 2008, December 31, 2009 and December 31, 2010 (collectively the "subsequent years") consistent with the Minutes. In part, to reallocate to CBS a non-capital loss in the amount of $24,366,301 (the "NCL") in its taxation year ended March 7, 2007. CBS contends the NCL is available for carry-forward from its predecessors arising in years prior to the 2007 Years.

[3] The respondent opposes the Motion. She asserts the Minutes constitute an unenforceable illegal agreement indefensible on the facts with no bearing in reality such that the Minister cannot legally reassess CBS in accordance with the Minutes nor can she be required to do so.

[4] This Motion arises because five weeks after the Minutes were signed, the respondent informed CBS that the Canada Revenue Agency ("CRA") subsequently discovered a mistake of fact in that no non-capital losses were available for carry-forward to the 2007 Years.[1]

[5] All references to provisions that follow are to the *Income Tax Act* ("*ITA*").

I. Factual Background

[6] To situate CBS in filing appeals for the 2007 Years, some historical context is useful. CBS is the successor, by amalgamation, to several other related corporations which carried on various businesses. From 1999 to July 1, 2002, Famous Players Inc., and its predecessors, operated a business showing movies in leased theatres and other related activities ("FP").[2] From 1999 to June 30, 2002, Viacom Canada Outdoor Inc. ("VOC") and Viacom Entertainment Canada Inc. ("VEC") each operated at a loss.[3]

[7] On July 1, 2002, Viacom Canada Inc. ("Viacom") was formed upon amalgamation with several companies including FP, VOC and VEC. On March 27, 2006, Viacom was renamed to CBS Canada Holdings Co. (i.e., CBS).[4]

[8] On March 8, 2007, CBS was involved in an amalgamation with several other related corporations, resulting in the two taxation year-ends of March 7, 2007 and December 31, 2007 ("March 2007 TY" and "December 2007 TY").[5]

[9] In its income tax returns for each of the 2007 Years, CBS deducted a non-capital loss in computing income. CBS claims these were incurred by its predecessors in prior years and available for carry-forward in the amounts of $25,751,078 and $7,557,852 and to be applied to March 2007 TY and to December 2007 TY, respectively.[6]

[10] The Minister reassessed the non-capital losses available to CBS for carry-forward as $893,260 for the March 2007 TY and $382,594 for the December 2007 TY with the remaining non-capital loss amounts being denied on the basis such amounts were less than reported by CBS.[7] The Minister also viewed certain expenses in respect of the rent deducted by CBS in prior taxation years as not deductible in those years ("rent deductions").

[11] The pleadings describe the issues as follows:

> Notice of Appeal
>
> 48. Was the Appellant liable for the assessed Part I tax and related interest for each of the 2007 Taxation Years?
>
> 49. Specifically,
>
> (a) were the non-capital losses from prior years of $25,751,078 and $7,557,852 properly deductible in computing the Appellant's taxable income for the March 2007 Taxation Year and the December 2007 Taxation Year, respectively? and
>
> (b) were the rental expenses as reflected in the GAAP Statements properly deductible in computing the non-capital losses of the predecessors of the Appellant?
>
> Reply
>
> 15 …
>
> i. what amount of non-capital losses is available for carry forward to the taxation years ended March 7, 2007 and December 31, 2007; and
>
> ii. whether the predecessors to the appellant are entitled to deduct an amount in excess of the actual rental expense incurred and payable in the year in computing income under the *Income Tax Act* …

[12] The central issue in CBS' appeal is the quantum of non-capital loss available for carry-forward that it can deduct in the March 2007 TY. In that regard, its Notice of Appeal alleges:

> 35. Viacom Canada [i.e.,Viacom], one of the predecessors of the Appellant, deducted $25,751,078 of non-capital losses from prior years in computing its taxable income for the March 2007 Taxation Year. …

[13] The respondent admitted in the Reply that "in computing taxable income for the March 2007 taxation year, Viacom Canada, … deducted non capital losses of prior years in the amount of $25,751,078. He denies that Viacom Canada had non-capital losses in this amount that were available to be carried forward and deducted in computing income for the March 2007 taxation year. He denies the remainder of the facts alleged in paragraph 35 of the Notice of Appeal".[8]

[14] In support of the Motion, Deborah Toaze, a partner at Blake, Cassels & Graydon LLP, filed an affidavit ("Toaze Affidavit").

[15] In support of the respondent's position, Jean François Houle, an Acting Team Leader at CRA Appeals, filed an affidavit ("Houle Affidavit").

Offer

[16] On April 24, 2014, CBS counsel delivered to respondent counsel a letter with an attached offer ("Offer") to settle the appeal. In paragraph 2.7 of its Offer, CBS proposed it would concede the rent deductions and paragraph 2.8 that:

> 2.8 Strictly for purposes of the without prejudice settlement offer, the Minister and the Appellant agree that the revised non-capital loss balances of the Appellant shall be applied, pursuant to the provisions of the Act (including subparagraph 111(3)(b)(i), in accordance with Schedule A attached hereto.

