Corporate Combinations: An Update on Canadian Mergers

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Introduction

In effecting a corporate combination, whether in a related group of corporations or as a step in a corporate acquisition, amalgamations and windups are key tools in a tax practitioner's arsenal. The standard tax consequences, pursuant to the provisions of the Income Tax Act and the regulations thereto[1] have been comprehensively chronicled in the literature.[2] Appendixes 1 and 2 set out checklists that can be used as a guide in reviewing some of the tax and other considerations arising out of such transactions. We do not provide a detailed review of the matters noted in the checklists; the purpose of this paper is to provide an update of recent developments in the merger area, to consider the meaning of the term "amalgamation," to examine the circumstances in which one form of transaction may be preferred over another, and to discuss some recent technical issues arising out of such transactions.[3]

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Amalgamations Generally

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The Common-Law Meaning of "Amalgamation"

In the context of the Supreme Court of Canada decision in *Envision Credit Union v. Canada*,[4] we consider the meaning of the term "amalgamation" as a preliminary matter in this paper. Surprisingly, a review of the applicable case law reveals that there is no precise definition of "amalgamation" at common law and that the term can be construed broadly.

In *In re South African Supply and Cold Storage Co.*, the court noted that in every case, "one has to decide whether the transaction is such that, in the meaning of commercial men, it is one which is comprehended in the term . . . 'amalgamation.'"[5] Buckley J described the essential elements of an amalgamation:

> Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should

> pass—substantially they must pass—nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern. An amalgamation may take place, it seems to me, either by the transfer of undertakings A. and B. to a new corporation, C., or by the continuance of A. and B. by B. upon terms that the shareholders of A. shall become shareholders in B. It is not necessary that you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertakings of both corporations shall substantially be merged in one corporation only.[6]

In *R v. Black & Decker Manufacturing Co.*, the Supreme Court referred to the broad common-law meaning of "amalgamation" and noted that

> [t]he word "amalgamation" is not a legal term and is not susceptible of exact definition: In re *South African Supply and Cold Storage Company*. The word is derived from mercantile usage and denotes, one might say, a legal means of achieving an economic end. The juridical nature of an amalgamation need not be determined by juridical criteria alone, to the exclusion of consideration of the purposes of amalgamation. Provision is made under the *Canada Corporations Act* and under the Acts of the various provinces whereby two or more companies incorporated under the governing Act may amalgamate and form one corporation. The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union. Also, one must recall that the amalgamating companies *physically* continue to exist in the sense that offices, warehouses, factories, corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not disappear although it may become part of a greater enterprise.
>
> There are various ways in which companies can be put together. The *assets* of one or more existing companies may be sold to another existing company or to a company newly-incorporated, in exchange for cash or shares or other consideration. The consideration received may then be distributed to the shareholders of the companies whose assets have been sold, and these companies wound up and their charters surrendered. In this type of transaction a new company may be incorporated or an old company may be wound up but the legal position is clear. There is no fusion of corporate entities. Another form of merger occurs when an existing company or a newly-incorporated company acquires the *shares* of one or more existing companies which latter companies may then be retained as subsidiaries or wound up after their assets have been passed up to the parent company. Again there is no fusion. But in an amalgamation a different result is sought and different legal mechanics are adopted,

> usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the *Income Tax Act* or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.[7]

It is noteworthy that in *Black & Decker*, the Supreme Court narrowed the range of transactions that previously were within the ambit of the broad common-law definition of an amalgamation in the UK cases. While recognizing that these transactions were mergers, the Supreme Court did not see them as amalgamations because of the absence of fusion of the corporate entities.

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The Non-Tax Statutory Meaning of "Amalgamation"

In addition to the common-law meaning of "amalgamation," the word's meaning and scope can also be derived from Canadian statutory corporate law. The Canada Business Corporations Act and similar provincial statutes contain specific amalgamation procedures that must be followed strictly.[8] The corporate statutes generally say that "two or more corporations . . . may amalgamate and continue as one corporation."[9] Section 186 of the CBCA (which is representative of provincial corporate statutes) provides as follows:

> On the date shown in a certificate of amalgamation
>
> (a) the amalgamation of the amalgamating corporations and their continuance as one corporation become effective;
>
> (b) the property of each amalgamating corporation continues to be the property of the amalgamated corporation;
>
> (c) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation;
>
> (d) an existing cause of action, claim or liability to prosecution is unaffected;
>
> (e) a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation;
>
> (f) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation; and
>
> (g) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation.

Therefore, an amalgamation under the CBCA or an equivalent provincial corporate statute has the following effects: (1) the amalgamated corporation owns all the property and has all the

rights and obligations of the amalgamating corporations, and (2) third-party rights are not affected.[10]

In Canada, there have traditionally been two models of amalgamations:

1) all of the amalgamating corporations disappear and a new corporation takes their place (which was formerly the case under the corporate statutes of Manitoba and Quebec),[11] or
2) all of the amalgamating corporations continue their existence and activities as a single corporate entity (which is currently the case under most Canadian corporate statutes) (the so-called continuation statutory model).

An example of the first model was considered in *Fawcett & Grant Ltd. v. MNR.*[12] In *Fawcett*, the appellant and two other corporations were amalgamated in 1962 under the Quebec Companies Act. The minister reassessed the appellant for prior years. The appellant argued that the minister erred in seeking to assess a non-existent person. The Tax Appeal Board agreed with the appellant on the basis that Quebec's corporate statute, at the relevant time, provided that an amalgamation resulted in the creation of a new corporation and the disappearance of the amalgamating corporations.[13]

An example of the second model was considered in *Black & Decker*. At issue was whether an amalgamated corporation was liable for an offence committed by a predecessor corporation before amalgamation. Dickson J emphasized that whether an amalgamation creates or extinguishes a corporate entity depends on the statute pursuant to which the amalgamation took place and held that liability remained because the amalgamating corporations continued as one after the merger:

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue." That word means "to remain in existence or in its present condition"—*Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state; (ii) the statement in s. 137(13)(b) that the "amalgamated company possesses all the property, rights . . ." If corporate birth or death were envisaged, one would have expected to find, in the statute, some provision for transfer or conveyance or transmission of assets and not simply the word "possesses," a word which re-enforces the concept of continuance; (iii) letters patent of amalgamation are obtained for the purpose of "confirming the agreement" (s. 137(11)), in marked contrast to letters patent of incorporation which expressly create a body corporate and politic; (iv) the French version of s. 137(1), perhaps better than the English version, serves to express what has occurred,

> "Deux ou plus de deux companies . . . peuvent fusionner et continuer comme une seule et même compagnie." The effect is that of blending and continuance as one and the selfsame company; (v) the Act contains a number of express provisions whereby the life of corporate creations may be terminated—*Videlicet* where a company carries on business not within the scope of its objects (s. 5(4)), or forfeits its charter (s. 31), or surrenders its charter (s. 32), or is dissolved (s. 133(11)). The Act is silent on the extinction of companies by amalgamation; (vi) if Parliament had intended that a company by the simple expedient of amalgamating with another company could free itself of accountability for acts in contravention of the *Criminal Code* or the *Combines Investigation Act* or the *Income Tax Act*, I cannot but think that other and clearer language than that now found in the *Canada Corporations Act* would be necessary. . . .
>
> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.[14]

More recent cases also recognize that an amalgamation generally does not result in the extinguishment of predecessor corporations unless the relevant corporate legislation expressly extinguishes the predecessor corporations. In *Pan Ocean Oil Ltd. v. The Queen*, the court noted that "there is no doubt that in corporate law, both in Alberta and in most other Canadian jurisdictions, an amalgamation does not put an end to the amalgamating companies and the latter continue to exist in the new entity."[15]

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The Tax Statutory Meaning of "Amalgamation"

Prior to the mid-1950s, the Act did not contain rules governing amalgamations, presumably because only a few provinces permitted companies to amalgamate under their corporate statutes.[16] Amalgamations were authorized under statutes of special application such as those governing banks, railway companies, and trust and loan companies. More specific treatment of amalgamations arose due to the increased frequency of statutory amalgamations and the adoption of rules by more provinces.[17]

Section 85I was added to the Act[18] to apply to an "amalgamation," which was defined essentially as it is in current subsection 87(1) " " ", except that it was not restricted to taxable Canadian corporations. All other references to "amalgamations" in the Act at that time were to this definition. The definition excluded from its application all mergers in the ordinary commercial sense, such as mergers resulting from one company having acquired another's assets, or the distribution of corporate assets from one company to another upon winding up. Interestingly, the panellists at the annual tax conference held after the adoption of section 85I were not sure whether the drafters regarded the amalgamation of companies "as a fusion theory or the new entity theory."[19]

This definition of an amalgamation was considered in *Allendale Mutual Insurance Company v. The Queen*,[20] in which a "consolidation" under the Rhode Island corporate statute was held to be an amalgamation for the purposes of subsection 85I(1).

As part of tax reform in the early 1970s, section 85I became section 87 ¨ ¨ ¨ and was further restricted to apply only to taxable Canadian corporations.[21] References to "amalgamations" began to appear in the Act, without a definition. In some provisions, the context was in respect of Canadian corporations; at other times, it was not specified.[22] In other provisions, the undefined term "amalgamation" or "amalgamate" was used in conjunction with "merger" or "merge."[23]

The definition of "amalgamation" in subsection 87(1) is provided solely for the purposes of section 87:

> In this section, an amalgamation means a merger of two or more corporations each of which was, immediately before the merger, a taxable Canadian corporation (each of which corporations is referred to in this section as a "predecessor corporation") to form one corporate entity (in this section referred to as the "new corporation") in such a manner that
>
> (a) all of the property (except amounts receivable from any predecessor corporation or shares of the capital stock of any predecessor corporation) of the predecessor corporations immediately before the merger becomes property of the new corporation by virtue of the merger,
>
> (b) all of the liabilities (except amounts payable to any predecessor corporation) of the predecessor corporations immediately before the merger become liabilities of the new corporation by virtue of the merger, and
>
> (c) all of the shareholders (except any predecessor corporation), who owned shares of the capital stock of any predecessor corporation immediately before the merger, receive shares of the capital stock of the new corporation because of the merger,
>
> otherwise than as a result of the acquisition of property of one corporation by another corporation, pursuant to the purchase of that property by the other corporation or as a result of the distribution of that property to the other corporation on the winding-up of the corporation.

It is interesting to note that the definition of "amalgamation" in subsection 87(1) refers to the formation of "one corporate entity" or the "new corporation." Even though the definition makes no specific reference to continuation (that is, whether amalgamating predecessor corporations continue to exist from and following the effective date of the amalgamation), the definition does not provide or deem amalgamating predecessor corporations to cease to exist at the time that the amalgamation takes effect.[24]

On the basis of the preamble to subsection 87(1) ¨ ¨ ¨, a "merger" is a combination of certain corporations to form one merged corporation; when certain conditions are met, such a "merger" constitutes an "amalgamation" for the purposes of section 87.[25] Accordingly, an amalgamation is

a type or subset of a merger. Assuming that the other conditions in subsection 87(1) are met, there cannot be an amalgamation for the purposes of section 87 " " " if any corporation being merged is not a taxable Canadian corporation. There also cannot be an amalgamation for the purposes of section 87 unless each shareholder of each corporation being merged becomes a shareholder of the merged corporation.

An amalgamation under a provincial corporate statute may not meet the definition of an amalgamation in subsection 87(1)—for example, when a shareholder receives cash instead of shares of the amalgamated corporation.[26] An interesting question is whether a continuation model of statutory amalgamation that does not meet the requirements of subsection 87(1) would need to rely on the specific rules in section 87 in any event to flow through tax attributes. This question is discussed below in the context of *Envision*.

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Forms of Amalgamations

The following discussion canvasses the various subsets of amalgamations and some of the circumstances in which one particular form may be useful.

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Vertical Amalgamation

Corporate law permits a short-form procedure for the amalgamation of a holding corporation (the parent) and one or more wholly owned subsidiaries if all corporations generally subsist under the laws of the same jurisdiction.[27] Although the shares of the subsidiaries are cancelled and the shares of the parent are unaffected, the deeming rules in subsection 87(1.1) " " " ensure that the amalgamation qualifies under the definition in subsection 87(1) " " ".

It is generally preferable from a commercial-law perspective to effect a vertical amalgamation because it avoids the practical issues arising on a liquidation of a wholly owned subsidiary, which involves an explicit conveyance of property and the actual termination of corporate existence.[28] For example, third-party consents may be needed in respect of a winding up, and transfer taxes may be payable in respect of real property. Further, flexibility in income tax planning may be increased if section 87 rather than section 88 applies to the merger, particularly if there are existing losses.

Since the ability to bump capital property under paragraph 88(1)(d) " " " was extended to vertical amalgamations pursuant to subsection 87(11) " " ", a voluntary liquidation or windup has become less common.[29] Note, however, that not all vertical amalgamations that are qualifying amalgamations under subsection 87(1) will qualify for the bump: the extended definition of "subsidiary wholly-owned corporation" in subsection 87(1.4) " " " applies for the purposes of subsections 87(1.1) " " ", (1.2), (1.4), and (2.11), but not for the purposes of subsection 87(11), for which the definition in subsection 248(1) " " " applies.

For example, assume that a corporation (Parent) owns all of the issued and outstanding shares of

two corporations (Subco 1 and Subco 2). Parent amalgamates with Subco 1 and Subco 2 to form an amalgamated corporation (Amalco). The provisions of subsection 87(11) will apply such that the cost to Amalco of each capital property of Subco 1 and Subco 2 can be bumped under paragraph 88(1)(d).[30] If Subco 2 owns all of the issued and outstanding shares of another corporation (Subco 3), and Parent amalgamates with Subco 1, Subco 2, and Subco 3 to form an amalgamated corporation (Amalco), the amalgamation is a qualifying amalgamation for the purposes of subsection 87(1), but subsection 87(11) will not apply: each of Subco 1, Subco 2, and Subco 3 is a subsidiary wholly owned corporation within the meaning of subsection 87(1.4), but only Subco 1 and Subco 2 are subsidiary wholly owned corporations within the meaning of subsection 248(1). (See figure 1.)

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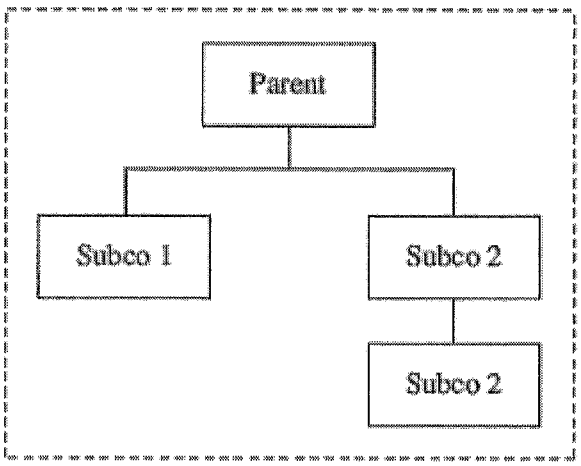
Horizontal Short-Form Amalgamations

Corporate law generally permits a short-form procedure for the amalgamation of two or more wholly owned subsidiaries of the same holding corporation without requiring an amalgamation agreement or shareholder approval.[31] In this type of amalgamation, no new shares of the amalgamated corporation are issued; rather, corporate law requires that the shares of all but one of the predecessor corporations be cancelled without any repayment of capital. Paragraph 87(1.1)(b) " " " deems the shares of the predecessor corporation that were not cancelled on the amalgamation to be shares of the amalgamated corporation received by the shareholder by virtue of the amalgamation for the purposes of paragraph 87(1)(c) " " ", so that a horizontal short-form amalgamation is a qualifying amalgamation under section 87 " " ".

Although such an amalgamation is simple from a corporate perspective, some tax advisers shy away from this type of transaction. From a tax perspective, the shares being cancelled are not shares of one predecessor corporation owned by another, but rather shares of a predecessor corporation owned by the parent. Corporate law provides for the preservation of stated capital of the cancelled shares,[32] but there is no provision either in corporate law or in the Act that explicitly preserves the adjusted cost base (ACB) of the cancelled shares. On a technical basis, therefore, it is arguable that the ACB to the holding corporation of the predecessor shares that were cancelled will be lost as a consequence of the amalgamation. This may be a substantial number. The relieving administrative position of the Canada Revenue Agency (CRA) is that the ACB of the cancelled shares will be added to the cost of the shares of the amalgamated corporation, which are deemed to have been received by the shareholder on the amalgamation pursuant to subsection 87(4).[33] Whether this position is technically correct is debatable, since subsection 87(1.1) " " " applies only for the purposes of paragraph 87(1)(c) " " " and not for the purposes of subsection 87(4) " " ". An alternative to reliance on the CRA's administrative position is to cause the amalgamation to take place pursuant to the long-form horizontal amalgamation procedures under corporate law.