[17] Schedule A to the Offer contained the proposed application of revised non-capital loss balances (and capital loss utilization) for the 2007 Years which indicates, in part, that:

Net Adjustments From Settlement

March 7, 2007 Taxation Year:	
Additional non-capital losses:	($24,366,301.00)
Less denied capital loss:	1,540,380.00
	($22,825,921.00)
December 31, 2007 Taxation Year	
Additional non-capital losses:	0.00
Less denied capital loss:	14,356,044.23
	$14,356,044.23
Total Net Adjustment:	**($8,469,876.77)**

Compare to adjustments from audit:

March 7, 2007 Taxation Year	23,317,492.00
December 31, 2007 Taxation Year	(7,180,786.23)
	$16,136,705.77

[18] By letter dated May 21, 2014 ("May letter") respondent counsel informed CBS counsel that the quantum of non-capital losses referred to in Schedule A differ from the CRA records and the CRA hoped to provide "a revised schedule outlining the non-capital loss amounts according to its records" by the end of May 2014.[9]

[19] Since then and up to September 17, 2014, respondent counsel made inquiries with the CRA as to the revised schedule.[10] The respondent then sent a letter dated September 17, 2014 to CBS counsel that states the CRA "is in agreement with the non-capital losses as provided in Schedule A attached to [the] April 24, 2014 letter."[11]

[20] Draft T7W-Cs prepared by the CRA for the 2007 Years (requested by and for CBS' review as part of the Offer) and draft T7W-Cs for subsequent years (requested subsequently by CBS) were provided by respondent counsel to CBS counsel with her letter dated October 22, 2014.[12] These were to reflect adjustments to CBS' taxable income arising from the implementation of the proposed settlement.

[21] On October 26, 2014, CBS counsel advised respondent counsel of CBS' proposed changes to the draft T7W-Cs for only the subsequent years; CBS received the revised drafts on December 10, 2014.[13] The drafts for all years are attached as Schedules B to F to the Minutes.

[22] On December 12, 2014, CBS counsel sent to respondent counsel draft minutes of settlement and a draft notice of discontinuance and states his "hope is that we can execute the documents next week and then CRA can proceed to reassess in accordance with the Minutes and the referenced T7WCs you provided".[14] Respondent counsel provided comments on and changes to both of these drafts to CBS counsel by letter dated December 18, 2014; the changes were incorporated. [15]

[23] On December 19, 2014, the Minutes were signed and sent by CBS counsel to respondent counsel with an executed Notice of Discontinuance ("Discontinuance").[16] Attached to the Minutes was a copy of the same Schedule A appended to the Offer.

Acceptance

[24] On January 7, 2015, respondent counsel executed the Minutes with Schedule A attached and provided a copy of same to CBS counsel. The same day respondent counsel informed the Court by letter that the parties had reached a settlement pursuant to subsection 169(3) and asked that the appeals be held in abeyance.[17]

[25] On January 12, 2015, the Court informed the parties' counsel that the appeals would be held in abeyance pending the Minister's issuance of the notices of reassessment in accordance with the Minutes.

Events subsequent to signing the Minutes

[26] On February 16, 2015, respondent counsel telephoned and left a message for CBS counsel regarding the Minutes. She later informed Ms. Toaze that the CRA had questions regarding Schedule A to the Minutes and was having difficulty implementing the Minutes. Respondent counsel requested details regarding the NCL.[18]

[27] CBS counsel sent a letter dated February 19, 2015 to respondent counsel, and reiterated CBS' position that there was a binding agreement and the reassessments must be issued.[19]

[28] On February 20, 2015, respondent counsel advised CBS counsel that "Contrary to its prior understanding, the CRA has recently discovered that there are no non-capital losses available for carry forward to the taxation years under appeal" and cannot issue reassessments contrary to the provisions of the *Income Tax Act.* Respondent counsel requested that should CBS have any information that would lead the CRA to conclude otherwise, to forward the same.[20]

[29] By letter dated March 10, 2015, respondent counsel informed the Court that "there is a mistake of fact relating to the settlement" and the Minister is unable to implement the settlement contrary to the *Income Tax Act.*[21] CBS immediately requested case management and informed the Court it would be filing a motion. The case management judge issued a timetable order ("Motion Order") for CBS to file its Motion.

[30] The respondent then served a Request to Admit ("Request") on CBS for an admission that "As of April 23, 2014 the appellant did not have a balance of $24,366,301 in non-capital losses realized in the taxation year prior to 2007."

[31] CBS sought an urgent case management conference and four days later brought an interim motion requesting that no further steps be taken by either party, except under the Motion Order, until the Motion is heard. The respondent opposed and was unavailable. The Request and interim motion were abeyed until further order of the Court or direction of the motions judge ("Abeyance Order").

[32] Subsequently, the respondent cross-examined Ms. Toaze on her Affidavit to test the accuracy and veracity of the assertions, information and exhibits as is relates to the Minutes and the NCL.

[33] Three months after the Abeyance Order issued, the respondent requested a motion that a portion of the Abeyance Order be rescinded and a motion be heard striking the Toaze Affidavit. Noting there had been no appeal of the Abeyance Order, the case management judge reiterated that the motions judge is best suited to determine what evidence ought to be before

the Court and in respect of the Motion and directed the parties to bring any motions to exclude evidence immediately before the Motion.

[34] The respondent brought a motion to strike the Toaze Affidavit or portions thereof ("Strike Motion") on numerous bases.[22] The Motion was adjourned pending the disposition of the Strike Motion by the motions judge.

[35] The Strike Motion was granted, the Toaze Affidavit was struck and CBS was granted leave to file another affidavit in support of its Motion as per CBS' request. Instead of filing another affidavit, CBS appealed the Order. It succeeded at the Federal Court of Appeal on the bases that "The Tax Court Judge was correct to hold that, to the extent that Schedule A was tendered to prove the truth and origin of the losses to which it referred, it was inadmissible except to the extent permitted by the principled approach to the hearsay rule. But the Tax Court Judge erred in attributing to CBS an intention which it had not manifested, namely an intention to prove its non-capital losses by tendering Schedule A …" and "… If the losses are an issue in the enforcement motion, then CBS is bound by its choices as to the evidence it has led. …"[23]

II. Issue

[36] The issue in this Motion is whether the Minutes constitute a valid and binding settlement agreement that is enforceable against the Minister. It must first be determined whether an agreement was reached by the parties. If so, was it binding on and enforceable against the Minister, per CBS, or is it an illegal agreement indefensible on the facts that has no bearing in reality, per the respondent?

III. Parties' positions

[37] CBS' position is that the respondent's acceptance of the Minutes on January 7, 2015 created a valid and legally-binding contract with CBS and is enforceable against the Minister. CBS submitted the NCL (i.e., $24,366,301) is available for carry-forward and flowed from an existing pool of non-capital losses in the amount of $296,385,732 (the "Pool" or $296M) from years prior to the 2007 Years that had been reassessed by the Minister based on CBS' filings. CBS argued that the parties agreed in the Minutes to reallocate and reapportion the Pool of losses differently over different taxation years as set out in Schedule A including the NCL to be applied in the March 2007 TY. In

refusing to reassess and implement the Minutes, the Minister breached her obligations.

[38] Initially, the respondent's position was that the Minister erred in including the NCL and cannot reassess as the agreement would be factually and legally indefensible. Later in oral argument, she refined her position and asserted that the agreement is factually indefensible with no bearing in reality, therefore, illegal and non-binding on the Minister. And, since CBS chose not to tender any positive evidence of the existence of the subject matter (i.e., the NCL from prior years to be carried forward to be applied to the March 2007 TY) or quantum of any non-capital losses, it is bound by that choice. The Court therefore cannot issue an order directing the Minister to reassess on the basis outlined because it would be contrary to the facts and evidence.

IV. Analysis

[39] As directed by the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, [*Sattva*], when interpreting a written contract, courts must have regard to the surrounding circumstances of the contract - the factual matrix - known to both parties at the time of formation of the contract to understand the terms of the agreement reached in order to determine "the intent of the parties and the scope of their understanding".[24] In interpreting a contract, the words must be read as a whole, giving the words their ordinary and grammatical meaning.

[40] In *Apotex Inc. v Allergan Inc.*, 2016 FCA 155, 399 DLR (4th) 549, (FCA) [*Apotex*], the Federal Court of Appeal articulated the following legal framework for determining whether a settlement agreement exists:[25]

i. Parties must have a mutual intention to create legal relations.

ii. Consideration must flow between the parties.

iii. Terms of the agreement must be sufficiently certain.

iv. There must be a matching offer and acceptance on all essential terms.

V. Analysis

A. Did the Minutes constitute a settlement agreement?

(i) Mutual intention

[41] The first requirement in *Apotex* is to determine whether objective evidence exists that the parties mutually intended to create legal relations.

[42] CBS' Offer dated April 24, 2014, with Schedule A, was sent to the respondent. Negotiations continued until January 7, 2015 at which point respondent counsel accepted and signed the Minutes with Schedule A attached and held the executed Discontinuance pending the processing of the reassessments by the Minister consistent with the Minutes. The same day, she notified the Court that the parties had reached a settlement pursuant to subsection 169(3).

[43] Under the Minutes the parties agreed, through authorized counsel, to settle the appeals for the 2007 Years and make adjustments to the subsequent years.[26] Viewed objectively, a reasonable person would conclude that in observing the parties' conduct, including written communications, that the respondent's acceptance of CBS' Offer demonstrates the parties had a mutual intention to create legal relations and thereby satisfied the first requirement.

(ii) Consideration

[44] The second requirement is also met as consideration flowed between the parties. CBS conceded the rent deductions, provided the Discontinuance and agreed to the revised non-capital losses in Schedule A. The Minister agreed to reassess CBS regarding such losses and make other adjustments to the 2007 Years and subsequent years in accordance with the Minutes.

(iii) Terms sufficiently certain

[45] The third requirement requires the terms of the agreement to be sufficiently certain such that parties were objectively *ad idem* and intended a legal relationship.