Figure 1



Merger by Absorption

As noted above, Canadian statutory corporate law generally provides only two models of amalgamation; the continuation model is the more common. Thus, a merger by absorption—whereby one of the merging corporations survives the merger (known as a merger by absorption)—generally cannot be effected under the corporate amalgamation provisions. Instead, the arrangement provisions in the business corporation statutes have been used because the courts have held that a plan of arrangement is the appropriate mechanism to effect a fundamental change that could not otherwise be achieved.[34]

A merger by absorption is a common form of merger under various US state corporate laws. In a number of rulings,[35] the CRA has acknowledged that an absorptive merger of two corporations under the laws of Delaware, in which the separate legal existence of one corporation ceases and the other corporation continues, satisfies the definition of "foreign merger" in subsection 87(8.1) " " ", a definition similar to "amalgamations" in subsection 87(1) " " ".[36]

The CRA has issued an income tax ruling confirming that subsection 87(1) applies to a vertical merger in which the parent was the surviving entity;[37] it has issued a similar income tax ruling where the subsidiary, not the parent, survived the merger.[38] Reference was made in the first tax ruling to the factum of the director of the CBCA, which noted that the plan of arrangement approximated a merger of a parent corporation and its subsidiaries that could be effected under US corporate statutes and that this type of US merger transaction was the basis for the short-form amalgamation provisions in the CBCA.[39]

The primary rationale for seeking to have an absorptive merger qualify as an amalgamation under subsection 87(1) appears to be US-tax-related. In the first tax ruling, the purpose of the merger

was stated to be to avoid any US tax issue under the Foreign Investment in Real Property Tax Act (FIRPTA)[40] that could arise from the merger of the parent and its subsidiaries. In the second tax ruling, the subsidiary was the publicly traded target of an acquisition by the parent, another publicly traded Canadian corporation. The purpose of having the target survive the merger was to allow for the possibility of issuing shares of the parent in consideration for the target shares and having the transactions treated as a "tax-deferred reorganization" for US shareholders for US tax purposes.[41]

However, there may be other situations where, for corporate or business reasons, it is preferable to have one predecessor corporation survive.

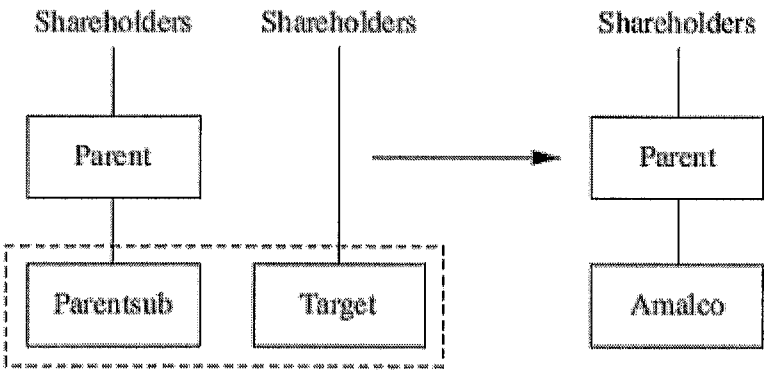
Triangular Amalgamations

A triangular or three-cornered amalgamation can be used to effect a corporate acquisition using all share, or a combination of cash and share, consideration. Such a transaction is therefore frequently relied on as an alternative to the takeover bid process under securities laws.[42] For example, assume that a Canadian public corporation (Parent) wants to acquire shares of another Canadian corporation (Target) for share consideration. The transaction could be structured as a share-for-share takeover bid (governed by either subsection 85(1) " " " or section 85.1 " " "), a standard amalgamation of Parent and Target, or as a triangular amalgamation of a subsidiary of Parent (Parentsub) and Target pursuant to which Target shareholders receive shares of Parent instead of shares of the amalgamated corporation (Amalco).[43] For the transaction to qualify as a triangular amalgamation within the meaning of the Act, Parent must control Amalco immediately following the amalgamation.[44] (See figure 2.)

From a corporate and securities perspective, the advantage of using an amalgamation in the takeover context is the ability to implement the transaction with a two-thirds approval threshold of the votes cast at a shareholders' meeting.[45] Under a formal takeover bid, the acquiror would have to rely on the compulsory and squeeze-out acquisition provisions of corporate law to acquire any non-tendered shares.[46] Compared with a standard amalgamation, which requires the approval of shareholders of both Parent and Target, a triangular amalgamation will not (at least under corporate law) ordinarily require the approval of Parent shareholders.[47]

Significantly, paragraph 87(9)(a) " " " deems the shares of Parent issued to the shareholders of a predecessor corporation to be shares of Amalco for the purposes of paragraph 87(1)(c) " " " and subsection 87(4) " " ", thus permitting a triangular amalgamation to qualify as a qualifying amalgamation under subsection 87(1) " " " and the shareholders of the predecessor corporations to obtain tax-deferred rollover treatment (provided that they hold their shares as capital property and receive only shares of Parent as consideration on the amalgamation).[48]

Figure 2



The rules in subsection 87(9) " " " applying to triangular amalgamations have been the subject of previously published analysis,[49] and will not be repeated here. Rather, we consider below some of the particular instances where, from a tax perspective, a triangular amalgamation may or may not be preferable to a standard amalgamation or a share-for-share exchange.

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Target Has High Cost Base in Assets but Low Paid-Up Capital

Others have pointed out that in a triangular amalgamation, depending on the circumstances, Parent may end up with a higher or lower ACB in the Amalco shares compared with a share-for-share exchange transaction governed by section 85.1 " " " or subsection 85(1) " " ".[50] As the example below illustrates, depending on the paid-up capital (PUC) of the Target shares and the net tax value of the Target assets, this may present a valuable planning opportunity.

If Parent acquired Target pursuant to a transaction to which section 85.1 applied, Parent's cost of the Target shares will be the lesser of the fair market value (FMV) and the PUC[51] of those shares. If elections under subsection 85(1) were filed, Parent's cost of the Target shares will be the aggregate of the agreed amounts (in most cases at least equal to the ACB of the tendering shareholders). Thus, if Target shareholders invested in Target early in its life cycle and therefore have nominal cost, and if the Target shares have low PUC, Parent will have a low ACB in the Target shares irrespective of the value of the Parent shares issued on the exchange.

In contrast, in a triangular amalgamation, paragraphs 87(4)(b) " " " and 87(9)(a.4) " " " generally limit Parent's cost of the Amalco shares to the ACB to Parent immediately before the amalgamation of the Parentsub shares (and any Target shares) owned by Parent immediately prior to the amalgamation. The rule effectively denies Parent any additional tax basis in the Amalco shares acquired by Parent by virtue of the exchange by Target shareholders of their Target shares for Parent shares—that is, Parent receives no cost base addition for the issuance of the Parent shares. This result is comparable, but not identical, to that described above. However, if Parent owns all of the issued shares of Amalco immediately after the amalgamation (which should be the case when Amalco does not issue any redeemable preferred shares), Parent's cost of the Amalco shares may be bumped up to the net tax cost of Amalco's assets by a designation

under subparagraph 87(9)(c)(ii) " " ".[52] Thus, where Target has a high cost in its assets[53] but low PUC in its shares (for example, if Target acquired assets through the reinvestment of its earnings), a triangular amalgamation may result in Parent acquiring Amalco at a higher cost than would be the case in a share-for-share exchange.[54]

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Target Has (or Will Have) an LRIP Balance

The introduction of the eligible dividend regime[55] has resulted in an additional layer of analysis in any amalgamation transaction, because the low-rate income pool (LRIP) and general-rate income pool (GRIP) consequences must be considered. The amalgamated corporation will be able to designate a dividend as an eligible dividend only (1) where it has no balance in its LRIP (if the amalgamated corporation is not a Canadian-controlled private corporation [CCPC]) or (2) where it has a sufficient balance in its GRIP (if the amalgamated corporation is a CCPC).[56] The provisions of paragraphs 87(2)(vv) " " " and 87(2)(ww) " " " and subsections 89(5) " " " and 89(9) " " " generally provide for a continuity of GRIP and LRIP accounts on an amalgamation, but these rules may give rise to adverse results in some circumstances, particularly if one or more of the predecessor corporations is a CCPC and another predecessor corporation is a Canadian public corporation.

Assume that the acquiror corporation (Parent) is a Canadian public corporation with no LRIP. Parent has provided notice on its website to designate all dividends as eligible dividends. The target corporation (Target) is a CCPC without any GRIP. It has traditionally reinvested its earnings (which benefited from the small business deduction) in assets such that it has a high tax cost in its assets. On a standard amalgamation of Parent and Target, paragraph 87(2)(ww) and subsection 89(9) will provide that the amalgamated corporation (Amalco) has an LRIP balance equal to the LRIP of each non-CCPC predecessor (nil in the example) plus, for each CCPC predecessor, an LRIP balance equal to the amount determined by the formula in paragraph 89(9)(b). At a high level, the LRIP addition in respect of Target (the CCPC's predecessor) is equal to the tax cost of its net assets (including cash and reduced by outstanding debts) less unexpired available losses less deducted reserves and then reduced by Target's GRIP and the PUC of its issued and outstanding shares. The result is that Amalco will have an LRIP balance, which means that any payment of dividends to shareholders must be of non-eligible dividends until the LRIP balance is reduced to nil. Clearly, this is an undesirable result for a public corporation.

The preference in such a case is for the acquiring corporation to acquire Target as a subsidiary. When an amalgamation is desired for commercial reasons, the transaction can be accomplished by a triangular amalgamation of Parentsub and Target. In the result, Amalco will have an LRIP balance; but as long as Amalco has avoided paying dividends to Parent, Parent's ability to pay and designate eligible dividends should continue unimpaired.

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Avoiding an Acquisition of Control of Parent

Assume, on the facts given in the example above, that Target is of greater value than Parent (that is, the acquisition of Target by Parent is a reverse takeover, with Target shareholders ultimately owning more than 50 percent of the continuing entity).

If the transaction were structured as a share-for-share exchange, the transaction would result in an acquisition of control of Target. In addition, the reverse takeover rule in paragraph 256(7)(c) " " " should apply to deem an acquisition of control of Parent, on the basis that if all of the shares of Parent that were acquired by Target shareholders on the exchange were acquired by a single hypothetical person, the person would have acquired control of Parent.

Similarly, if the transaction were structured as a standard amalgamation of Parent and Target, paragraph 256(7)(b) " " " should apply to deem an acquisition of control of Parent. Paragraph 256(7)(b), which governs whether a standard amalgamation gives rise to an acquisition of control of a predecessor corporation, is complicated; in the context of a takeover structured as an amalgamation, the basic rule is that control of a predecessor corporation will be considered to have been acquired as a result of the amalgamation unless the shareholders of the predecessor corporation control the amalgamated corporation or the amalgamation is an amalgamation of equals, such that neither of two predecessor shareholder groups controls the amalgamated corporation after the amalgamation.[57] In the example, therefore, because the shareholders of Target will control Amalco, there will be a deemed acquisition of control of Parent but no acquisition of control of Target.

It is clear in the example that a triangular amalgamation of Parentsub and Target will result in an acquisition of control of Target. However, structuring the transaction as a triangular amalgamation provides the opportunity to argue (although it remains to be determined how strong the argument is) that there is no acquisition of control of Parent. The two arguments are essentially as follows:

- On the one hand, because subparagraph 256(7)(b)(i) " " " provides that control of a corporation is deemed not to have been acquired solely because of an amalgamation unless it is deemed by subparagraph 256(7)(b)(i) or (ii) to have been acquired, paragraph 256(7)(b) " " " should therefore be viewed as a complete code for determining whether the triangular amalgamation results in an acquisition of control of Parent.[58] Further, paragraph 256(7)(c) " " " arguably should not apply because, on its words, it applies only to an "exchange." On that basis, since Parent is not a predecessor corporation to the amalgamation, there should be no acquisition of control.

- The counterargument, which the CRA has adopted,[59] is that subparagraph 256(7)(b)(i) does not apply because it cannot be said that control was acquired solely because of the amalgamation; thus, paragraph 256(7)(c) should apply to deem an acquisition of control of Parent, since Target shareholders will acquire more than 50 percent of the voting shares of Parent.

Although the latter view appears consistent with the intention of the Department of Finance in

enacting paragraph 256(7)(c),[60] it remains to be seen which view a court will adopt, particularly having regard to the primacy of the textual, contextual, and purposive approach to statutory interpretation. From a policy perspective, one wonders whether a clarifying amendment would be in order.

2013 CR 8: p.14 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

Target Is a Private Corporation with Resource Assets and Non-Resident Shareholders

A key benefit of structuring a takeover transaction as a triangular amalgamation rather than as a share-for-share exchange arises when the shares of Target constitute "taxable Canadian property"—for example, where Target is a private oil and gas corporation (or otherwise derives more than 50 percent of its value from Canadian real or resource properties) with non-resident shareholders. In such a case, section 116 compliance obligations will arise if the transaction is structured as a share-for-share-exchange (notwithstanding that the transaction is tax-deferred).

In contrast, the CRA's longstanding administrative position has been that a non-resident shareholder of shares of a predecessor corporation that constitute taxable Canadian property does not need to comply with the procedures set out in section 116 when the amalgamation is tax-deferred pursuant to subsection 87(4) " " ".[61] The basis for the CRA's position is that if the shares of the predecessor corporation constitute taxable Canadian property to a non-resident shareholder, then, by virtue of the postamble to subsection 87(4), the shares of the amalgamated corporation received by the shareholder on the amalgamation are deemed to be taxable Canadian property to the shareholder for 60 months following the amalgamation. The CRA has confirmed that the same reasoning applies in the triangular amalgamation context because subsection 87(4) applies by virtue of paragraph 87(9)(a) " " ".[62] Accordingly, non-resident shareholders of Target do not need to comply with section 116 if the transaction is structured as a triangular amalgamation.

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Debt

The discussion above considers, in large part, the benefits of a triangular amalgamation. One drawback to a triangular amalgamation arises when Target has issued debt. It is often commercially desirable for the Target debt to be exchanged for debt of, or assumed by, Parent. Not only does the Act not provide for a rollover on this type of exchange, but such an exchange is actually prohibited; if the exchange occurred, the amalgamation would cease to satisfy the condition in paragraph 87(1)(b) " " " that all of the liabilities of the predecessor corporations immediately before the amalgamation become liabilities of the amalgamated corporation because of the amalgamation, and the amalgamation would not be a qualifying amalgamation for the purposes of section 87 " " ". Accordingly, any Target debt either must survive as Amalco debt or must be repaid prior to the amalgamation.

2013 CR 8: p.15/16/17 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

Envision and Non-Section 87 Amalgamations

The question that has arisen recently is whether an amalgamation that does not meet the definition of "amalgamation" in subsection 87(1) " " " nonetheless entails the flowthrough of tax attributes if the amalgamation is a continuation model. The facts were as follows in *Envision*. Two British Columbia credit unions amalgamated under the Credit Union Incorporation Act[63] on January 1, 2001. At the same moment, each predecessor corporation sold some real property to a newly incorporated corporation, 619, for shares of 619. Those shares would pass to Envision by virtue of the merger. The purpose of the sale was to have the amalgamation fall outside paragraph 87(1)(a) " " " (on the basis that not all of the property of the predecessors became property of Envision by virtue of the amalgamation) to ensure that the preferred rate amount of the predecessors did not flow through. As a consequence of avoiding section 87 " " ", another far more significant tax account—the undepreciated capital cost (UCC)—also did not flow through.

The Tax Court held that the merger was not a section 87 amalgamation because the surplus real estate never passed to Envision by virtue of the merger, although it was still a valid amalgamation under the CUIA:

> The amalgamated credit union acquired all of the shares of 619 which had acquired the beneficial interest in the assets (and therefore the Appellant indirectly acquired the beneficial interest) but the Appellant did not directly acquire the beneficial interest in the surplus assets.[64]

However, the Tax Court also held that the corporate law principles established in *Black & Decker* applied and that, as a continuation of its predecessors, Envision took over their UCC balances. If Envision's argument was correct, the effect would be that capital cost allowance could be claimed twice in respect of the same assets—once by the predecessors and once by Envision.

The Federal Court of Appeal held that the Tax Court was correct to conclude that the UCC of the predecessors flowed through to Envision by virtue of the principles established by *Black & Decker*:

> The issue in *Black & Decker* was whether an amalgamated corporation, which had come into existence under the "continuation" statutory model of the *Canada Corporations Act*, R.S.C. 1970, c. C-3, was liable for an offence committed by a predecessor corporation before amalgamation. Writing for the Court, Justice Dickson (as he then was) held that liability remained because the amalgamating corporations continued as one after the merger. He stated the applicable legal principle as follows (at 422):
>
> > The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.
> >
> > For present purposes I shall assume that section 87 does not apply to the case before us. However, if the *Black & Decker* principles apply, the predecessors' UCC balances immediately before amalgamation survive the merger and are attributable to Envision

for the following reasons.

First, the CUIA, under which the amalgamation of the predecessors took effect, adopts essentially the same "continuation" model of amalgamation as the provision of the *Canada Corporations Act* considered in *Black & Decker*. Subsection 20(1) and paragraph 23(*a*) of the CUIA provide that when two credit unions merge they "continue as one credit union."

Second, Justice Dickson's conclusion that the corporate attributes of the amalgamating companies continue "without subtraction" in the amalgamated company is broad enough to include the predecessors' UCC balances. As the Judge aptly put it (at para. 72):

> . . . if the depreciation that had been allowed to Delta and First Heritage is not recognized by . . . [Envision], then Delta and First Heritage would not be continued without subtraction. To not include the depreciation that had been allowed to Delta and First Heritage would be to subtract this claim and in my opinion would not be the correct result based on the statement of Justice Dickson . . . .

I also agree with the Judge that the statement by the Tax Court in *CGU Holdings Canada Ltd. v. Canada*, 2008 TCC 167, *aff'd.* 2009 FCA 20 (*CGU*), that the refundable tax account did not flow through on amalgamation does not assist Envision. This is because the amalgamation considered in *CGU* fell within section 87, and the amalgamated corporation was therefore deemed to be a new corporation. . . .

Section 87 does not adopt the "continuation" model of amalgamation but provides instead that the entity emerging from an amalgamation is deemed to be a "new corporation." Since corporations merging under section 87 would not continue in the amalgamated "new corporation," *Black & Decker* would not apply, and therefore section 87 would have to specify precisely which of their attributes passed to the new corporation.