[46] The Offer details the terms of the settlement which were ultimately reached between the parties in the Minutes and Schedule A. The parties agreed the Minister would deny various deductions (capital losses in the 2007 Years, non-capital loss in the December 2007 TY, rent deductions as

conceded by CBS and adjustments to the subsequent years) and allow CBS' revised non-capital loss balances in the 2007 Years in accordance with Schedule A in exchange for it discontinuing its appeal.[27]

[47] Paragraphs 3(a) and 2.9(a) of the Minutes and Offer, respectively, indicate how the Minister shall reassess CBS to allow a deduction for the March 2007 TY. Namely:

> Minutes
>
> 3. The Minister shall reassess the Appellant's taxation years ending March 7, 2007 and December 31, 2007 (the "2007 Years") and:
>
> (a) Allow the Appellant's deduction, in computing taxable income for the March 7, 2007 taxation year, of non-capital losses arising in prior taxation years equal to $24,366,301; …
>
> Offer
>
> 2.9 The Minister shall reassess the Appellant's taxation years ending March 7, 2007 and December 31, 2007 (the "2007 Years") and:
>
> (a) Allow the Appellant's deduction in computing taxable income for the March 7, 2007 taxation year an additional amount of non-capital losses equal to $24,366,301. **…**

[48] The change in language in paragraph 3(a) to "non-capital losses arising in prior taxation years equal to $24,366,301" from the previous language in paragraph 2.9(a) ("an additional amount of non-capital losses equal to $24,366,301") resulted from the respondent's request for clarification in her December 18, 2014 letter to CBS.

[49] The terms in the Minutes, in my view, are sufficiently certain as to what was agreed between the parties, the actions to be taken by them and the agreed basis for doing so regarding the NCL and other matters demonstrating they were objectively *ad idem* and intended a legal relationship.

(iv) Matching offer and acceptance on all essential terms

[50] The respondent submitted that when she signed the Minutes, the Minister assumed the NCL existed which constituted an essential element.

CBS' Offer was sent to and accepted by respondent counsel on the bases previously outlined. The penultimate paragraph of the Offer stated "The settlement offer contained in this letter is open for acceptance by the Respondent at any time until this offer is withdrawn by the Appellant."

[51] Communications during the negotiations confirm that the Minister evaluated the Offer and after the parties' clarified certain matters, the Minutes were signed. Initially, she had queried the NCL and said the CRA was working on a revised schedule. Yet, her September 17, 2014 letter to CBS, indicated that the CRA is in agreement with the non-capital losses as provided in Schedule A to the Offer which shows "Additional: non-capital losses" of $24,366,301 for application to the March 2007 TY. For assurance, CBS had asked the CRA to prepare the draft T7W-C for the March 2007 TY, Schedule B ("Schedule B"), which was appended to the Minutes and reflects the NCL. Again, the language in paragraph 3(a) of the Minutes was changed and reflected the NCL arose in the years prior to the 2007 Years (a change sought by the respondent) and the Minister agreed the NCL shall be applied in accordance with Schedule A to the Minutes. All of which signals the parties' common understanding as to the implementation.

[52] Clearly, there was a matching Offer and acceptance on all essential terms when the Minutes were signed, with Schedules A and B attached, thereby confirmed the parties' common understanding. Also, the Court was immediately notified a settlement was reached.

[53] I am also of the view that the factual matrix surrounding the Minutes which were known to the parties at the time of signing the Minutes, clearly demonstrate the parties intended to enter into a settlement agreement and they understood the scope of the terms at the time of formation of the Minutes.

B. Was the settlement agreement binding on and enforceable against the Minister?

[54] In *Apotex*, the Federal Court of Appeal recognized other criteria that could be a material requirement regarding settlement agreements and noted that some legislation may preclude an agreement or new mandatory terms may be incorporated.[28]

[55] The respondent submitted the principles in *Galway v Canada (Minister of National Revenue – MNR)*, 74 DTC 6355 (FCA) [*Galway*] and *CIBC*

World Markets Inc. v Canada, 2012 FCA 3, [2012] GSTC 4, (FCA) [*CIBC*] are to be incorporated as other material requirements with respect to settlement agreements entered into by the Minister. Relying on these and other principles, the respondent argued that once the Minister subsequently learned of the error (NCL does not exist) in paragraph 3(a) of the Minutes, the agreement to reassess is indefensible on the facts therefore illegal and unenforceable requiring the Court to intervene because it has no bearing in fact nor reality.[29]

[56] The *Galway* principle provides that the Minister has a 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 and cannot assess for some amount designed to implement a compromise settlement. After applying *Galway*, in *Cohen v Canada*, [1980] CTC 318, (FCA) [*Cohen*], the Federal Court of Appeal also found that "[t]he agreement whereby the Minister would agree to assess income tax otherwise than in accordance with the law would, in my view, be an illegal agreement" and the right to reassess tax is still pursuant to governing legislation and not any kind of contractual arrangement as that is a factual compromise.

[57] The Court in *CIBC* noted that courts have enforced settlements that apply tax law to agreed facts, but the Minister's power to agree to facts is limited by the *Galway* principle - that Minister cannot agree to an assessment that is indefensible on the facts and the law. It commented that the Minister is limited to making decisions based solely on considerations arising from the *Act* itself and cannot make "deals" divorced from those considerations. Similarly, in *Bolton Steel Tube Co. v Canada*, 2014 TCC 94, 2014 DTC 1102, [*Bolton*], Campbell J. found that based on the evidence, the reassessment resulting from the Minister's understanding under the settlement agreement was completely divorced from the facts and refused to enforce the reassessment.

[58] Subsection 169(3) contemplates settlement of income tax appeals and is intended to facilitate the resolution of litigation by entering into written agreements.

[59] After agreeing to settle the appeal under a written agreement, the appellant in *1390758 Ontario Corp. v Canada*, 2010 TCC 572, 2010 DTC 1385 [*1390758*], attempted to resile from it asserting it was unaware of the implications of the settlement and asked that the appeal be decided on its

merits. Having found a settlement was reached, Bowie J. found at paragraphs 35, 36 and 37 that:

> 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.
>
> 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.

[60] This approach was endorsed by this Court in *Huppe v R.*, 2010 TCC 644, 2011 DTC 1042 [*Huppe*]. Justice Webb found that this is not a case whether it is all or nothing proposition unlike *Galway* (where the whole amount was to be included or not) and unlike *Cohen* (where the income was a non-taxable capital gain or not) nor did Mr. Huppe continue to negotiate following the repudiation by the Crown. [30]

[61] In *CIBC*, the Court noted that nothing in *1390758* undercuts the *Galway* principle.

[62] Recently, the Federal Court of Appeal in *University Hill Holdings Inc. v Canada*, 2017 FCA 232, 2017 DTC 5131, (FCA) [*University Hill*], reaffirmed the principles in *Galway* and *CIBC* and commented that settling the quantum of expenses is not an all or nothing function and involved a compromise of facts, therefore, "the Court will only interfere if the agreed-upon facts clearly have no bearing to reality."[31] Application for leave to appeal to the Supreme Court of Canada was denied very recently.[32]

[63] Not unlike the situation in *Huppe*, the present case was not an all or nothing case nor did CBS take fresh steps nor negotiate following the

respondent's repudiation. The Minutes permitted CBS to deduct an amount of non-capital losses greater than previously allowed by the Minister though less than it had originally claimed. The question becomes are the agreed facts borne out by reality?

[64] The respondent says the Minutes are divorced from reality. The reality being that CBS' balance of non-capital losses available for carry-forward arising in years prior to the taxation year ended March 2007 did not exceed $893,260 ("$893K"). That "sole fact", established in the Houle Affidavit, was not rebutted by CBS nor did it adduce positive evidence to the contrary.[33] Specifically, she argued the Toaze Affidavit and appended documentation was tendered only to assert facts leading to and as proof of settlement, not for the truth of its contents (of the fact that the $24,366,301 in Schedule A to the Minutes exist). As such, CBS representations to the Federal Court of Appeal regarding that Affidavit and the Court's comments that if such losses are in issue in this Motion, CBS would be bound by its evidentiary choice, then the respondent says CBS is bound by that and other choices not to tender to evidence to show the non-capital losses exist. This Court could not issue an order directing the Minister to reassess on the basis that CBS has the NCL available because the only uncontroverted evidence before the Court is that sole fact (that the amount of non-capital losses available for carry-forward in the March 2007 TY is $893K).

[65] The respondent's assertion that the only uncontroverted evidence is that sole fact disregards or obscures, in my view, a fuller appreciation of other known, or inferred, facts in the Houle Affidavit that provide evidentiary support that the NCL agreed to exists and is grounded in objectively reality. The $893K had previously been reassessed as the amount of non-capital losses available. However, that is only part of the equation. Subsequent negotiations appear to have brought to light better characterizations of the overall situation based on the information and through negotiation this culminated in the parties' agreement to reallocate such losses.

[66] It is undisputed between the parties that CBS and its predecessors had amassed a significant pool of non-capital losses commencing in 2000 and up to the 2007 Years. The composition of the $296M Pool of non-capital losses, highlighted by CBS in its submissions during the hearing of this Motion comprise amounts itemized on Appendix 1 of these reasons that had been reassessed by the Minister and reflected in the chart ("Chart"), (broken down

annually), found in paragraph 18 of the Houle Affidavit and in the Continuity Schedule, Exhibit C.

[67] As the appeals officer assigned to review CBS' objection to the 2007 Years, Mr. Houle had reviewed CBS' non-capital loss continuity schedule for fiscal years 1998 to 2005 ("Continuity Schedule"), prepared by the auditor. Information in the Continuity Schedule was generated from the CRA's Cortax electronic database. The Continuity Schedule itemized the amounts annually; the last three columns show the amounts reported by CBS, the amounts revised by the CRA and the difference between the two amounts, respectively.[34] Cortax includes all amounts reported by CBS and its predecessors and is automatically updated when amounts are assessed, reassessed or determined by the Minister.