In contrast, the broad principles in *Black & Decker* concerning "flow through" are derived from the "continuation" model of merger, under which predecessor corporations continue "without subtraction" in the amalgamated corporation. Section 87 created a different model of amalgamation (the "new corporation"). There is thus no basis to imply a legislative intent that section 87 should occupy the field to the extent of excluding the common law consequences of "continuation" model amalgamations that do not qualify as amalgamations for the purpose of the section.[65]

The foregoing comments of the Federal Court of Appeal were based on the premise that section 87 " " " did not apply to the merger. However, the court concluded that the Tax Court was incorrect in finding that section 87 did not apply, on the basis that all of the property owned by the predecessors immediately before the amalgamation could be traced directly to property owned by Envision after the amalgamation, which became its property by virtue of the amalgamation:

> The transactions related to the merger thus merely changed the form of the predecessors' property that became property of Envision. That is, instead of becoming owner of the beneficial interest in the surplus assets on amalgamation, Envision became owner of all the issued shares in 619, the value of which was set at the fair market value of the surplus assets. All the property owned by the predecessors immediately before the amalgamation can thus be traced directly to property owned by Envision after the amalgamation.
>
> Hence, the fact that the beneficial interest in the surplus properties was vested in Envision's wholly owned subsidiary as of the moment of amalgamation does not warrant a conclusion that the property of the predecessors did not become property of Envision for the purpose of paragraph 87(1)(a) " " ".
>
> As for the second requirement, namely that the predecessors' property became the new corporation's property "*by virtue of the amalgamation*," on Envision's theory of the transactions the shares became property of Envision by virtue of the purchase and sale agreement and the issuance of shares in 619, and not by virtue of the amalgamation. However, the transactions under which Envision became the owner of the shares at the moment of amalgamation were part of a composite transaction, each component of which was intimately related to the merger. The causal and temporal connections between the merger and Envision's ownership of the shares could hardly have been closer.[66]

Having reached this conclusion, the Federal Court of Appeal did not find it necessary to express an opinion on the Crown's argument that if taxable Canadian corporations merge in accordance with the applicable corporate law, the transaction is an amalgamation for the purposes of section 87. That was "a question for another day."[67]

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On appeal, the Supreme Court unanimously held that the effect of section 23(b) of the CUIA, which provides that on and after the date of an amalgamation "the amalgamated credit union is seized of and holds and possesses all the property, rights and interests and is subject to all the debts, liabilities and obligations of each amalgamating credit union," was that Envision was seized of the surplus real property at the exact time of the amalgamation. This finding meant that the amalgamation met the requirements of paragraph 87(1)(a) " " ". The majority of the Supreme Court further found that it was not open to the parties to amalgamate except in accordance with the provisions of the CUIA: to permit otherwise would be contrary to the protection for creditors afforded by requiring all assets and liabilities to continue in the amalgamated credit union.

The majority of the Supreme Court further considered the effectiveness of the amalgamation agreement and the purchase and sale agreements in respect of the surplus property, because Envision raised a question about their validity.

Rothstein J accepted that the amalgamation and the asset sale by the predecessor corporations occurred at the same time. At the moment Envision was created on the amalgamation, it was immediately able to transact in relation to the property with which it was seized and accordingly was able to fulfill the obligations of the predecessor corporations. Rothstein J stated the

following:

> At the moment of amalgamation, the predecessors, Delta and First Heritage, no longer had separate legal personalities capable of fulfilling the terms of the sale agreements. While they were continued under the *CUIA*, they were continued inside Envision: *Black and Decker*, at p. 422. Any legal obligations that the predecessors had entered into that needed to be fulfilled, at or after the time of the amalgamation, had to be fulfilled by Envision. This is the effect of s. 23(b) of the *CUIA*, which causes the amalgamated credit union to be seized of all of the obligations of its predecessors on and after the moment of amalgamation. So, despite the fact that the agreements listed Delta and First Heritage as the vendors, at the moment of amalgamation, the vendor was Envision.
>
> This principle flows from this Court's decision in *Black and Decker*, at p. 418, where it was noted that under a continuation model of amalgamation, "upon amalgamation each constituent company loses its 'separate' existence but it by no means follows that it has thereby ceased to exist." From this understanding of amalgamation, it follows that contracts that were entered into in the names of the predecessor corporations are binding upon and must be fulfilled by the amalgamated entity, barring restrictions in those contracts to the contrary: *British Columbia Company Law Practice Manual* (2nd ed. 2007), vol. 1, at p. 11-7. . . .
>
> When Envision was seized of the property, it was not by virtue of an agreement for purchase and sale. Envision's seizure of the property cannot be equated to a conveyance: *Black and Decker*, at p. 417. Instead, it is more appropriate to think of Envision's being seized of the assets of its predecessors as similar to changing the name of the legal owner. Distinguishing seizure from a conveyance makes sense given the adoption of the continuation model of amalgamation. A conveyance requires that the seller and the buyer be separate legal entities at the time of the transfer of the property. At the moment Envision was created, the predecessors ceased to have any independent legal existence, so there were not two parties capable of engaging in a conveyance. In this case, there was no point in time when Delta, First Heritage *and* Envision existed as separate legal entities such that Delta and First Heritage could convey their property to Envision. At the moment of amalgamation, only Envision continued to exist as a separate legal entity.[68]

Thus, any commitment by a predecessor to be fulfilled at or after the time of amalgamation was undertaken by Envision, because at and after that time the predecessors had no independent legal existence.

Although Rothstein J did not need to consider the Federal Court of Appeal's approach of tracing the surplus properties through the shares of 619, he held that such a tracing approach should be rejected. It is a basic rule of company law that shareholders do not own the assets of a corporation, and it would require an explicit lookthrough rule in the Act to permit that rule to be ignored:[69]

> The Minister argues that the broad definition of property and the language in s. 87 of "in

> such a manner that" is sufficient to create such a look-through or tracing rule. In my view, that cannot succeed. That legislative language is not as explicit as those provisions of the *ITA* that permit shareholders to be deemed to be the owners of corporate property. The tracing approach cannot be used to cause an amalgamation to meet the requirements of s. 87.[70]

Note that separate reasons concurring in the result were issued by Cromwell J, who did not think that it was necessary to go beyond the finding that at the moment of amalgamation only Envision was a separate legal entity. Note also that *Envision* contains some helpful comments on the timing of an amalgamation: in the absence of a deeming rule, "an amalgamation must take place at a particular time and not just on a particular date."[71] Finally, in light of the conclusion that the amalgamation was a qualifying amalgamation under section 87 " " ", the Supreme Court left "for another day" the question whether the flowthrough of tax attributes following a non-qualifying amalgamation is governed by *Black & Decker*, as was held by both of the lower courts.

It will be interesting to see whether the courts consider a non-qualifying amalgamation in the future. There are other ways to prevent an amalgamation from qualifying under the definition in subsection 87(1) " " "—for example, issuing non-share consideration to shareholders, which is permitted under many corporate law statutes.[72] This strategy did not appear to be open to Envision, given the provisions of the CUIA, which contemplate that shares of each amalgamating credit union are to be exchanged for shares of the amalgamated credit union.[73] Another approach is to include a non-taxable Canadian corporation as one of the amalgamating corporations (such as a corporation that is tax-exempt under section 149).[74]

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Specific Tips and Traps

Ensuring that an amalgamation transaction can proceed without giving rise to any adverse tax consequences will require a detailed review of section 87 " " " and corresponding provisions of the Act. (For detailed checklists, see appendixes 1 and 2.) The following discussion considers only a few of the specific tips and traps that can arise in respect of an amalgamation or windup transaction.

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Foreign Affiliate Dumping

We have already identified several circumstances in which an amalgamation can be used to achieve tax and commercial goals. However, if one or more of the amalgamating corporations is controlled by a non-resident corporation and holds, directly or indirectly, shares or debt of a foreign affiliate, the foreign affiliate dumping (FAD) provisions in section 212.3 " " " can at times give rise to an adverse (and sometimes unintended) Canadian tax result that makes the proposed transaction untenable. The FAD provisions have been examined in detail elsewhere.[75] In the discussion that follows, we focus on the potential application of the FAD rules to the types of amalgamations described herein. We also consider the application of the FAD provisions to

windup transactions by way of a comparative example.

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The FAD Provisions Generally

In general terms, (1) the FAD provisions apply where a corporation resident in Canada (CRIC) that is controlled by a non-resident corporation makes an investment in a foreign affiliate, and (2) if the FAD provisions are applicable, result in a deemed dividend subject to non-resident withholding tax or a reduction of PUC. For these purposes, "investment" is broadly defined in subsection 212.3(10) " " " as including, among other things,

1) an acquisition of shares of a foreign affiliate by a CRIC,[76]
2) an acquisition of certain debt of a foreign affiliate by a CRIC,[77] and
3) an indirect acquisition by a CRIC of shares of a foreign corporation resulting from a direct acquisition by the CRIC of shares of another Canadian-resident corporation (the acquired Canco) where
   a) the foreign corporation is a foreign affiliate of the acquired Canco, and
   b) the total FMV of all of the foreign affiliate shares held directly or indirectly by the acquired Canco exceeds 75 percent of the total FMV (determined without reference to debt obligations of any Canadian-resident corporation in which the acquired Canco has a direct or indirect interest) of all the properties owned by the acquired Canco.[78]

Accordingly, in applying the FAD rules to amalgamations and windups, the question is whether the transaction in question results in a direct or indirect acquisition of shares or a direct acquisition of debt of a foreign affiliate by a CRIC. From a policy standpoint, we expect that an amalgamation or windup transaction carried on wholly within a corporate group should never give rise to an "investment" for the purposes of the FAD rules. Conversely, we accept that if an amalgamation transaction is, in substance, a corporate takeover, there may be an "investment," but only if the amalgamation results in an indirect acquisition of foreign affiliate shares held by the target corporation where the value of the foreign affiliate shares exceeds the 75 percent threshold set out in the indirect investment rule. The Department of Finance accepts the general premise that if no incremental value is being transferred from a CRIC to a foreign affiliate, the FAD rules should not apply,[79] as will be seen from the examples below. However, the rules are not drafted in a manner that always ensures this result.

As the FAD rules are currently implemented, their operating premise is that all investments by a CRIC in a foreign affiliate are caught, subject to specific narrow exceptions for certain corporate reorganizations (which for our purposes are found in paragraphs 212.3(18)(a) " " " and 212.3(18)(c) " " " and subsection 212.3(22) " " "). Specific examples of the application of those provisions are considered below.

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Example 1: Internal Reorganizations

Assume that a foreign corporation (Forco) is the sole shareholder of a Canadian holding corporation (Canco), which in turn owns two Canadian subsidiaries (Cansub 1 and Cansub 2), both of which carry on business in Canada. Further assume that in addition to its Canadian business, Cansub 1 also owns shares of two foreign affiliates, Forsub 1 and Forsub 2. Canco wants to amalgamate Cansub 1 and Cansub 2 to form Amalco in order to combine the Canadian operating businesses of the two corporations. Prior to the amalgamation, the shares of Cansub 1 derive more than 75 percent of their value from the shares of Forsub 1 and Forsub 2. After the amalgamation, the same will be true for the shares of Amalco.

In this example, without regard to the implications of the FAD rules, Canco's tax advisers amalgamate Cansub 1 and Cansub 2 using a horizontal short-form amalgamation governed by subsection 87(1) " " ".[80] (See figure 3.)

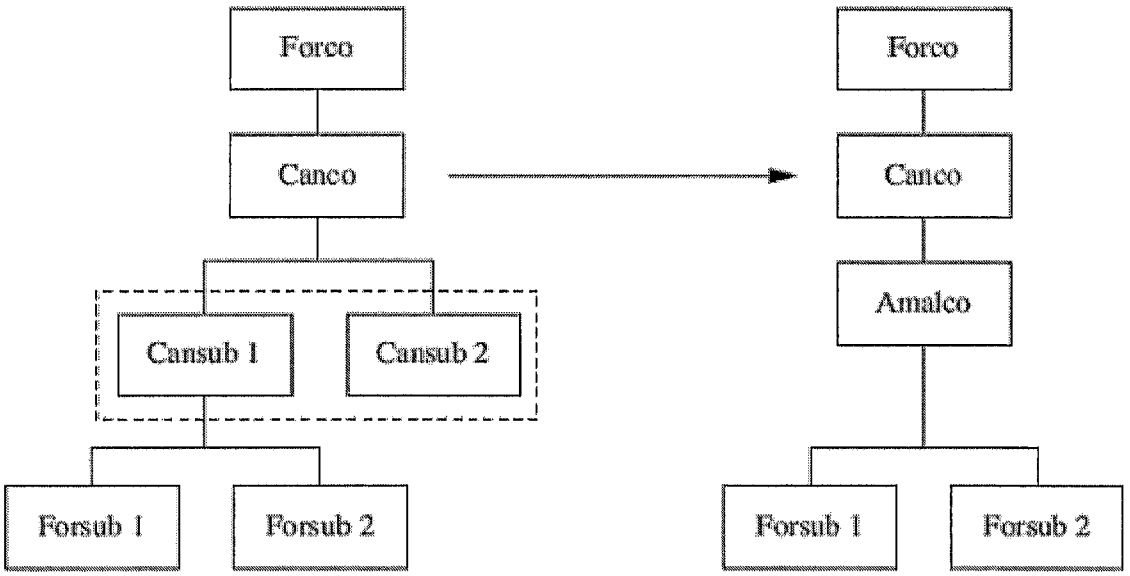
Owing to the tiered nature of the Forco structure, the potential applicability of the FAD rules as a consequence of the amalgamation must be assessed at two levels: (1) a potential acquisition of shares of Forsub 1 and Forsub 2 by Amalco, and (2) a potential indirect acquisition of shares of Forsub 1 and Forsub 2 by Canco as the result of the direct acquisition of shares of Amalco.

In these circumstances, the starting point in the FAD analysis is whether the amalgamation of Cansub 1 and Cansub 2 results in an acquisition of property (including the shares of Forsub 1 and Forsub 2) by Amalco. This thorny question has previously been debated without any final resolution.[81] Under corporate law, the shares of Forsub 1 and Forsub 2 become the property of Amalco without the need for a conveyance of any sort. Thus, for corporate-law purposes, it is generally accepted that an amalgamation does not result in a disposition of property by any predecessor corporation or in an acquisition of property by the amalgamated corporation. The provisions of the Act, however, are inconsistent in this regard. On the one hand, section 87 " " " does not contemplate that assets are disposed of by the predecessor corporations to the amalgamated corporation—no rollover is provided because, under paragraph 87(1)(a) " " ", all of the property of the predecessors "becomes" the property of the amalgamated corporation. The Supreme Court's decision in *Envision* appears to confirm that there is no conveyance of assets for the purposes of subsection 87(1) " " ".[82] On the other hand, various provisions of section 87 are premised on the assumption that the amalgamated corporation has acquired assets from the predecessor corporations.[83] Further, Amalco is a new corporation for the purposes of the Act pursuant to paragraph 87(2)(a) " " ",[84] and there is no provision deeming Amalco to be a continuation of its predecessors for the purposes of the FAD rules (as contrasted with paragraph 212.3(22)(a) " " ", discussed below).

The definitive answer to the question—at least insofar as the FAD rules are concerned—is yet to be determined. At present, however, the fact that certain provisions in the FAD rules explicitly exempt acquisitions occurring "on" amalgamations makes it clear that the FAD provisions were drafted on the basis that an amalgamation may result in the amalgamated corporation having "acquired" shares or debt of a foreign affiliate from a predecessor corporation. On the facts given in example 1, therefore, a prudent tax adviser should proceed on the basis that on the

amalgamation of Cansub 1 and Cansub 2, Amalco will be considered to have acquired the shares of Forsub 1 and Forsub 2 from Cansub 1. This acquisition will then be an "investment" pursuant to paragraph 212.3(10)(a) " " ", and the FAD rules can potentially apply.

Figure 3



On the basis of the policy objective described above, it is clear that the FAD rules should not apply in example 1, because no new amount is being transferred to a foreign affiliate. The policy objective is achieved in example 1 by virtue of the exception in subparagraph 212.3(18)(a)(ii) " " ", which provides that the FAD rules do not apply to an investment in a foreign affiliate made by a CRIC if the following requirements are satisfied:

1) The investment is an acquisition of shares (other than shares of the type described in subsection 212.3(19) " " ") of a foreign affiliate that occurs on an amalgamation described in subsection 87(1) " " " of two or more corporations to form the CRIC.
2) Each of the predecessor corporations is related to each other (determined without reference to paragraph 251(5)(b) " " ") immediately before the amalgamation.
3) None of the predecessor corporations deals at arm's length (determined without reference to paragraph 251(5)(b)) with another predecessor corporation at any time that
   a) is prior to the investment time (the time of the amalgamation), and
   b) is in the period during which the series of transactions or events that includes the making of the investment occurs (the amalgamation).

These requirements should be satisfied in respect of the acquisition of Forsub 1 and Forsub 2 shares on the amalgamation of Cansub 1 and Cansub 2, since (1) the amalgamated corporation, Amalco, is the acquiring CRIC; (2) Cansub 1 and Cansub 2 were related immediately prior to the amalgamation because they were both controlled by Canco; and (3) Cansub 1 and Cansub 2 do

not deal at arm's length at any relevant time. Accordingly, subsection 212.3(2) " " " should not apply at the Amalco level.

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The applicability of the FAD rules in example 1 must also be examined at the Canco level. By virtue of subsection 87(4) " " ", Canco, as a shareholder of Cansub 1 and of Cansub 2, is deemed to have disposed of the shares of Cansub 1 and Cansub 2 on the amalgamation for proceeds equal to the ACB and to have acquired the shares of Amalco for the same amount. In example 1, the shares of Amalco derive more than 75 percent of their value from the shares of Forsub 1 and Forsub 2; thus, the acquisition constitutes an "investment" for the purposes of the FAD rules pursuant to the indirect investment rule in paragraph 212.3(10)(f).