[68] Mr. Houle explained in his Affidavit that by the taxation year ended December 31, 2005, the closing balance for CBS' pool of non-capital losses was $74,853,866. Of that amount, CBS applied $73,960,606 to income reported in the December 31, 2006 taxation year leaving a closing balance for that year for CBS' pool of non-capital losses of $893K available for carry-forward to the March 2007 taxation year. He had arrived at this conclusion at the objection stage as reflected on his non-capital loss schedule for 2006 to 2008 dated May 2012, Exhibit D to his Affidavit, based on the information in the Continuity Schedule.[35]

[69] Generally, I found some information and certain explanations in the Houle Affidavit to be lacking and left unanswered questions.[36] For instance, the Houle Affidavit describes the "disputed non-capital losses" as being claimed for the first time by CBS (Viacom) in the taxation year ended December 31, 2000 when CBS first reported or was initially assessed as having current year losses of $128,636,248. The Minister then recalculated the amount of non-capital losses available to be $101,453,650, a difference of $27,182,598 ("$27M").[37] The $27M was included as part of a larger amount of non-capital losses that totalled $38,476,673 ("$38M"). The $38M represents the difference between what CBS had claimed and what the Minister had reassessed spanning the December 31, 2000 to December 31, 2005 timeframe. However, other than highlighting the $38M as the total difference, his Affidavit does not explain the treatment accorded to that amount, the impact and how, or even if, this amount factored into the negotiations. This is incomplete especially when it appears from paragraph 2.3 of the Offer and paragraph 3(b) of the Minutes it was a factor.[38]

[70] Surprisingly, no evidence was presented by either party as to whether Mr. Houle was involved or not during the negotiations. Little, if any, evidence was tendered by him as to the circumstances surrounding the negotiations or at the time of formation of the Minutes. The respondent submitted that it cannot be assumed, as CBS did in its submissions, that Mr. Houle was not involved in the negotiations. Of course, the converse is also true. Some elucidation on this aspect would have been helpful. I infer and find that it is more likely that he was not involved in the negotiations. Had he been involved, he likely would have said so in his Affidavit.

[71] Necessarily, the parties' positions shifted when negotiations commenced. Despite that, Mr. Houle commented at paragraph 26 of his Affidavit that he had "reviewed Schedule A to the Offer, and it does not accord with the Minister's determinations of losses available" to CBS for the 2007 Years. That suggests to me he has failed to fully appreciate, if at all, that the negotiations centred on the reallocation of non-capital losses from the Pool from prior years with a reapplication of such losses from some years to others.

[72] Clearly, Schedule A's function, was to set out the proposed reapplication of such losses mostly in different amounts applied over different taxation years, including the 2007 Years, based on the Pool available. The characterizations of the overall situation resulting from the negotiations are particularized below under the column Schedule A which also reveals that some losses that had previously been applied, per the Chart or Exhibit D were to be replaced by different amounts in different taxation years predicated on Schedule A to the Minutes in the context of the reallocation:

Non-Capital Losses Taxation Year	**Per Chart and/or Exhibit D**	**Per Schedule A**
December 31, 2002	($14,241,604)	($12,545,024)
December 31, 2004	($37,804,710)	($36,062,138)
December 31, 2005	($169,485,552)	($140,418,281)
December 31, 2006	($73,960,606)	($73,960,606)
March 2007: Loss available (previously reassessed and the	($893,260)	($893,260)

Minutes)		
Additional loss (the Minutes and reallocated from 2005)		($24,366,301)
December 2007: Loss available (previously reassessed and the Minutes)	($382,594)	($382,594)
Total Non-Capital Losses	($296,768,326)	($288,628,204)

[73] Consequently, and contrary to Mr. Houle's comment, this reallocation and reapplication would change the losses available to CBS for the 2007 years as noted above under the column entitled Schedule A.

[74] Further, the Chart, the Continuity Schedule and Schedule A show non-capital losses totalling $169,485,522 ("$169M") in 2005, as reassessed.[39] However, Schedule A then lists only $140,418,281 ("$140M") of the $169M under the application of losses adjustment column. CBS explained this is because part of the difference between the two amounts was transferred from 2005 to and for reapplication to CBS' March 2007 TY as an "Additional loss" of $24,366,301. I am not satisfied that Mr. Houle was fully familiar with what transpired during the negotiations. Of import, Schedule B, prepared by the CRA reflects both the $893K and the $24,366,301 amounts consistent with CBS' position. No explanation was provided by the respondent with respect to this.

[75] CBS points out the quantum of non-capital losses agreed to in the Minutes was almost $8 million less than what it claimed in its Notice of Appeal.

[76] Based on the foregoing, I am not persuaded that there was a mistake regarding the NCL in the Minutes as contended by the respondent. I prefer and accept CBS' explanations as more plausible based on the certain information in the Houle Affidavit. I find that the parties' agreement centred on the reallocation of the established Pool of non-capital losses. Support for

the reallocation is contained in the language used in the Offer and in the Minutes where the parties indicate they are agreeing on "the revised non-capital loss balances" of CBS from prior years that shall be applied in accordance with Schedule A.

[77] I also find that the NCL existed and was available for carry-forward to the March 2007 TY having flowed from the Pool from years prior to the 2007 Years that had been reassessed by the Minister based on the CRA records which included CBS' filings.

[78] I conclude that the agreed fact in the Minutes - that the $24,366,301 is available - is grounded in objective reality. As such, the agreement to reassess on that basis is defensible on the facts (and the law) and the agreement is therefore binding, valid and enforceable against the Minister. Had this proceeded to trial, the Court could issue a judgment consistent with the order directing the Minister to reassess on said basis.

[79] In *Noran West Development Ltd.*, Paris J. applied the principles of contract law to reject the argument that the taxpayer had made a mistake about the scope of the settlement agreement. Emphasizing the importance of objective clarity of the settlement agreement, he concluded it must be presumed that, in those circumstances the party intended to accept the agreement as written.[40]

[80] The surrounding circumstances in the present case do not support the Minister's subjective belief. Again, the Minutes were premised on information generated from the CRA records, as reassessed, that show the Pool of non-capital losses from prior years exist. Terms were negotiated over eight months giving both parties ample opportunity to evaluate the Offer, its merits and implications plus query the contents of same. Five months after the Offer was sent, the CRA not only agreed the NCL existed but continued to negotiate, including giving CBS assurance on Schedule B, that the NCL was available and acknowledged in the signed Minutes that the "non-capital losses arising in prior taxation years equal to $24,366,301" shall be reassessed in CBS' March 2007 TY. Having entered into the Minutes and having invested time and effort, I conclude it must be presumed the parties intended to be bound by the Minutes as written and the Minister viewed the facts as defensible.

[81] I observe that the documentation appended to the Toaze Affidavit, tendered merely to prove settlement, is consistent with the above conclusion.

[82] Finally, the respondent suggested that I reject CBS' new Pool reallocation explanation because it was raised for the first time at this Motion and CBS' only previous explanation for not responding to her repeated attempts (detailed at paragraphs 26 to 35 of these reasons) to ascertain how CBS say the NCL differs from what the CRA understood them to be was that CBS might be seen to be renegotiating. CBS countered that the Pool reallocation argument was raised for the first time in the context of the FCA hearing. I was left with the impression that had the new explanation been presented sooner to the respondent, it might have obviated the steps taken after signing the Minutes and up to and including this Motion.

VI. Conclusion

[83] CBS' Motion to enforce the settlement against the Minister is granted with costs to the appellant and the appeals for the taxation years ended March 7, 2007 and December 31, 2007 are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment, pursuant to paragraph 171(1)(b) of the *ITA*, in accordance with the terms of the Minutes of Settlement.

Signed at Ottawa, Canada, this 12th day of September, 2018.

"K. Lyons"

Lyons J.

APPENDIX 1

	CBS' Non-Capital Losses Available for Reallocation from years prior to the 2007 Years	**Non-Capital Losses***
December 31, 2000	Closing Balance	$147,358,541
December 31, 2001	Current year loss	$ 95,238,224
June 30, 2002	Current year loss	$ 27,665,273
	Additional losses transferred in on amalgamation	$ 15,058,735**
December 31, 2003***	Current year loss	$ 11,064,959
Total Non-Capital Losses for Reallocation		$296,385,732

* These are after adjusting the expenses for rent deducted. Houle Affidavit, paragraph 18, and Continuity Schedule.

** The $15,058,735 is on the Continuity Schedule but was omitted from the Chart. According to the Minister, it is the difference between the closing balance of losses as at June 30, 2002, $270, 262,038 and the opening balance for the 2002 taxation year post-amalgamation of $285,320,773.

*** Between December 31, 2004 to December 31, 2007 there were nil non-capital losses.

[1] Affidavit of Jean François Houle ("Houle Affidavit"), paragraph 25.
[2] Houle Affidavit, paragraph 4.
[3] Houle Affidavit, paragraph 5.
[4] Houle Affidavit, paragraph 6.
[5] Houle Affidavit, paragraph 7.
[6] Houle Affidavit, paragraphs 8 and 9.
[7] Houle Affidavit, paragraphs 10, 11 and 12 - Notices of reassessments and confirmation are dated May 9, 2011 and February 1, 2013, respectively. The remaining amounts denied are $24,857,818 for the March 2007 year end and $7,175,258 for the December 2007 year end.
[8] Reply, paragraph 8.
[9] Toaze Affidavit, Exhibit D.
[10] Toaze Affidavit, paragraph 12.
[11] Toaze Affidavit, Exhibit E.
[12] Toaze Affidavit, Exhibit F.
[13] Toaze Affidavit, Exhibits G and H.
[14] Toaze Affidavit, Exhibit I.
[15] Toaze Affidavit, Exhibit J.
[16] Toaze Affidavit, Exhibit K.
[17] Toaze Affidavit, Exhibits M and L.
[18] Toaze Affidavit, paragraph 29.
[19] Toaze Affidavit, Exhibit O.
[20] Toaze Affidavit, Exhibit P.
[21] Toaze Affidavit, Exhibit Q.
[22] The respondent alleged CBS failed to permit effective and meaningful cross-examination of its affiant on a controversial issue; it refused to answer most relevant and proper questions regarding information and documentation appended to the Toaze Affidavit and made improper claims of privilege, confidentiality and lack of relevance; the affiant improperly swore the Affidavit on a contentious issue; refused to tell the respondent whether or not the statement in Schedule A was true or accurate and the Affidavit provides too much hearsay when better evidence is available.
[23] Respondent's written representations, paragraph 16.
[24] *Sattva* at paragraph 47 referring to *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J. The Court referred to the decision in *Reardon Smith Line Ltd. v Hansen-Tangen* [1976] 3 All ER 570 UK (HL) and the statement that "No contracts are made in a vacuum; there is always a setting in which they have to be placed."
[25] *Apotex*, paragraphs 21, 22, 25 to 33.
[26] Edward Kroft for CBS and Elizabeth Chasson for the respondent.
[27] Minutes, paragraphs 1 and 5.
[28] *Apotex*, paragraphs 40 and 41.