Fortunately, in these circumstances, subparagraph 212.3(18)(c)(ii) " " ", as it is proposed to be amended,[85] should provide an exception from the FAD rules at the Canco level. As amended, the subparagraph will provide that the FAD rules do not apply to an investment in a foreign affiliate made by a CRIC if the following requirements are satisfied:

1) the investment is an indirect acquisition of shares of a foreign affiliate of the type referred to in paragraph 212.3(10)(f) " " " (that is, an indirect acquisition resulting from a direct acquisition by the CRIC of shares of a Canadian-resident corporation where the 75 percent value threshold in that provision is met or exceeded) (other than shares of the type described in subsection 212.3(19) " " ");
2) the investment occurs on an amalgamation described in subsection 87(1) " " " of two or more predecessor corporations to form the CRIC or of which the CRIC is a shareholder;
3) each of the predecessor corporations is related to each other (determined without reference to paragraph 251(5)(b) " " ") immediately before the amalgamation; and
4) none of the predecessor corporations deals at arm's length (determined without reference to paragraph 251(5)(b)) with another predecessor corporation at any time that
   a) is prior to the investment time (the time of the amalgamation), and
   b) is in the period during which the series of transactions or events that includes the making of the investment occurs (the amalgamation).

These requirements should be satisfied at the Canco level in respect of the amalgamation of Cansub 1 and Cansub 2, since (1) Canco, the CRIC, is the shareholder of the two predecessor corporations; (2) Cansub 1 and Cansub 2 are related immediately prior to the amalgamation because they are both controlled by Canco; and (3) Cansub 1 and Cansub 2 do not deal at arm's length at any relevant time. Accordingly, the FAD rules should not apply at the Canco level (assuming that subparagraph 212.3(18)(c)(ii) " " " is amended as proposed).

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Example 2: Corporate Acquisition Followed by Internal Amalgamation

In example 1, the amalgamation exceptions to the FAD provisions work as intended for an internal reorganization. Assume the same fact pattern as that given in example 1, but also assume

that, prior to the amalgamation of Cansub 1 and Cansub 2, and as part of the same series of transactions, Canco acquired Cansub 1 from an arm's-length party. The FAD rules applied on the acquisition of Cansub 1 as a result of the indirect investment rule in paragraph 212.3(10)(f) " " ". From a policy standpoint, the FAD rules should not have any further application on the amalgamation of Cansub 1 and Cansub 2, since they would have already applied to the indirect acquisition of Forsub 1 and Forsub 2 by the Canco group. This policy objective, however, is not evident in the technical application of the FAD rules.

As discussed above, on the amalgamation of Cansub 1 and Cansub 2, Amalco should technically be considered to have acquired the shares of Forsub 1 and Forsub 2 (an investment within the meaning of paragraph 212.3(10)(a) " " "), and Canco should be considered to have indirectly acquired the shares of Forsub 1 and Forsub 2 (an indirect investment within the meaning of paragraph 212.3(10)(f)) by virtue of having acquired the Amalco shares on the amalgamation. It is therefore necessary to rely on an exception to the FAD rules. In example 2, however, Cansub 1 and Cansub 2, the two predecessor corporations, deal at arm's length with one another at some point in the relevant series of transactions. Accordingly, the requirements of clauses 212.3(18)(a)(ii)(B) " " " and 212.3(18)(c)(ii)(B) " " ", discussed above, are not satisfied.[86] Thus, the FAD rules will apply at both the Amalco level and the Canco level. In other words, the series of transactions under which Canco acquired Cansub 1 and Cansub 1 was then amalgamated with Canco's existing subsidiary, Cansub 2, will result in the application of the FAD rules three times—clearly an inappropriate result from a policy perspective.[87]

Example 2 illustrates the key limitation of the exceptions in subparagraphs 212.3(18)(a)(ii) " " " and 212.3(18)(c)(ii) " " ": the series condition effectively precludes reorganizations that occur in the post-acquisition context unless another exception can be relied on.[88] Although the Department of Finance has issued at least one comfort letter dealing with a specific transaction in which the series requirement was not satisfied in the context of subparagraph 212.3(18)(a)(i) " " ",[89] it is unclear whether the proposed amendment will extend to subparagraph 212.3(18)(a)(ii).

Fortunately, in example 2, it may be possible to avoid the application of the FAD rules by restructuring the intended amalgamation so that subsection 87(11) " " " applies. Consider, for example, the situation where (instead of Cansub 1 and Cansub 2 being amalgamated) Canco and its two subsidiary wholly owned corporations, Cansub 1 and Cansub 2, are amalgamated pursuant to subsection 87(11). If it is desirable for Amalco to be held by a Canadian holding corporation, Canco can, as a preliminary step to the amalgamation, transfer the shares of Cansub 2 to Cansub 1 under subsection 85(1) " " ". Because Cansub 2 does not own any shares or debt of a foreign affiliate, the FAD rules should not be engaged on this preliminary step. (See figure 4.)

In this transaction, paragraph 212.3(22)(a) " " ", as it is proposed to be amended,[90] should provide an exception from the FAD rules. If there has been an amalgamation to which subsection 87(11) " " " applies,

1) the amalgamated corporation (Amalco) is deemed to be the same corporation as, and a continuation of, the parent (Cansub 1) and each subsidiary wholly owned corporation

(Cansub 2);

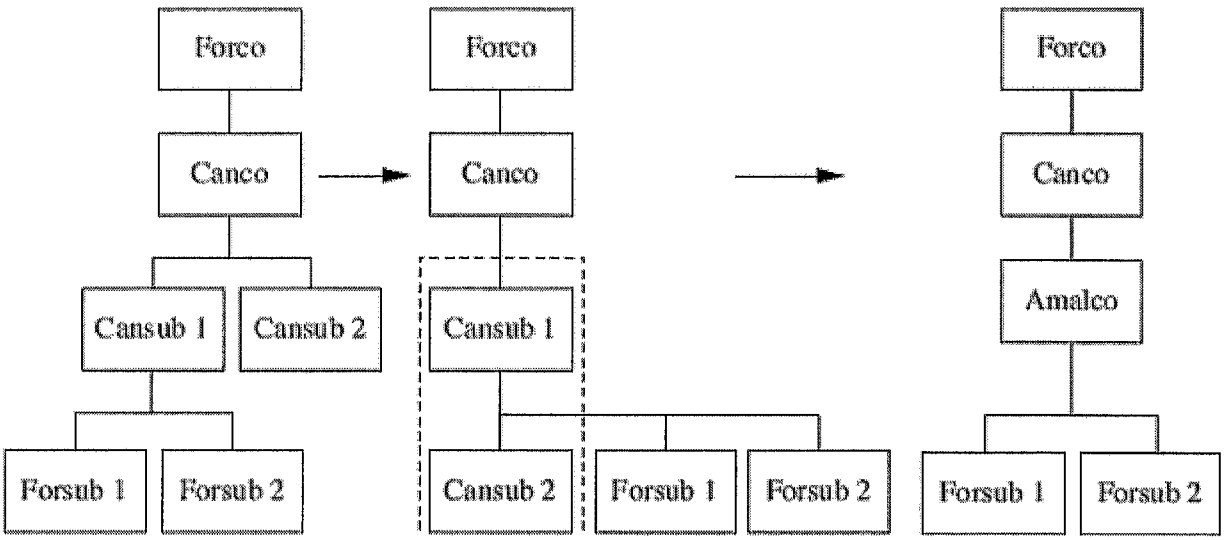
2) the amalgamated corporation is deemed not to acquire any property of the parent or the subsidiary wholly owned corporations as a result of the amalgamation; and

3) each shareholder of the amalgamated corporation (Canco) is deemed not to acquire indirectly any property of the parent or the subsidiary wholly owned corporations as a result of the amalgamation.

In example 2, the consequence of amended paragraph 212.3(22)(a) " " " is that Amalco is deemed not to have acquired the shares of Forsub 1 or Forsub 2 on the amalgamation, and the new Canco is deemed not to have acquired indirectly the shares of Forsub 1 or Forsub 2. Accordingly, there should be no "investment" to which the FAD rules can apply (assuming that paragraph 212.3(22)(a) is amended as proposed).

Example 2 is interesting because, notwithstanding the transactions leading to the same end structures, an amalgamation pursuant to subsection 87(1) " " " causes the FAD rules to apply twice, whereas an amalgamation pursuant to subsection 87(11) " " " does not. One can imagine numerous situations in which this very fact will cause transactions to be restructured in reliance on subsection 87(11), resulting in additional structuring to achieve what was once a simple objective. Similarly, there are sure to be situations in which a subsection 87(11) amalgamation is not commercially viable.

Figure 4



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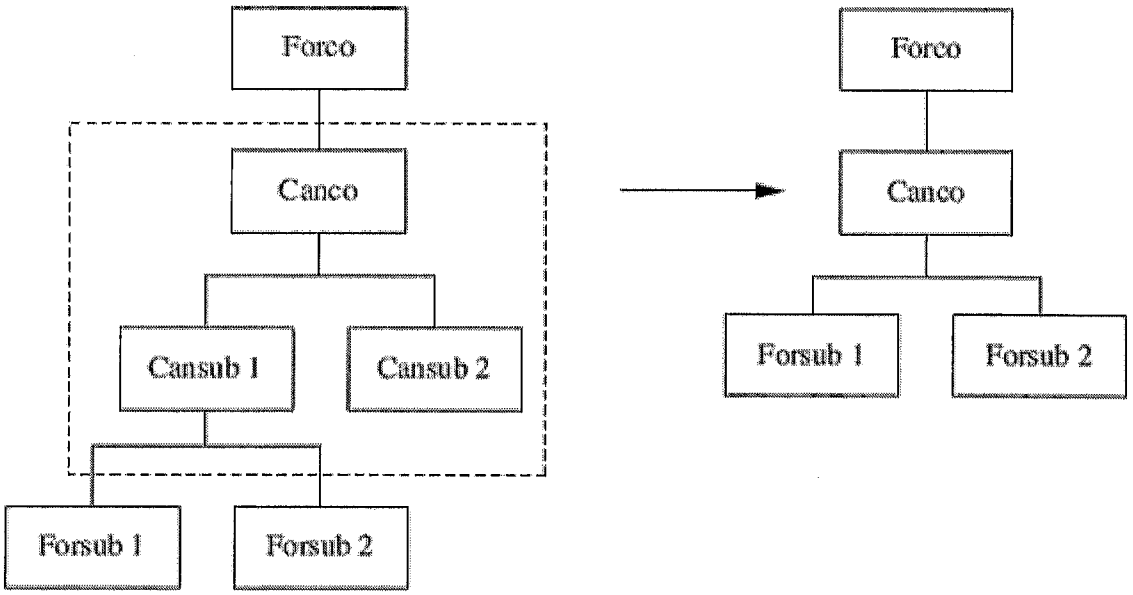
Example 3: Corporate Acquisition Followed by Internal Windup

As an alternative to a vertical amalgamation pursuant to subsection 87(11) " " ", Cansub 1 and Cansub 2 could be wound up under subsection 88(1) " " ". (See figure 5.) Paragraph 212.3(22)(b) " " " provides that where there has been a winding up to which subsection 88(1) applies,

1) the parent (Canco) is deemed to be the same corporation as, and a continuation of, the subsidiary that is wound up (Cansub 1 and Cansub 2), and
2) the parent is deemed not to acquire any property of the subsidiary as a result of the winding up.

The consequence of paragraph 212.3(22)(b) " " " in example 3 is that Canco is deemed not to have acquired the shares of Forsub 1 or Forsub 2 on the winding up of Cansub 1. Accordingly, there should be no "investment" to which the FAD rules can apply. Notably, if subsection 88(1) is relied on, the exemption in paragraph 212.3(22)(b) is preferable to the exemptions in subparagraphs 212.3(18)(a)(i) " " " and 212.3(18)(c)(i) " " " due to the absence of a series test in paragraph 212.3(22)(b).

Figure 5



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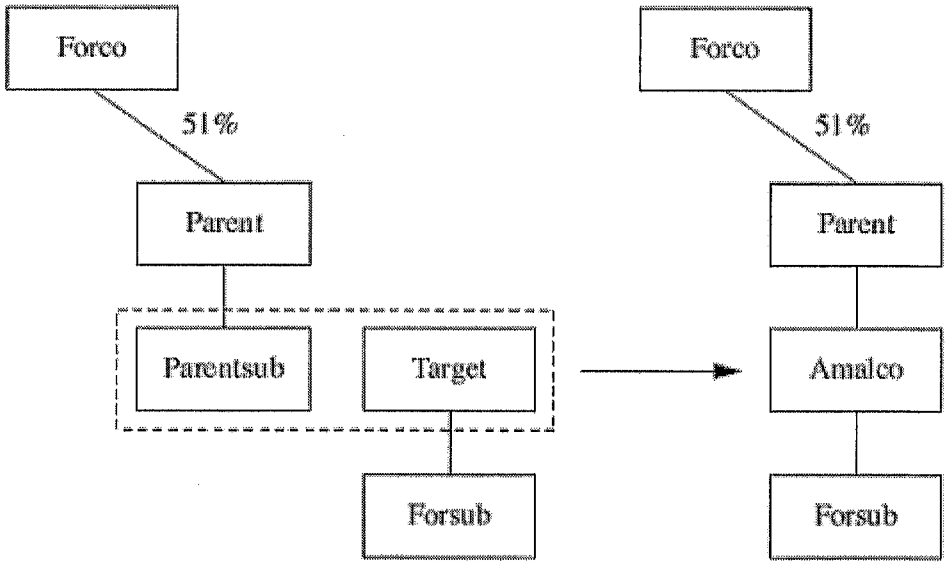
Example 4: Corporate Acquisition by Way of Triangular Amalgamation

Assume that a target corporation (Target) is acquired by a foreign-controlled Canadian parent corporation (Parent) by virtue of a triangular amalgamation of Target and a subsidiary of Parent (Parentsub). Target owns shares of a foreign affiliate (Forsub). Prior to the amalgamation, less than 50 percent of the value of Target is derived from the shares of Forsub. (See figure 6.)

From a policy perspective, because the triangular amalgamation is effectively an acquisition of Target by Parent, it is appropriate that the amalgamation should result in an "investment" for the purposes of the FAD rules if a direct acquisition of Target by Parent would have constituted an indirect investment by Parent in Forsub pursuant to paragraph 212.3(10)(f) " " ". Conversely, however, if a direct acquisition of Target by Parent would not have triggered the application of the FAD rules because the value of Target derived from the shares of Forsub was below the 75

percent threshold in paragraph 212.3(10)(f), the fact that the acquisition occurs by amalgamation should not change the result. As will be seen, however, the rules do not achieve this outcome.

Figure 6



As previously discussed, the amalgamation of Parentsub and Target should result in the acquisition by Amalco of the shares of Forsub. Although Parent, as a shareholder of Parentsub, is deemed to have acquired the shares of Amalco (and hence to have indirectly acquired the shares of Forsub), this result should fall outside the threshold value in paragraph 212.3(10)(f).

The exception to the FAD rules in subparagraph 212.3(18)(a)(ii) " " " does not apply to exempt the amalgamation from the FAD rules because Parentsub and Target dealt at arm's length at some point in the series. The exception in paragraph 212.3(22)(a) " " " is also inapplicable because the amalgamation is not governed by subsection 87(11) " " ". Thus, it appears that the FAD rules will apply to the acquisition by Amalco of the shares of Forsub. Therefore, it is preferable to structure the acquisition of Target as a takeover rather than as a triangular amalgamation.

Paid-Up Capital

The legal stated capital of a class of shares as determined under the relevant corporate law is the basis for computing the PUC of that class.[91] The initial PUC balance is then adjusted under various provisions of the Act, including subsection 87(3) " " ", which provides that the aggregate PUC of the shares of an amalgamated corporation cannot exceed the aggregate PUC of the shares of the predecessor corporations, as reduced by the PUC of shares that are held by another predecessor corporation. Thus, on a vertical amalgamation, the PUC of the shares of a subsidiary is eliminated. When subsection 87(3) applies, the PUC reduction is prorated among all of the classes of shares of the amalgamated corporation in proportion to their aggregate PUC.

In *Copthorne Holdings Ltd. v. Canada*,[92] the Supreme Court confirmed that the general anti-avoidance rule (GAAR) in subsection 245(1) " " " applied where, as a result of a series of transactions, the stated capital and PUC of the shares of a former subsidiary, which would have been cancelled on a vertical amalgamation, were preserved on a horizontal amalgamation. The Supreme Court held that the parenthetical clause in subsection 87(3) had an anti-avoidance character:

> Because s. 87(3) is one provision within this series of grinds, it is reasonable to conclude that it shares the same purpose of precluding the preservation of PUC where such preservation would allow for a withdrawal, without liability for tax, of an amount in excess of the investment made with tax-paid funds.[93]

The transfer of shares of the former subsidiary was an abusive avoidance transaction because it was contrary to the purpose of subsection 87(3) " " ". Therefore, GAAR applied to reduce the double-counted PUC (that is, the portion attributable to the former subsidiary).[94]

As a result, any transaction whereby PUC is preserved or duplicated can potentially give rise to the application of GAAR:

> Simply because PUC was validly created does not mean that it may be validly preserved. . . .
>
> While a series of transactions that results in the "double counting" of PUC is not in itself evidence of abuse, this outcome may not be foreclosed in some circumstances.[95]

If the aggregate stated capital of the shares of the amalgamated corporation exceeds the PUC of the shares of the predecessor corporations, the computation of the grind in subsection 87(3) " " " may lead to anomalous results. Such results can be avoided if a number of conditions set out in subsection 87(3.1) " " " are met and the amalgamated corporation files an election. Essentially, the number of shares of each class of shares, the stated capital of each class of shares, the number of shareholders of each class of shares, and the terms and conditions of each class of shares of a predecessor corporation must be maintained in the amalgamated corporation. Depending on the complexity of the share capital, these requirements may be difficult to meet. The CRA has confirmed that on the vertical amalgamation of a parent and a subsidiary, the requirements of subsection 87(3.1) are met notwithstanding that the rules in subsection 87(1.1) " " " apply only for the purposes of paragraph 87(1)(c) " " " and not for the purposes of subsection 87(3.1).[96] Practical considerations (such as priority of classes) do not appear to have been addressed.

The rules in subsection 87(3) do not prohibit a PUC shift between classes of shares on the amalgamation. Arguably, the purpose of subsection 87(3) would not be abused if there was no abusive preservation or duplication of PUC, as in *Copthorne*.[97] The CRA has administratively accepted the shifting of PUC onto squeeze-out shares in an amalgamation to prevent a deemed dividend under subsection 84(3) " " ".[98] However, the CRA will consider applying GAAR when PUC has been streamed to a specific class of shares in order to accomplish a surplus strip.[99]

The Amalgamation Benefit Rule

An important component of any qualifying amalgamation is the application of subsection 87(4) " " ", which provides, subject to a number of conditions, for a tax-deferred rollover to a shareholder of a predecessor corporation that holds the shares as capital property and that exchanges, or is deemed to exchange, shares of the predecessor corporation *solely*[100] for shares of the amalgamated corporation. However, the provision contains an important exception (referred to, since the decision in *Husky*,[101] as "the subsection 87(4) exception"). In the following discussion, we canvass the conditions for the applicability of the subsection 87(4) exception and consider whether a price adjustment clause can be used to provide protection.

The potential applicability of the subsection 87(4) exception to a particular amalgamation must be determined on a shareholder-by-shareholder basis. No rollover is available if (1) the FMV of the shares of the predecessor corporation owned by the shareholder immediately before the amalgamation exceeds the FMV of the shares of the amalgamated corporation received by the shareholder immediately after the amalgamation, and (2) it is reasonable to regard any portion of the excess (referred to in subsection 87(4) as the "gift portion") as a benefit that the shareholder desired to have conferred on a person related to the shareholder.[102] If those conditions are satisfied, the shareholder is deemed to have disposed of the shares of the predecessor corporation for proceeds equal to the shareholder's ACB plus the gift portion (or, if it is lesser, the FMV of the shares of the predecessor corporation),[103] but the shareholder's ACB of the amalgamated corporation shares will remain equal to the ACB of the predecessor corporation's shares (or, if it is less, the FMV of the shares of the amalgamated corporation and the amount that would have otherwise been the shareholder's capital loss from the disposition of the predecessor corporation shares).[104] In most cases, the result is that the shareholder will realize a capital gain equal to the amount of the gift portion, but without any increase in the ACB in the shares of the amalgamated corporation. This benefit rule has a punitive result. As the Federal Court of Appeal stated in *Husky*, the objective of the subsection 87(4) exception is to deter a taxpayer from using a corporate amalgamation to shift value of a predecessor corporation to the amalgamated corporation if, but only if, a person related to the taxpayer has a direct or indirect interest in the amalgamated corporation that will be enhanced by the shift in value.

In many cases, the determination of whether a benefit has been conferred will require evidence of the value of the shares of each predecessor corporation compared with the value of the shares of the amalgamated corporation. Valuation is not a science, and thus differences of opinion between taxpayers and the CRA can arise. If shareholders of the predecessor corporations are related and the value of the shares of the predecessor corporation is uncertain, consideration can be given to including a price adjustment clause[105] in the amalgamation agreement. Appendix 3 contains a sample of such a clause.

Conclusion

As evidenced by the recent amendments to the Act and recent court decisions, the Canadian income tax consequences of Canadian mergers continue to evolve, necessitating periodic updates to practitioners' understanding of the rules. This paper, and in particular the checklists in the appendixes, is intended to provide such an update; we acknowledge that the topic is not exhaustively addressed herein and will require future updates.

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Appendix 1: Amalgamation Checklist

This checklist is a guide to the review of tax and certain other considerations arising out of an amalgamation. It is not intended to be an exhaustive list of all of the legal, financial, and tax considerations involved in a merger of two or more corporations by way of an amalgamation. Readers should consult the relevant provisions of the federal and provincial tax law, the corporate law, and the law applicable to a particular industry.

General

Item	Comments
Name of predecessor corporations	
Relationship between predecessor corporations	Parent, subsidiary, debtor-creditor Prepare corporate chart for each predecessor corporation showing intercompany shareholdings and intercompany debt. Note options to acquire equity. Consider whether predecessor corporations are related or associated.
How did corporate structure arise?	
Business of each predecessor corporation (manufacturing, wholesaler, retailer, distributor, investment, etc.)	Legal or regulatory factors that must be considered in connection with the amalgamation.
Purpose of the merger	Outline basic objectives.
Determine authorized signatories for predecessor corporations.	
Structure of merger	
Consider the form and structure of amalgamation.	Regular (87(1) " " "), vertical short-form (87(1.1)(a) " " "), horizontal short-form (87(1.1)(b) " " "), triangular (87(9) " " "), absorptive merger
Is it more advantageous to perform the merger under another section of the Act?	85 " " " rollover, 85.1 " " " share-for-share exchange, 88 " " " windup
Amalgamated corporation	
Name of amalgamated corporation	Consider whether it is necessary to register a business name.
Jurisdiction of amalgamated corporation	If not same as predecessor corporations, consider whether continuance of one or more of predecessor corporations is possible.
Directors	Number, names, addresses, citizenship
Officers	Names, addresses

General

Item	Comments
Location of registered office	
Authorized capital	Consider how shares of predecessor corporations are to be converted to shares of amalgamated corporation.
Year-end of amalgamated corporation	
Proposed amalgamation date	Consider issues relating to taxation year of less than 365 days.
Corporate seal	
For each predecessor corporation	
Obtain copies of articles of incorporation, articles of amendment, and any other constating documents.	Do the articles preclude an amalgamation? If yes, can they be amended?
Bylaws	Is there an impediment to the merger? If so, can the bylaws be amended?
	Which bylaws will be used by amalgamated corporations?
Incorporating jurisdiction	Canada, provincial, foreign
	If not same jurisdiction as amalgamated corporation, can predecessor corporation be continued?
Confirm that corporate filings are up to date.	Filings for CBCA corporation in default may preclude amalgamation.
Year-end of predecessor corporations	
Authorized capital	
Issued capital	• Percentage of shareholder(s) interest in each class • Intercompany shareholdings • Circumstances under which shares were issued • Residence of shareholders • Options, if any Is there a large shareholding that would prevent amalgamation?
Stated capital	Based on review of minute book. Reconcile with financial statements. Resolve discrepancies.
PUC	Determine PUC. If it differs from stated capital, explain.
Contributed surplus	Contributed surplus of predecessor corporations flows through to amalgamated corporation (87(2)(y) " " ").
Directors	Minute book and government registries
Officers	Minute book and government registries
Business styles	Consider whether it is necessary to register business names and styles following the amalgamation.
Extraprovincial registrations	Consider whether it is necessary to update extraprovincial registrations following amalgamation.
Searches	
Order searches for each corporation	PPSA, bankruptcy, executions, etc.
Contracts, intellectual property, lawsuits	

General

Item	Comments
Review shareholders' agreements, leases, mortgages, government licences or rights; research and development contracts; debt or security agreements; guarantee agreements; intellectual property agreements; distributor agreements; supplier and customer contracts; employee-related agreements; collective agreements; insurance policies; and government grants, subsidies, assistance, and other programs.	Is there a contractual impediment to an amalgamation? Are notices required? Are consents required?
Patents, licences, trademarks	
Lawsuits	
Assets and liabilities	
List of fixed assets	Note cost amount.
List of liabilities	Note intercompany liabilities.
List of creditors	Consider whether creditors need to be notified.
Consider including subsidiaries in the amalgamation to consolidate the corporate structure.	
Solvency tests	
Confirm that each predecessor corporation is solvent within the meaning of the relevant corporate law.	Is an opinion required?
If a predecessor corporation is not solvent, can steps be taken to render it solvent?	Consider a capital contribution. Consider whether a capital contribution will result in increase in ACB (53(1)(c) " " ").
Regulatory considerations	
Application or notice under the Investment Canada Act	
Application or notice under the Competition Act	
Securities Act, if applicable (such as continuing status as a reporting issuer, filing a material change report, etc.)	
Consider effect of amalgamation on filings and/or licences (for example, liquor licence).	
Consider refiling PPSA (Personal Property Security Act) registrations re corporate name change.	
Consider refiling registrations under land registry system.	
Employees	
Review employment agreements.	Determine whether enforceable upon amalgamation.
Review union agreements to ensure that they survive amalgamation.	
Review employee benefit plans for continuance or discontinuance, need to merge, notification: pension plan, deferred profit-sharing plan, employee benefit plan, employee trust, supplementary unemployment benefit plan, group sickness or accident insurance plan, private health services plan, and group term life insurance policy.	
Accounting	
Review accounting policies to ensure that no significant	

General

Item	Comments
accounting problems arise.	
Consider effect of amalgamation on future earnings per share.	
Corporate matters	
Obtain approval of amalgamation by directors of predecessor corporations.	
Obtain approval of amalgamation by shareholders of predecessor corporations.	Confirm voting requirements under statute or constating documents.
Obtain a statutory declaration of a director or officer, or a director's statement, for each predecessor corporation attesting to solvency and matters relating to creditors, as required under applicable corporate law.	Declaration or statement must state that there are reasonable grounds for believing that (1) each predecessor corporation and the amalgamated corporation will be able to pay its liabilities; (2) the realizable value of the amalgamated corporation's assets will not be less than the aggregate of its liabilities and stated capital of all classes; (3) no creditor will be prejudiced by the amalgamation; (4) adequate notice has been given to all known creditors of the predecessor corporations and no creditor has a legitimate objection (CBCA 185(2); OBCA 178(2); ABCA 185(2)).
Amalgamation agreement: In a short-form amalgamation, the shares of one corporation will remain in existence. Is there an advantage to having the shares of one predecessor corporation continue rather than another?	
Prepare articles of amalgamation.	
Consider dissent rights.	
Other matters	
Change seal and logo, if necessary.	
Update patents and trademarks, if necessary.	
Notify • bank • suppliers • municipalities • government departments (such as motor vehicle registration) • tax authorities (if not notified) • debtors • creditors • insurance • media	
Status for tax purposes	
Determine status of predecessor corporations for tax purposes.	If a public corporation is included in amalgamation, the amalgamated corporation will be deemed to be a public corporation (87(2)(ii) " " "). Consider the effect on capital dividend account, RDTOH (refundable dividend tax on hand), and eligibility of shares for capital gains. Consider election not to be a public corporation (reg. 4800 " " ") and timing of same.

General

Item	Comments
	Amalgamated corporation will be a "Canadian corporation," as defined in 89(1) " ", as long as the amalgamation takes place under the laws of Canada or a province, and each of the predecessor corporations was a Canadian corporation immediately before the amalgamation.
	Special status of predecessor corporation: principal business is leasing, renting, developing, or sale of real property. Status as "principal business corporation" may be lost if amalgamated corporation's other businesses dilute the proportion of gross revenues from renting or leasing (regs. 1100(16) " ", (16) " "). Consider tax implications of a change of status.
	Eligibility for manufacturing and processing credit. Credit available to amalgamated corporation may be reduced if the gross revenue from certain active businesses is less than 10 percent of its gross revenues from all active businesses carried on in Canada (125.1(3), reg. part LII).
	Status of amalgamated corporation or predecessor corporations as "specified financial institution," "financial intermediary corporation," or "private holding corporation." Consider tax treatment of dividends on taxable preferred shares, short-term preferred shares, and term preferred shares. If amalgamated corporation is "financial institution" and property acquired is a "mark-to-market property" to it, or if any predecessor corporation was a financial institution and the property was mark-to-market to it, the property will be considered to have been disposed of by the predecessor corporation for proceeds equal to its FMV pursuant to 87(2)(e.4) " ", 142.5(2) " ", 87(2)(g.2), and 142.6(1) " " and acquired by the amalgamated corporation at a cost equal to FMV.
	Status as small CCPC. The "taxable income" and "taxable capital employed in Canada" of a parent corporation and its wholly owned subsidiary for the taxation year that ended immediately before the year of the amalgamation cannot be taken into account under 157(1.3)(b) " " and 157(1.4)(b) " " in determining whether the amalgamated corporation qualifies as a small CCPC (CRA doc. no. 2008-027756117).
Foreign tax considerations	
Foreign tax considerations considered?	If predecessor corporation has a US real property interest (USRPI), review the rules in respect of same to ensure that there has been no disposition of the USRPI for purposes of the Foreign Investment in Real Property Tax Act on the amalgamation. Consider impact of subpart F of the US Internal Revenue Code "controlled foreign corporation rules" if the predecessor or amalgamated corporation is part of a group controlled by US interests.
Advance tax ruling	
If the merger is complex or involves unclear issues, consider obtaining a ruling.	IC 70-6R5 " "

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General

Item	Comments
If 87(2)(a) produces unfavourable consequences, consider requesting relief from Income Tax Rulings Directorate.	IT-474R (cancelled), para. 10

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Technical requirements (section 87)

Item	Applicable provision/authority	Comments
General		
Confirm that predecessor corporations are "taxable Canadian corporations."	87(1) " ", 89(1) "taxable Canadian corporation," 250(5.1) " "; IT-474R2 " ", para. 3	Note that there are special rules for mergers of foreign affiliates (95(2)(d) " ").
Confirm that one corporate entity is formed as a result of amalgamation.	87(1) " "; CRA doc. nos. 2006-0178571R3, 2010-0355941R3	A Delaware-style merger of two predecessor corporations (whereby one predecessor corporation ceases to exist and the other predecessor corporation continues to exist) will be considered qualifying.
Confirm that all property of predecessor corporations will become the property of the amalgamated corporation by virtue of the amalgamation (other than intercompany receivables and shares).	87(1)(a) " "; *Envision* (SCC); IT-474R2 " ", paras. 2, 4	Administrative exceptions apply for (1) an interest such as a leasehold or royalty interest, in a property held by another predecessor corporation, where the interest merges with that property on the amalgamation, and (2) rights and options to acquire shares of another predecessor corporation, where the right or option terminates on amalgamation. (IT-474R2 " ", para. 4.)
		Amalgamation is not disqualified where the amalgamation agreement provides that, concurrently with the amalgamation, certain properties of one or more predecessor corporations are transferred to a third party in exchange for shares of the third party. Those shares then flow to the amalgamated corporation as a result of the amalgamation. At the moment of amalgamation, predecessors have no separate legal personality capable of fulfilling the terms of sale agreements. Any legal obligations that the predecessors had entered into that had to be fulfilled, at or after the time of the amalgamation, had to be fulfilled by the amalgamated corporation. (See *Envision*, at paras. 30-31, 46, 50.)
		The requirement may be redundant because effectively all corporate amalgamation statutes in Canada currently provide for continuity in respect of assets and liabilities (see *Envision*, at para. 38)
Confirm that all liabilities of predecessor corporations will become the liabilities of amalgamated corporation by virtue of the amalgamation (other than intercompany liabilities).	87(1)(b) " "; CRA doc. no. 2008-028932117	Predecessor corporations are not deemed to cease to exist (*The Queen v. Guaranty Properties* (FCA)). Tax liabilities of predecessor corporation become liabilities for the amalgamated corporation (CRA doc. no. 2008-028932117).
Confirm that all shareholders (other than predecessor corporations that hold shares in a predecessor corporation) are to receive shares of	87(1)(c) " ", 87(1.1) " ", 87(9)(a) " "; IT-474R2 " ", paras. 2, 5-8, 37; 248(1) "shareholder"; CRA doc. nos.	Administrative concessions for shareholders of predecessor corporations who receive (1) cash in lieu of fractional shares up to $200 (IT-474R " ", para. 37); (2) cash by virtue of exercising statutory

Technical requirements (section 87)

Item	Applicable provision/authority	Comments
the amalgamated corporation (or, in respect of a triangular amalgamation, shares of the parent of the amalgamated corporation) because of the amalgamation.	2001-0091465, 9724053, 2010-0376681R3; IC 88-2 " " ", para. 28	rights of dissent (IT-474R, para. 5; CRA doc. nos. 2001-0091465, 9724053); and (3) shareholders who receive preferred shares of the amalgamated corporation, on a squeeze-out amalgamation, that are redeemed immediately following the amalgamation (IT-474R, para. 5; GAAR will not apply: IC 88-2, para. 28).
		ITAR 26(21) will not be denied. IT-474R (cancelled), para. 38.
		In short-form amalgamations, shares not cancelled on amalgamation are deemed by 87(1.1) " " " to be shares of the amalgamated corporation received by virtue of the amalgamation (IT-474R2, para. 7; CRA doc. no. 2010-0376681R3).
Confirm amalgamation is effected otherwise than as a result of the acquisition of property of one corporation by another pursuant to the purchase of such property or as a distribution upon winding up.	87(1)(a) " " "	
Consider tax implications where amalgamation does not satisfy conditions in 87(1)(a)-(c).	*Envision* (SCC)	The tax consequences to the amalgamated corporation will be determined pursuant to corporate law.
Taxation year-end		
The "new corporation" deeming rule in paragraph 87(2)(a) applies for all purposes of the Act.	87(2)(a) " " "; *CGU Holdings Canada Ltd. v. The Queen* (FCA); CRA doc. no. 2008-027756117	
Confirm the timing of the amalgamation.	87(2)(a); IT-179R " " ", para. 5; IT-474R2 " " ", para. 10; IC 88-2, para. 21; CRA doc. no. 2011-0416871E5	The tax year of each predecessor corporation will end immediately before the amalgamation. Amalgamation is a method to change a year-end.
		The taxation year of the amalgamated corporation commences at the time of amalgamation (that is, earliest moment on date shown on certificate of amalgamation or time specified in certificate of amalgamation) (IT-474R2 " " ", para. 9).
		Amalgamated corporation may choose a new year-end, provided that the new fiscal period does not exceed 53 weeks (IT-474R2, para. 13).
		The CRA's concurrence is not required for a change in fiscal period (IT-179R " " ", para. 5).
		The CRA may consider an amalgamation to occur at a particular time on the amalgamation date even though the certificate of amalgamation does not specify a particular time (CRA doc. no. 2010-0355941R3).
		Consider GAAR (IC 88-2 " " ", para. 21).
Consider implications when an amalgamation and an acquisition of control take place on the same day.	87(2) " " ", 249(3.1) " " ", (4), 256(9); IT-474R2, para. 11; CRA doc. nos. 2004-0105481E5,	Consider whether 87(1)(a) " " " and 249(3.1) " " " and (4) may trigger multiple year-ends. If certain conditions are satisfied, two consecutive

Technical requirements (section 87)

Item	Applicable provision/authority	Comments
	2007-0243341C6, 2010-0363081C6, 2010-0388081E5	year-ends can be avoided (IT-474R2, para. 11). The acquisition of control and amalgamation must be the only two transactions on the amalgamation date outside the normal course of the target corporation's business (CRA doc. no. 2010-0388081E5).
		When a private corporation acquires a public corporation, the amalgamation will result in two deemed year-ends (CRA doc. no. 2010-0388081E5).
Consider implications if amalgamation takes place other than at fiscal year-end of predecessor corporations.	87(2)(a) " " "; IT-474R2 " " ", para. 10; 249	The creation of a short tax year may result in adverse consequences to predecessor corporations.
		When a very short taxation year has adverse consequences, consider requesting the minister's concurrence to extend the year-end to the date preceding the amalgamation.
Additional financial statements and tax returns may have to be prepared if amalgamation takes place on date other than day immediately following normal fiscal year-end.		
Taxation year of less than 365 days		
Cumulative eligible capital amount	20(1)(b) " " "	Deduction prorated for short year
Capital cost allowance (CCA)	Regs. 1100(2) " " ", (2.2), (3)	Prorated for short year
		Note exceptions including regs. 1100(1)(c) " " ", (e), (f), and (g).
		Consider effect of half-year rule for assets acquired by predecessor corporations (CRA ruling no. 2012-0451431R3; CRA ruling no. 2001-0084607).
Contributions to registered pension plans, pooled registered pension plans, and deferred profit-sharing plans	20(1)(q) " " ", 147(8) " " "	Limits apply regardless of length of year. Consider contribution before amalgamation. May not be possible to make within 120 days after amalgamation, because predecessor corporations cease to exist.
Consider effect on warranty expenses.	42 " " ", 87(2)(n) " " ", 111(1)(b) " " "; IT-330R (cancelled)	Short taxation year will reduce period during which warranty expenses can be treated as capital losses and carried back.
Consider effect on unpaid amounts.	78(1) " " ", (3)	
Consider effect on reserve with respect to land.	20(1)(n) " " "	
Consider effect on shareholder loans.	15(2) " " ", 17.1	May have to be repaid earlier.
Consider effect on carryforward of deductions and credits.		Short year may accelerate expiry of losses and investment tax credits.

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Assets and liabilities

Item	Applicable provision/authority	Comments
General		
If the Act is silent on the treatment of a particular tax attribute of a predecessor corporation, consider whether attribute will flow through to the amalgamated corporation.	*CGU Holdings Canada* (FCA)	
Consider whether 69(11) applies to transfer of assets by subsidiary.	69(11) " " "	Effect may be to have transfer take place at FMV.
Inventory		
Determine cost.	87(2)(b) " " ", 10 " " ", 28(1)(b) " " "; IT-474R2, paras. 16-17	Inventory is deemed to have been acquired by amalgamated corporation at its tax value to predecessor corporations. Inventory of farming or fishing business is deemed acquired by amalgamated corporation at nil cost or the amount, if any, specified under 28(1)(b).
Depreciation component of predecessor corporation's inventory included in income in its last taxation year will be deemed to be included in amalgamated corporation's income for a notional taxation year immediately preceding its first taxation year. Amalgamated corporation may claim corresponding deduction in its first taxation year.	87(2)(j.1) " " ", 12(1)(r) " " ", 20(1)(ii) " " "	
Accounts receivable and payable		
Accounts receivable and payable will be carried forward to amalgamated corporation at the tax value to predecessor corporations.	87(2)(c)	Continuity of treatment Where some or all of predecessor corporations used different methods for computing income, amalgamated corporation must compute its income on same basis as the predecessor corporation unless a change is permitted.
Review intercompany accounts.	248(1) "cost amount," 15 " " ", 17 " " ", 17.1, 78 " " "; IT-474R2, para. 15	Determine cost amount. Consider whether definition of "payable" or "receivable" is met. For contractors, consider whether amalgamation corporation uses the "progress method" or the "completion method" of computing income as discussed in IT-92 (IT-474R2, para. 15). Consider whether it would be advisable to settle debts before merger in light of sections 15 and 78.
	80(2)-(3), 80.01(3) " " "; IT-474R2, para. 51; IT-293R " " ", paras. 3, 24. CRA doc. nos. 2002-0178255, 2008-0267831E5, 2008-0269971R3	Consider application of debt-forgiveness rules. These rules may apply if debt is acquired for less than principal amount and original issue price. Any accrued foreign exchange gain or loss on a foreign currency denominated debt that is extinguished on an amalgamation, and is deemed settled as a result of 80.01(3), will not

Item	Applicable provision/authority	Comments
		be realized as a consequence of the amalgamation (CRA doc. no. 2008-0269971R3).
	80.01 " " "	Consider debt-parking rules if debt transferred to third party.
Depreciable capital property		
Determine capital cost and UCC balances of depreciable capital property of each prescribed class for each predecessor corporation.	87(2)(d)(i) " " "; IT-474R2 " " ", para. 18	The capital cost of depreciable property of a prescribed class to amalgamated corporation will be the capital cost of the depreciable property to predecessor corporations (IT-474R, para. 18). For purposes of computing any capital gains on depreciable property of a predecessor corporation, ITAR-20(1) flows such property to the amalgamated corporation (ITAR 20(1.2) " " ").
	87(2)(d)(ii) " " "; CRA doc. no. 2009-0314801E5	The UCC of depreciable property of a prescribed class to amalgamated corporations will be the UCC of the depreciable property to predecessor corporations (CRA doc. no. 2009-0314801E5). UCC of leasehold interest may be carried over to amalgamated corporation where 13(5.1) is applied as if amalgamated corporation is the same corporation and a continuation of predecessor corporation (IT-474R2 " " ", para. 21).
	87(2)(d)(ii) " " ", 87(2)(d.1) " " "; reg. 1100(3) " " "; IT-474R2, para. 18	CCA taken by predecessor corporations will be deemed to have been allowed to amalgamated corporation. CCA will be prorated for short-taxation years resulting from a deemed year-end (reg. 1100(3); IT-474R2, para. 18).
Depreciable property not of a prescribed class is deemed to have been acquired by the amalgamated corporation before 1972 at an actual cost equal to the actual cost to the predecessor corporation.	87(2)(d.1) " " "	The amalgamated corporation is deemed to have been allowed the total of all amounts allowed to the predecessor corporation in respect of the property under the regulations made under 20(1)(a) " " ".
Determine whether depreciable capital property was acquired in year prior to merger.	Reg. 1100(2.2) " " "; IT-474R2, para. 18	CCA on depreciable property acquired from predecessor corporations is not subject to the half-year rule, provided that the property was owned by the predecessor corporation at least 364 days before the first year-end of the amalgamated corporation. If the short taxation years of both the predecessor corporations and the amalgamated corporations are less than 365 days, the half-year rule could apply twice.
Depreciable property maintains its identity for specific purposes.	87(2)(d) " " "; regs. 1100(18)-(20); reg. 1101(1ad) " " "; regs. 1102(14), (20); IT-474R2,	Leasing/non-leasing: regs. 1100(18)-(20)
		Prescribed classes: reg. 1102(14) " " ", IT-481 (consolidated), para. 8

Assets and liabilities

Item	Applicable provision/authority	Comments
	para. 19; CRA doc. no. 2009-0332581E5	Consider anti-avoidance rule in reg. 1102(20) " ".
		Separate prescribed classes for scientific research: 87(2)(d)(ii)(D) " ", 37(6) " "
		Rental property/non-rental property: reg. 1101(1ad) " "
		Amalgamated corporation is not relieved from any conditions that must be satisfied for the property to be eligible for enhanced CCA (CRA doc. no. 2009-0332581E5).
Consider the impact of the amalgamation on the reclassification of depreciable property.	13(5) " ", 87(2)(d)(ii)(C) " "; IT-190R2, para. 7	
Consider replacement property rules where, before an amalgamation occurs, property of a predecessor corporation has been (1) lost, stolen, destroyed, or expropriated, or (2) was a "former business property" of the predecessor corporation.	13(4) " ", 44(1) " ", 87(2)(l.3) " ", 248(1) "former business property"; IT-259R4 " ", para. 22; CRA doc. no. 2010-035792117	87(2)(l.3) prevents the deferral rules in sections 13 and 44 from being lost. 13(4) and 44(1) permit a taxpayer to defer recognition of income or capital gains where a former property is involuntarily disposed of, or a former property that is a "former business property" is voluntarily disposed of. Property acquired by a predecessor corporation prior to an amalgamation may be considered to have been acquired by the amalgamated corporation for the purposes of 44 (CRA doc. no. 2010-035792117).
Consider whether predecessor corporation carries on a franchise, concession, or licence for a limited period that is wholly attributable to the carrying on of a business at a fixed place.	13(4.2) " ", 13(4.3) " ", 20(16.1) " ", 87(2)(l.4) " ", 248(1) "former business property"	87(2)(l.4) provides that an amalgamated corporation is deemed to be the same corporation as, and a continuation of, each predecessor corporation for the purposes of the replacement property rules.
Superficial loss rules apply.	87(2)(g.3) " "	
CCA of predecessor corporations can be revised after amalgamation.	IT-474R (cancelled), para. 18; IC 84-1	
If a predecessor corporation's capital cost of depreciable property was reduced for investment tax credits claimed or government assistance received, the amalgamated corporation will be considered to have acquired such property for the reduced cost	87(2)(j.6) " "; 2009-0314801E5	
Repayment of government assistance by amalgamated corporation increases capital cost of depreciable capital property to which assistance relates.	87(2)(j.6) " ", 13(7.1) " ", 53(2)(k) " "; IT-474R2 " ", para. 26, IT-273R2 " "	
Consider whether amalgamated corporation can take advantage of 20(4), (4.1), (5), or (5.1) with respect to uncollectible proceeds of disposition of depreciable property by predecessor corporation or loss on the sale of a mortgage taken back on sale of land.	20(4) " ", (4.1), (5), (5.1)	

Item	Applicable provision/authority	Comments
Consider ability of predecessor corporation to capitalize interest.	21(1) " " ", (3); IT-121R3 " " "	
Amalgamated corporation is considered to be continuation of predecessor corporations for purposes of the limitation on -tax-deferred transfers of capital property to Canadian partnerships in 97(2).	87(2)(g.1) " " ", 97(3) " " "	Limitation applies to all transfers under 97(2) " " ", including Canadian resource property, foreign resource property, eligible capital property, and inventory.
Non-depreciable capital property		
Determine the cost of non-depreciable capital property.	53 " " ", 54 " " ", 87(2)(e) " " "	The cost of non-depreciable capital property to amalgamated corporation is deemed to be the ACB of the capital property to the predecessor corporation immediately before the amalgamation.
Consider whether cost of partnership interest carries through to amalgamated corporation.	87(2)(e.1) " " ", 100(2) " " ", (2.1), *251(3.1) " " "; IT-474R2 " " ", paras. 23, 24	87(2)(e.1) applies if predecessor corporation and amalgamated corporation are related. Where applicable, the ACB of a partnership interest owned by a predecessor corporation (including negative amounts) becomes the ACB of the amalgamated corporation. If the amalgamated corporation is not related to the predecessor corporation, 100(2) and (2.1) require the predecessor corporation to realize any gain represented by negative ACB of a partnership interest. See 251(3.1) to determine whether predecessor corporations are related.
Consider whether amalgamation results in realization of negative ACB of partnership interest.	40(3.15) " " ", 87(2)(e.1) " " ", 100(2.1) " " "; CRA doc. nos. 2000-0001355, 2004-0094791E5	87(2)(e.1) does not deem a partnership interest to be an excluded interest (CRA doc. nos. 2000-0001355, 2004-0094791E5).
Consider whether amalgamation results in a Canadian partnership ceasing to exist.	98(5) " " ", 98(6) " " "; IT-474R2 " " ", para. 25; 88(1)(d)(ii.1) " " "	If Canadian partnership ceases to exist, 98(5) and (6) are not available to provide rollover. Consider having the partnership dissolved prior to the amalgamation. Each partner receives an undivided interest in the partnership property eligible for a rollover under 98(3). After the amalgamation, the undivided interests in various properties are combined in amalgamated corporation under 87(2). If the new corporation enters into a Canadian partnership, a rollover under 97(2) " " " may be available. Availability of bump may be limited.
Determine cost of security or debt obligation to amalgamated corporation for insurance or money-lending business.	87(2)(e.2) " " ", 142.6(5) " " ", 248(1) " " " "cost amount"	If used or held by predecessor corporation in the course of an insurance or lending business, cost to amalgamated corporation will be cost amount of predecessor corporation immediately before the amalgamation.
Consider whether new elections are required in respect of capital gain or loss treatment of	39(4) " " "	

Assets and liabilities

Item	Applicable provision/authority	Comments
Canadian securities.		
Tax-free zone of non-depreciable property purchased by a predecessor corporation prior to June 18, 1971 flows through to the amalgamated corporation. Tax-free zone of non-depreciable property purchased by an amalgamated corporation between June 18, 1971 and December 31, 1971 will not flow to the amalgamated corporation. The cost bases will crystallize at the time of amalgamation.	ITAR 26(5) " " ", (5.1)	ITAR 26(5.1) " " " deems an amalgamation within the meaning of section 87 to be a transaction between persons not dealing at arm's length.
If a predecessor corporation had a pool of identical properties, some (but not all) of which were purchased before 1972, from which some were sold before amalgamation, the first-in, first-out rules in ITAR 26(8) will not apply to determine actual cost of remaining property to successor corporation for purposes of ITAR 26(5).	ITAR 26(5) " " ", (8); 87(2)(e) " " "	Rules in ITAR 26(8) " " " apply only for computing ACB (not cost) of property.
Consider whether amalgamated corporation will be able to deduct interest on loan incurred by predecessor corporation to purchase shares of another predecessor corporation.	20(1)(c) " " "; CRA doc. no. 2009-0344721E5	Interest deduction should not be denied to the amalgamated corporation, provided that it continues to use the borrowed money in accordance with 20(1)(c) (CRA doc. no. 2009-0344721E5). *The Queen v. Bronfman Trust* (SCC) and *C.R.B. Logging Co. Ltd. v. The Queen* (FCA)
Consider whether informal election with respect to tax treatment of commodity speculations required.	IT-346R " " "	
Consider replacement property rules where, before an amalgamation occurs, property of a predecessor corporation has been (1) lost, stolen, destroyed, or expropriated, or (2) was a "former business property" of the predecessor corporation.	13(4) " " ", 14(6) " " ", 44(1) " " ", 87(2)(l.3) " " ", 248(1) "former business property"; IT-259R4 " " ", para. 22; CRA doc. no. 2010-035792117	87(2)(l.3) prevents the deferral rules in 13 and 44 from being lost. 13(4) and 44(1) permit a taxpayer to defer recognition of income or capital gains where a former property is involuntarily disposed of, or a former property that is a "former business property" is voluntarily disposed of. Property acquired by a predecessor corporation prior to an amalgamation may be considered to have been acquired by the amalgamated corporation for the purposes of 44 (CRA doc. no. 2010-035792117).
Repayment after amalgamation of government assistance received by a predecessor corporation will increase ACB of property to the amalgamated corporation.	87(2)(j.6) " " ", 13(7.1) " " "; IT-474R2 " " ", para. 26, IT-273R2 " " "	This is the case even though the amalgamated corporation was not in respect of original government assistance.
Superficial loss rules apply.	87(2)(g.3) " " ", 87(2)(g.4) " " ", 13(21.2) " " ", 14(12) " " ", 18(15) " " ", 40(3.4) " " "-(3.5)	*Cascades Inc. v. The Queen* (FCA)
Unclaimed government representation fees capitalized by predecessor corporation not	20(1)(cc) " " ", 20(9) " " "	

Item	Applicable provision/authority	Comments
deductible to amalgamated corporation.		
Vertical amalgamation: consider ability to bump cost base of non-depreciable capital property by excess of cost base of shares over cost of assets.	87(11) " " ", 88(1)(d) " " "; IT-474R2 " " ", paras. 22, 41	Applies only if subsidiary wholly owned corporation (248(1)). Gain can be realized if the lesser of PUC and the cost amount of the subsidiary's net assets exceeds the ACB of the subsidiary's shares (88(1)(d)(i)). Consider reducing PUC.
Eligible capital property		
Consider effect of amalgamation on eligible capital property.	87(2)(f) " " ", 248(1) "cost amount"; IT-474R (cancelled), paras. 20, 21	The amalgamated corporation is deemed to be the same as the predecessor corporations in determining an amount relating to cumulative eligible capital, an eligible capital amount, an eligible capital expenditure, or eligible capital property. The business previously carried on by the predecessor corporation must be carried on by the amalgamated corporation.
Consider availability of a terminal loss if the business is to be discontinued either in the predecessor corporation or in the amalgamated corporation.	24(1) " " ", 20(16) " " "	
Replacement property rollover is not available to amalgamated corporation.	14(6) " " " and (7), 87(2)(l.3) " " "	
Consider whether expenditures incurred to obtain financial, legal, and accounting professional advice in respect of the amalgamation are deductible rather than treating them treated as eligible capital expenditures.	14(5) " " " "eligible capital expenditure"; IT-143R3 " " ", paras. 13-14, 23; IT-99R5 " " ", para. 16; IT-474R2 " " ", para. 54; CRA doc. nos. 2003-005362117, 2011-039170117	Expenditures on professional advice incurred when deciding whether to undertake an amalgamation and when undertaking a successful amalgamation are eligible capital expenditures if they meet the requirements of the definition in 14(5) (IT-474R2, para. 54; IT-143R, paras. 13-14; IT-99R5, para. 16; CRA doc. nos. 2003-005362117, 2011-039170117). Expenditures incurred in an unsuccessful transaction will generally be accorded the same treatment (CRA doc. no. 2011-039170117; IT-143R, para. 23). Expenditures on professional advice incurred to fight a takeover bid are not deductible as current or capital expenditures because such costs relate to the ownership of the shares themselves (IT-99R5, para. 16).
Reserves		
Amounts deducted by predecessor corporations in their last taxation years are deemed to have been deducted by amalgamated corporation in a notional year immediately preceding the amalgamation.	87(2)(g) " " ", (g.1), (i), (j), and (m), 87(2)(ll) " " ", 20(1)(l) " " ", (m), 97(n) " " " and (o), 40(1)(a)(iii) " " "	IT-154R " " ", para. 14
Reserves claimed for tax purposes by predecessor corporations at date of amalgamation must be added to amalgamated corporation's income for first taxation year after	87(2)(g) " " ", (h), (i), and (j), 12(1)(d) " " ", (d.1), and (e)	

Item	Applicable provision/authority	Comments
amalgamation.		
Reserves in respect of transactions between predecessor corporations no longer available because amounts are eliminated on amalgamation.	87(1)(a) " " "	
Any bad debts of predecessor corporations recovered by amalgamated corporation must be included in amalgamated corporation's income in the year of receipt.	87(2)(g) " " ", 20(1)(p) " " ", 12(1)(i) " " "	
Amalgamated corporation is considered to be continuation of predecessor corporations for purposes of the rules relating to bad debt inclusions with respect to inventory and the rules relating to special reserves for banks.	87(2)(g.1) " " ", 12.4 " " ", 26 " " "	
Consider effect of amalgamation on reserves of creditors.	20(1)(n) " " ", 40(1)(a)(ii) " " ", 44(1)(e)(iii) " " "; IT-474R2 " " ", para. 52	
Bond and debenture holders		
Consider whether the holders of bonds, debentures, mortgages, notes, hypothecary claims, or other similar obligations of predecessor corporation are eligible for rollovers.	54 "capital property"; 87(6) " " ", 87(6.1) " " "; *Federated Co-operatives* (FCA)	Rollover only available for debt held as capital property. Bankers' acceptances not included (*Federated Co-operatives*). Rollover is permitted, provided that only consideration is a new debt instrument, and that the form and the amount payable on maturity of the new debt instrument are the same as the old instrument.
	87(6) " " "; IT-507R " " ", para. 21	Revisions may be made to maturity, rate, and collateral.
Rollover is not allowed on triangular amalgamation if debenture of predecessor corporation is exchanged for debenture of parent.	87(6)	Convertible debentures of predecessor corporation can be exchanged for convertible debentures of the amalgamated corporation where, on the conversion to the amalgamated corporation's shares, there is an immediate exchange for shares of the parent.
Tax-free zone will flow through on debt of predecessor corporation issued before 1971, even where amount payable on maturity and rate, collateral, etc. have been changed.	ITAR 26(23) " " "	
If debt of a predecessor corporation becomes a debt of the amalgamated corporation, and amount payable on maturity is constant, provisions of the Act do not apply in respect of the transfer of the debt.	87(7) " " "; IT-52R4 (cancelled), para. 21; CRA doc. nos. 2009-0344721E5, 2010-0387601E5	The Act applies to the amalgamated corporation as if it had incurred or issued the debt on the same terms and at the same time as the predecessor corporation.
Amalgamated corporation may have to include in income an unpaid amount deducted by predecessor corporation.	87(7) " " ", 78(1) " " "	*Dow Chemical v. The Queen* (FCA)
Upon an acquisition of control, where a corporation makes an election to realize an	87(7) " " ", 111(4) " " ", (12);	

Assets and liabilities

Item	Applicable provision/authority	Comments
accrued foreign exchange gain on a foreign-currency-denominated debt and an amalgamation follows, the amalgamated corporation is deemed to be the corporation that realized the gain.	CRA doc. no. 2010-0387601E5	
Share capital and PUC		
Determine stated capital and PUC of predecessor corporations and reconcile differences.	89(1) " " "paid up capital"	PUC of amalgamated corporation is generally equal to the sum of the PUC of predecessor corporations.
If individuals or non-residents are shareholders, consider whether PUC will be eroded on amalgamation.	87(3) " ", 87(3.1) " "; IT-474R2 " ", para. 48	Consider ability to shift PUC among classes. Consider 87(3.1) election to prevent 87(3) from applying.
PUC of amalgamated corporation should not exceed net asset values in amalgamated corporation.	84(1) " "; IT-474R (cancelled), para. 52	
If PUC of amalgamated corporation exceeds sum of PUC of predecessor corporations (excluding interlocking shareholders), excess is deducted from amalgamated corporation's PUC.	87(3) " ", 84(3)-(4.1), 89(1) "paid-up capital"; IT-474R2, para. 46	Any reduction to PUC is prorated among all outstanding classes of shares of amalgamated corporation in proportion to their aggregate PUC. Any reduction to PUC of class will affect PUC per share with respect to subsequent share issues from that class. Excess may subsequently be added back to the extent that a deemed dividend under 84(3) " ", (4), or (4.1) exceeds a deemed dividend otherwise calculated in order that PUC grind is distributed evenly among all shares of that class (87(3)(b) " ").
If PUC of predecessor corporations is less than stated capital, PUC of amalgamated corporation's shares may have to be reduced pro rata among all classes of shares.	87(3) " "; IT-474R2 " ", para. 46	
Where PUC of parent in a triangular amalgamation is increased by an amount that exceeds the total PUC of the shares of predecessor corporations which are exchanged for parent shares, PUC is adjusted downward.	87(9)(b) " "; IT-474R2 " ", para. 50	
Consider applicability of GAAR.	245(2) " "; IT-474R2 " ", para. 47; CRA doc. no. 2010-0373221C6; *Copthorne*	When a vertical structure is changed to a sister-corporation structure to avoid 87(3) (see *Copthorne*). When PUC is streamed into a specific class of shares of amalgamated corporation in order to accomplish a surplus strip (IT-474R2, para. 47).

Assets and liabilities - continued

"	Applicable	~ '

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
Shareholders		
Determine ACB.		Amalgamation is generally a neutral event for shareholders (87(4) " " "-(8.1))
If shares of predecessor corporation are converted by virtue of amalgamation, the conversion constitutes a disposition.	Subparagraph (b)(iii) of definition of "disposition" in 54	If one predecessor corporation holds shares of another predecessor corporation, the cancellation of those shares will not constitute a disposition.
Stop-loss rules apply on dispositions involving shares issued on amalgamation.		
If shares were acquired before 1972, consider implications under ITAR 26(21).	ITAR 26(21) " " "	V-day value lock-in will occur if two or more classes of shares of amalgamated corporation are received in respect of one class of shares of predecessor corporation or where 87(4)(c) is applicable. Applies only when consideration for shares of a predecessor corporation consists solely of shares of a single class of the amalgamated corporation.
		ITAR 26(21) " " " not available if ITAR 26(5) " " " previously applied or if predecessor corporation was reorganized previously and ITAR 26(21), (24), (26), or (27) applied. Tax-free zone is not available.
Confirm that shares are capital property to shareholders.	54 "capital property," 87(4) " " "	Shareholders who are dealers and traders in securities may realize a gain. Consider election under 39(4) " " ". If shares are not capital property, consider application of 85 " " " and 86.
A fractional share is a share for purposes of the rollover.	248(1) " " "; IT-474R2 " " ", paras. 37-38	
If shares are capital property, there is generally a rollover (provided that no consideration was received other than shares of predecessor corporation).	87(4) " " ", 84(3) " " "; IT-474R2 " " ", paras. 36, 37; *Husky*; CRA doc. no. 2002-0177163	Administrative concession for cash in lieu of fractional shares where cash does not exceed $200. Taxpayer may choose either (1) to include in its income any gain or loss from the disposition of its fractional share, or (2) to reduce the ACB of the shares received on the amalgamation If cash exceeds $200, taxpayer must report a deemed dividend under 84(3), to the extent that cash exceeds PUC of fractional share and any gain or loss from the disposition of its fractional share. Consider whether ancillary agreements in respect of share constitutes consideration. See IT-474R2, paras. 36, 37.
If shares are capital property, there is generally a rollover (provided that no consideration was received other than shares of predecessor	87(4) " " ", 84(3) " " "; IT-474R2 " " ", paras. 36, 37; *Husky*; CRA doc. no.	Rollover may not be denied solely because shareholders of predecessor corporations receive, together with shares of the amalgamated corporation, rights to acquire

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
corporation). *(cont.)*	2002-0177163 *(cont.)*	shares of the amalgamated corporation under a shareholders' rights plan (CRA doc. no. 2002-0177163).
If FMV of shares of predecessor corporation is greater than FMV of shares issued on amalgamation, and it is reasonable to regard all or any portion of the excess as a "benefit" that the shareholder desired to confer on a person related to the shareholder, consider a gifting provision.	87(4)(c) " " "; IT-474R2 " " ", para. 40; *Husky*	If provisions apply: •? gift portion is added to proceeds; •? capital loss is denied; and •? ACB of amalgamated corporation's shares is adjusted. Gifting provision applies on a shareholder-by-shareholder basis. The only relevant "benefit" is the shift in value described by the gift portion (*Husky*).
Consider whether part IV tax or part VI.1 tax is payable on dividends received from amalgamated corporation.	186(4) " " ", 191(2) " " "	For purposes of part VI.1 tax, do shares represent a "substantial interest" (191(2))? For purposes of part IV tax, are shareholder and predecessor corporations connected corporations? Will the shareholder and the amalgamated corporation be connected (186(4))?
Consider the impact of the amalgamation on shareholders and persons not dealing at arm's length.	15 " " "	Could result in income inclusion where a benefit is conferred on a shareholder.
	78 " " "	Could result in income inclusion where certain unpaid amounts are owing by a non-arm's-length person.
If a person holds shares in two or more predecessor corporations, or two or more classes of shares in one predecessor corporation, the separate ACB for shares of each predecessor corporation will flow through to shares of the amalgamated corporation.	ITARs \ITAR 26(21); 87(4) " " "; IT-474R (cancelled), para. 45	
If a shareholder holds two or more classes of shares of a predecessor corporation, the aggregate of the ACB of all such shares may have to be allocated among the shares of the amalgamated corporation.	87(4) " " "	Allocation is done on a class-by-class basis according to the relative FMV of a particular class compared with the aggregate FMV of all shares of the amalgamated corporation. Consider arranging the amalgamation agreement so that shares of a class are exchanged specifically for shares of a particular class of the amalgamated corporation.
Cancellation of intercompany shares between predecessor corporations will not result in gain or loss.	IT-474R (cancelled), para. 42; 87(4)	Does not apply to cancellation of shares on foreign mergers that do not satisfy the requirements of 87(1).
ACB of cancelled shares may not be transferred to shares of another predecessor corporation that remain to constitute shares of a new corporation.	87(1.1) " " ", 87(4) " " "	
Consider whether amalgamated corporation may renounce resource expenses incurred	66(15) " " " "flow-through share,"	

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
after an amalgamation to a flowthrough shareholder.	87(4.4) " " ", 87(9)(a.21) " " "	
Non-resident shareholders	116 " " "; IT-474R2 " " ", para. 45	116 compliance is not required as per CRA's administrative position (IT-474R2, para. 45; CRA doc. no. 2011-0429021E5). If predecessor corporation is not listed on a designated stock exchange, or shareholder holds more than 25% of the shares of any class, shares may become taxable Canadian property. Consider foreign implications and compliance obligations. Consider relevant tax treaty.
If shares of predecessor corporation are listed on a designated stock exchange and are replaced by unlisted shares of predecessor corporation, shares generally maintain status as "excluded property" and "qualified investments."	87(10) " " "	
Shares of amalgamated corporation retain status of shares of predecessor corporations as taxable Canadian property for 60 months following the amalgamation.	87(4) " " "; IT-474R2 " " ", para. 45	
In a triangular amalgamation, if shares of parent are received by a non-resident whose shares of a predecessor corporation were taxable Canadian property, the parent shares are deemed to be taxable Canadian property for 60 months.	87(9)(a) " " ", 87(4) " " "; CRA doc. no. 2011-039174117	
Stock options		
Consider tax consequences of exchange of options to acquire shares of predecessor corporations for options of amalgamated corporation.	87(5) " " "	87(5) provides a tax-free rollover if taxpayer owned options in predecessor corporation as capital property and received no consideration other than options in amalgamated corporation. No requirement that shares to be acquired under new option be similar to those covered by old option (IT-474R2, para. 43). Consider application of 15(1) " " ", 56(2) " " ", 245(2) " " ".
Consider tax consequences where an option that was granted by a predecessor corporation expires after the amalgamation.	49(2) " " ", 87(2)(o) " " "; IT-474R2 " " ", para. 27	Amalgamated corporation is generally treated as having granted the option and received proceeds for granting the option that were received by the predecessor corporation. If predecessor corporation has granted an option that expires after the amalgamation, the amalgamated corporation is deemed to have disposed of a capital property with an ACB of nil, for proceeds of disposition equal to the consideration previously received by predecessor corporation for issuing the option. Exception: where holder of the option at expiration deals with amalgamated corporation

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
		at arm's length. Person dealing at arm's length with predecessor corporation is deemed to be dealing with amalgamated corporation at arm's length.
Consider tax consequences where employees have acquired shares of predecessor CCPC under a stock option plan less than two years before the amalgamation.	7(1.1) " " ", (1.5), 110(1)(d.1) " " "; IT-113R4 " " ", para. 17; IT-474R2 " " ", para. 44	Employees who acquire shares of predecessor CCPC under stock option plan in accordance with 7(1.1) should have rollover treatment under 7(1.5) " " ". Consider availability of a deduction of 50% of benefit under 110(1)(d.1).
Consider tax consequences when employees exchange existing options in predecessor corporations for options in amalgamated corporation.	7(1.4) " " "; IT-474R2 " " ", para. 44	Employee stock options to which section 7 is applicable do not receive rollover treatment under 87(5). Rollover is available in specific circumstances pursuant to 7(1.4). No benefit is available under 7(1)(b) " " " if right is exchanged on amalgamation or merger for right under agreement with amalgamated corporation to issue or sell to taxpayer shares of amalgamated corporation or non-arm's-length person, provided that in-the-money value of new option does not exceed in-the-money value of old option.
Employees		
Amalgamated corporation is continuation of each predecessor corporation for purposes of contributions to employee benefit plans.	87(2)(j.3) " " ", 12(1)(n.1) " " ", 32.1 " " "	
Amalgamated corporation is continuation of each predecessor corporation for purposes of salary deferral arrangement rules.	87(2)(j.3) " " ", 12(1)(n.2) " " ", 20(1)(oo) " " " and (pp)	
Amalgamated corporation is continuation of each predecessor corporation for purposes of contributions to be made to a retirement compensation arrangement.	87(2)(j.3) " " ", 12(1)(n.3) " " ", 20(1)(r) " " "	
Amalgamated corporation is continuation of each predecessor corporation for purposes of contributions to employee life and health trusts.	87(2)(j.3), 20(1)(s) " " ", 144.1(4) " " "-(7)	
Amount received by an employee from amalgamated corporation that would if received from predecessor corporation be deemed by 6(3) to be income from employment is deemed to be income.	87(2)(k) " " ", 5 " " ", 6(3) " " "	
Employee profit-sharing plan		
An election made under 144(10) by a predecessor, in connection with an employee's profit-sharing plan, is deemed to be an election made by the new corporation.	87(2)(r) " " ", 144(10) " " "; CRA doc. no. 2009-0328661E5	An "out of profits" formula must have an acceptable yearly minimum contribution per employee. CRA may not permit provisions in the arrangement that suspend an employer's contributions or reduce them beyond an acceptable minimum (CRA doc. no. 2009-0328661E5).

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
Registered plans		
Amalgamated corporation is continuation of predecessor corporations.	87(2)(q), 147, 147.1, 147.2; regs. 8300-8520; CRA doc. nos. 2009-0326971C6, 2009-0326981C6	
Losses		
For purposes of determining the amalgamated corporation's non-capital loss, net capital loss, restricted farm loss, farm loss, or limited partnership loss, and applying the rules in 113(3) to (5.4) and 149(10)(c), the amalgamated corporation is considered the same corporation as and a continuation of each predecessor corporation.	87(2.1) " " ", 111(3) " " "-(5.4), 149(10)(c) " " ", 251.2 " " "; IT-302R3 " " ", para. 27; IT-474R2 " " ", para. 28	Losses generally flow through and retain their character.
Amalgamated corporation is considered the same as the predecessor corporation for purposes of the superficial-loss rules.	87(2)(g.3) " " ", (g.4), 13(21.2) " " ", 14(12) " " ", 18(15) " " ", 40(3.4) " " " and (3.5)	
Taxable dividends, capital dividends, and life insurance capital dividends must be taken into account in applying stop-loss provisions on subsequent disposition of shares following amalgamation.	87(2)(x) " " ", 112(3) " " "- (4.22)	
Only losses not previously deducted flow through.	87(2.1) " " ", 111(3) " " "	
Losses are subject to carryforward periods.	111(1)(a) " " "	Consider effect of timing of amalgamation on carryforward periods.
Consider whether losses arising in the amalgamated corporation can be carried back to a taxation year of a predecessor corporation.	87(2.11) " " ", 87(2.1)(e) " " "; IT-302R3 " " ", para. 27; IT-474R2 " " ", paras. 28, 30; CRA doc. no. 2006-0170341E5	In a vertical amalgamation of parent with wholly owned subsidiary, losses of amalgamated corporation can be carried back to parent (87(2.11); CRA doc. no. 2006-0170341E5). In every other case, there is no carryback of losses of amalgamated corporation to predecessor corporation (87(2.1)(e)). Consider using losses prior to amalgamation.
If series of amalgamations, or if amalgamated corporation is wound up, CRA is of the view that 87(2.1) will flow through.	87(2.1) " " ", 88(1.1) " " "-(1.3); IT-474R2 " " ", para. 31	
An amalgamated corporation is to be treated as a continuation of each predecessor corporation for purposes of the corporate loss trading rules in 256.1.	87(2)(g.1) " " ", 256.1 " " "	
Consider whether amalgamation results in acquisition of control.	111(4)-(5.4) " " ", 256(7)(b) " " "; IT-302R3 " " ", para. 28; IT-474R2 " " ", para. 29; CRA doc. no. 2010-0388081E5	Losses are subject to acquisition-of-control rules if amalgamation results in acquisition of control, limiting carryforward of losses. Amalgamation of two corporations that are not related results in acquisition of control. Characterize losses: net capital losses expire (111(4)).

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
		Non-capital losses and farm losses expire unless the same business is carried on with a reasonable expectation of profit. Even if the test is met, non-capital losses are only deductible against the corporation's income from the same or a similar business (loss streaming rules) (111(5) " " ").
		"Pregnant capital losses" cannot be carried forward: ACB of property reduced by excess of ACB over FMV; excess is capital loss or CCA if depreciable capital property in taxation year ending immediately prior to change of control. No 20(1)(l) reserve for doubtful debts (111(5.3) " " ", 20(1)(p) " " ").
Carryforward amounts		
Carryforward amounts flow through to amalgamated corporation; consider effect of amalgamation on carryforward period.	87(2)(v) " " ", 110.1 " " "	Charitable donations
	87(2)(z), 126(7), 126(2.3)	Foreign tax credits
	87(2)(z.1) " " "; *Groupe Honco Inc. c. R* (CAF); CRA doc. nos. 2008-0296371E5, 2008-0303091E5, 2007-022338117	Capital dividend account Negative balances flow through. If negative balance in one but positive balance in the other, consider paying capital dividend by corporation with positive balance in capital dividend account before amalgamation. For interaction with anti-avoidance rule in 83(2.1) " " ", see *Groupe Honco* (CAF).
	87(2)(z.2) " " "; CRA doc. no. 2008-0303091E5	Part III and part III.1 tax
	87(2)(aa) " " "	RDTOH
	87(2)(qq) " " "	Unused investment tax credits
	87(2)(t) " " "	Pre-1972 capital surplus on hand
	87(2)(kk) " " "	Losses may be reduced on sale of shares of controlled corporation.
Foreign merger		
If the amalgamation is a "foreign merger," shareholders of non-resident corporation are provided with a rollover.	87(8) " " ", 87(8.1) " " ", 87(8.3) " " ", 87(4) " " "; CRA doc. nos. 2005-0152611R3, 2007-022522117	Consider whether an election should be made to have 87(8) not apply. Consider whether 87(8.3) operates to deny a rollover.
Consider whether pre-1972 capital surplus on hand in the shares should be realized by Canadian corporate shareholders.	87(8), 87(8.1); ITAR 26(21) " " "	
Taxable preferred shares		
Amalgamated corporation is continuation of predecessor corporations.	87(2)(rr) " " " and (ss), 191(4) " " ",	

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
	191.1(2) " " " and (4), 191.3 " " "	
Compliance		
Ensure that income tax returns are filed.	150(1) " " "; reg. 201(1) " " "; CRA doc. no. 2011-0397221E5	T2 within 6 months from the year-end of each predecessor corporation. T2 within 6 months of the first year-end of amalgamated corporation. Include schedule 24 in respect of the amalgamation. Amalgamated corporation can prepare T5 information slips for predecessor corporations, provided that corporate law governing amalgamation permits a continuation of predecessor corporation (reg. 201(1); CRA doc. no. 2011-0397221E5).
An authorized representative of all predecessor corporations can be considered a representative of the amalgamated corporation.	CRA doc. no. 2011-0404651I7	
Other tax considerations		
Anti-avoidance rules: Consider potential application.	69(11) " " ", 87(8.3) " " ", 245; IC 88-2 " " "; IT-474R2 " " ", paras. 55, 56	
Objections and appeals: Consider whether predecessor corporations have tax appeals outstanding that the amalgamated corporation will need to address.	IT-474R2, paras. 33-34; *Guaranty Properties v. The Queen*	
Refunds: Refunds of tax paid by a predecessor corporation made after an amalgamation will be issued to the amalgamated corporation.	IT-474R2, para. 34	
Attribution rules: Consider effect of amalgamation on loans and transfers subject to attribution rules.	87(2)(j.7) " " ", 74.4 " " ", 74.5 " " "	
Legal expenses: Consider whether legal expenses incurred during the amalgamation are deductible.	14(5) " " "	
Scientific research and experimental development: Consider whether SR & ED expenditures and ITCs of predecessor corporations flow through to amalgamated corporation.	87(2)(l) " " ", 87(2)(qq) " " ", 87(1.4) " " ", (2.11), 37(1) " " ", (6.1), 127(9.1) " " "-(9.2); CRA doc. no. 2010-0391291E5	SR & ED ITCs cannot be carried back to reduce predecessor corporation's taxes, except in vertical amalgamation (CRA doc. no. 2010-0391291E5).
GRIP and LRIP: Balances of predecessor corporations flow through to amalgamated corporation.	87(2)(vv) " " ", 87(2)(ww) " " ", 89(5) " " ", (9)	
Resource expenses: Consider whether resource expenses flow through to amalgamated corporation.	87(1.2) " " ", 66.7 " " "; ITAR 29 " " "	
Unused part I.3 carryforwards: Consider the effect of the amalgamation on carryforward of	87(2)(j.9) " " "	

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
unused part I.3 tax credits of predecessor corporation.		
Undeducted surtax: Consider effect of amalgamation on undeducted surtax.	87(2)(j.91) " " "; CRA doc. no. 2006-0181631E5	
Small business deduction and instalment deferral: Amalgamated corporation is deemed to be a continuation of predecessor corporation for purposes of small business deduction and instalment deferrals.	87(2)(j.92) " " ", 126(5.1) " " ", 157(1) " " "	
Non-resident entities: For purposes of 94, 94.1, and 94.2, which deal with foreign trusts and non-resident entities, the amalgamated corporation is deemed to be a continuation of and the same corporation as each predecessor corporation.	87(2)(j.95) " " ", 94 " " ", 94.1 " " ", 94.2 " " "	
Contingent amount rules: Consider the contingent amount rules in 143.4.	87(2)(l.5) " " ", 143.4 " " "	Amalgamated corporation is deemed to be a continuation of the predecessor corporation for purposes of the contingent amounts rules.
SIFT windup corporations: If predecessor corporation is a SIFT windup corporation, so is amalgamated corporation.	87(2)(s.1) " " ", 85.1(8) " " "	
Australian trusts: For purposes of the Australian trust/foreign affiliate regime in new 93.2, the amalgamated corporation is deemed to be a continuation of and the same corporation as each predecessor corporation.	93.2(5) " " "	
Other taxes: Consider liability for other taxes.		Retail sales tax, land transfer tax, GST, QST, HST
Shares of foreign affiliates: Consider effect of amalgamation of attributes of foreign affiliates.	87(2)(u) " " ", 91(5) " " ", 92 " " ", 93(2.01) " " ", (2.11), (2.21), and (2.31)	87(2)(u) provides continuity of predecessor corporations with respect to certain attributes of foreign affiliates such as "exempt dividends."
Foreign affiliate dumping rules: Consider whether amalgamation is exempt from the FAD rules in 212.3.	212.3(18) " " ", (18.1), (22)	
Late-filed elections: Consider whether late-filed elections can be filed by amalgamated corporation in respect of transactions undertaken by predecessor corporations.	83 " " ", 85 " " ", 97(2) " " ", 98(3) " " ", 184(3) " " ", 85(7) " " "; IT-474R2 " " ", para. 32	Amalgamated corporation may generally file election on behalf of predecessor corporation, provided that predecessor corporation would otherwise be eligible to file the election. See *CGU Holdings* (FCA) regarding 134.1(1) " " " election.
Excessive elections: For purposes of the additional tax on excessive elections in parts III and III.1, amalgamated corporation is deemed to be a continuation of and the same corporation as each predecessor corporation.		
Patronage dividends: Amalgamated corporation is deemed to be the same corporation as each predecessor corporation for purposes of the rules in 135 concerning the deduction for and	87(2)(g.5) " " ", 135 " " "	

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
inclusion in income of patronage dividends.		
Instalments: Instalments of amalgamated corporation computed with reference to instalment base of predecessor corporations.	157(1) " " "; reg. 5301(4) " " "; CRA Guide T7B-Corp.	
Business and account numbers and compliance		
Continuation of federal business number (for GST, ITA, customs, CPP, and EI purposes)	248(1) " " " "business number"	Predecessor corporations can choose to keep the business number of one of the predecessor corporations rather than obtaining a new business number. Send letter to CRA (together with articles of amalgamation and names and business numbers of predecessor corporations) requesting that amalgamated corporation continue to use one of predecessor corporations' business number and that all accounts be transferred to amalgamated corporation's business number.
Ontario employer health tax		Advise Ministry of Finance. A new account will be issued to the amalgamated corporation. The previous account extensions will be closed and final returns issued. The predecessor corporation must file a final return within 40 days of date of amalgamation for the part of the calendar year that payroll was paid. Amalgamated corporation is entitled to a prorated exemption from the date of amalgamation.
Ontario corporate and income tax		For taxation years ending on or after January 1, 2009, Ontario corporations file using federal business number. (See comments above.)
GST		
Consider whether amalgamated corporation will be entitled to predecessor corporation's input tax credits for GST.	ETA 169, 271; *GST Headquarters Document* 11650-2; Canadian Bar Association Commodity Tax Section, annual GST/HST meeting (March 3, 2005)	Until the business number of amalgamated corporation is confirmed by CRA, amalgamated corporation must continue filing under predecessor accounts. When CRA has confirmed amalgamated corporation's business number, amalgamated corporation may utilize predecessor corporation's unclaimed input tax credits.
Cancel predecessor corporation's GST registration.	ETA 271; Canadian Bar Association Commodity Tax Section, annual GST/HST meeting (February 27, 2003), question 42; form RC145, "Request To Close Business Number (BN) Accounts"; GST Memoranda (NS) 2.71, GST Memoranda, 400-3-1	Amalgamated corporation may keep one of the former business numbers of the predecessor corporations or take a new business number. However, it must reapply for registration. To take effect on the first day of the following fiscal year, the application must be received within one month after the end of the current fiscal year. The application must set out the date of the deregistration and the FMV of the remaining inventory for which input tax credits have been claimed. Outstanding GST must be remitted.

Assets and liabilities - continued

Item	Applicable provision/authority	Comments
CPP and EI		
Consider impact on CPP and EI contributions.	IT-474R2 " " ", para. 35; CRA Ruling no. 9729845; Department of Finance *News Release* no. 2004-015; Canada Pension Plan Act, 9(2); Employment Insurance Act, 82.1	No CPP or EI doubling up if the amalgamation takes place other than at year-end.

Appendix 2: Windup Checklist

This checklist is a guide to the review of tax and certain other considerations arising out of a windup pursuant to subsection 88(1) " " ". It is not intended to be an exhaustive list of all of the legal, financial, and tax considerations involved in a merger of two or more corporations by way of a windup. Readers should consult the relevant provisions of the federal and provincial tax law, the corporate law, and the law applicable to a particular industry.

General

Item	Comments
Names of parent and subsidiary	
Relationship between parent and subsidiary	Prepare corporate chart showing intercompany shareholdings and intercompany debt. Note options to acquire equity.
How did the corporate structure arise?	
Business of each of parent and subsidiary (manufacturing, wholesaler, retailer, distributor, investment, etc.)	Consider whether legal or regulatory factors are to be considered in connection with the windup.
Purpose of the windup	Outline basic objectives.
Determine authorized signatories for parent and subsidiary.	
Structure of windup	
Is it more advantageous to perform the windup under another section of the Act?	85 rollover, 85.1 share-for-share exchange, 87 amalgamation
For parent and subsidiary	
Obtain copies of articles of incorporation and articles of amendment, if any.	
Bylaws	Is there an impediment to the windup? If so, can the bylaws be amended?
Confirm that corporate filings are up to date.	
Year-end of parent and subsidiary	
Authorized capital	

General

Item	Comments
	• percentage of shareholders' interest in each class; • intercompany shareholdings; • circumstances in which shares were issued; • residence of shareholders. • options, if any Consider legal ownership and beneficial ownership; IT-488R2 " " ", para. 3. Note relationship of minority shareholders to parent. If related, or otherwise dealing not at arm's length, 88(1) " " " does not apply.
Stated capital	Based on review of minute book. Reconcile with financial statements. Resolve discrepancies.
PUC	Determine PUC of corporation to be wound up. If PUC differs from stated capital, explain.
Directors	Number, names, addresses, citizenship; minute books and government registries
Officers	Names and addresses; minute books and government registries.
Business styles	Consider whether it is necessary to register business names and styles following the windup.
Extraprovincial registrations	Consider whether it is necessary to update extraprovincial registrations following windup.
Searches	
Order searches for each corporation.	PPSA, bankruptcy, executions, etc. Ensure that registrations are made as required.
Contracts, intellectual property, lawsuits	
Review leases, mortgages, government rights; research and development contracts; debt or security agreements; guarantee agreements; intellectual property agreements; distributor agreements; supplier and customer contracts; employee-related agreements; collective agreements; insurance policies; government grants, subsidies, assistance, and other programs.	Can these be transferred to the parent corporation? Are notices required? Are consents required? Are third-party rights (such as rights of first refusal) triggered by the transfer of assets?
Patents, licences, trademarks	
Lawsuits	
Ensure that bank and other major creditors understand the transaction.	
Assets and liabilities of corporation to be wound up	
List of fixed assets	Note tax cost.
List of liabilities	Note intercompany liabilities.
Prepare a tax balance sheet if a bump under 88(1)(c) and (d) is contemplated.	Identify subsidiary's assets and liabilities at their tax cost. Refer to subsidiary's financial statements and tax returns.
List of creditors	Consider whether creditors need to be notified.
Consider legal requirements to convey subsidiary's assets to	Subsidiary's legal representative should obtain a clearance

General

Item	Comments
	avoid potential liability for unpaid taxes, interest, and penalties (159(2) " " ").
Solvency tests	
Confirm that parent and subsidiary are solvent within the meaning of the relevant corporate law.	Is opinion required?
If a corporation is not solvent, can steps be taken to render it solvent?	Consider capital contribution. Consider whether capital contribution will result in increase in ACB (53(1)(c) " " ").
Regulatory considerations	
Application or notice under the Investment Canada Act.	
Securities Act, if applicable (such as continuing status as a reporting issuer, filing a material change report, etc.)	
Consider effect of windup on filings and/or licences (such as a liquor licence).	
Consider refiling PPSA registrations.	
Consider re-filing registrations under land registry system.	
Employees	
Review employment agreements.	Determine if enforceable upon windup. Consider merits of assigning employee agreements to parent (if possible) or having parent make new offers of employment to subsidiary's employees.
Review union agreements to ensure that they survive windup.	
Review employee benefit plans for continuance or discontinuance, need to merge, notification—pension plan, deferred profit-sharing plan, employee benefit plan, employee trust, supplementary unemployment benefit plan, group sickness or accident insurance plan, private health services plan, group term life insurance policy.	Review the plans and applicable laws to identify impediments to the transfer of these plans to parent.
Accounting	
Review accounting policies to ensure that no significant accounting problems arise.	
Corporate matters	
Obtain approval for winding up from directors of parent and subsidiary.	
Obtain approval for winding up from shareholders of parent and subsidiary.	
Prepare a dissolution agreement to document the assumption of liabilities and obligations by the parent corporation.	
Prepare articles of dissolution in prescribed form.	
Consider whether officer of the parent is