[29] The respondent said in *Sifto Canada Corp. v Canada*, 2017 TCC 37, 2017 DTC 1020, [*Sifto*] evidence was presented at trial to support the facts of the original settlement.

[30] Paragraphs 13 and 9. The Court distinguished *Huppe* from *Galway*, *Cohen* and *Garber v Canada*, 2005 TCC 635, 2005 DTC 1456.

[31] The taxpayers, part of a larger film production group, were connected to two of four master limited partnerships ("MLPs"). The settlement agreement reached with the CRA set out the tax treatment of claimed expenses for fees (management, producer referral and financing) and used amounts for Sentinel Hill MLP to indicate the expenses to be allowed or disallowed, with a common understanding that CRA would make determinations of the income or loss of the other MLPs and their investors on a basis consistent with the treatment of Sentinel Hill MLP. The CRA reassessed based on the agreement; the taxpayers disagreed how it should be applied to them and appealed the reassessments. The Tax Court held the agreement was valid, binding and principled pursuant to the *ITA.* The reassessments accorded with the agreement. On appeal, the Federal Court of Appeal dismissed the appeal.

[32] August 30, 2018.

[33] Choices include CBS' affiant's refusal to be cross examined on the truth of that fact (that the NCL in Schedule A exists), not to present evidence through its affiant, not to challenge why the $893K is wrong and not to cross-examine Mr. Houle. She submitted the choice not to cross-examine Mr. Houle precludes CBS from implying or arguing his evidence is wrong or inaccurate and it cannot impugn his credibility without first confronting him about the correctness and propriety of his statements otherwise it would be contrary to *Browne v Dunne* (1893) 6 R 67 (H.L.).

[34] Houle Affidavit, paragraphs 14, 15 and 16. When preparing a continuity schedule, the responsible CRA officer will review Schedule 4 (non-capital loss schedule) from Cortax and transfer such losses to the continuity schedule being prepared for a taxpayer and the officer is expected to ensure the non-capital loss balance on the continuity schedule corresponds to the balance in Cortax.

[35] Houle Affidavit, paragraph 20. In paragraphs 21 and 22, he deposed that CBS:

a) did not report current year non-capital losses for the taxation year ended March 7, 2007, therefore the available balance of non-capital losses remained at $893,260 and that amount was applied in that year; b) reported non-capital losses of $382,594 in the taxation year ended December 31, 2007 which had been transferred on the amalgamation and the full balance was applied in that year; and c) consequently, the closing balances of non-capital losses in each of the 2007 Years were nil.

[36] During the Motion, it became apparent that Mr. Houle, in paragraphs 25 and 26 of his Affidavit, had mistakenly misquoted CBS as acknowledged by the respondent. This generated confusion in this Motion and the Strike Motion.

[37] Houle Affidavit, paragraph 17. This difference is on the Continuity Schedule and the Chart.

[38] The Minister had reassessed and denied the non-capital losses in the 2007 Years and the rent deductions and also recognized the $38M as an additional capital loss in CBS' 2005 taxation year representing an allowable capital loss of

$19,238,336.50. CBS was allowed, portions of the allowable capital loss ($1,540,380 in March 2007 and $14,356,044.23 in December 2007) to be deducted with smaller amounts (totalling $341,302) deducted in its subsequent years. Paragraph 3(b) of the Minutes indicate that the allowable capital loss amounts that had been previously allowed to CBS for the 2007 Years were to be denied.

39 The $169M was the CRA's revised figure adjusted from the $167,600,878 as filed by CBS. The $169M had been applied to the December 31, 2005 opening balance of the $244,339,418 pool of non-capital losses available (not on the Chart nor expressly referred to in the Houle Affidavit) with a difference of $74,853,866 as further reduced by $73,960,606 in arriving at the $893K as part of the December 31, 2005 closing balance.

40 A somewhat similar conclusion was reached in *Bolton Steel* when the Minister raised the issue of contractual interpretation based on subjective belief of the parties. In rejecting the Minister's argument, Justice Campbell found subjective belief of one party is not sufficient and none of the surrounding circumstances supports the Minister's subject belief. The principles in *1390758* were endorsed in *Noran West Developments Ltd. v Canada*, 2012 TCC 434, [2012] TCJ No. 353 (QL).

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APPEARANCES:

Counsel for the Appellant:	Edwin G. Kroft, Q.C., Jeffrey Trossman and Jeffrey M. Shafer
Counsel for the Respondent:	Naomi Goldstein

COUNSEL OF RECORD:

For the Appellant:

Name:	Edwin G. Kroft, Q.C., Jeffrey Trossman and Jeffrey M. Shafer
Firm:	Blake, Cassels & Graydon LLP Toronto, Ontario

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada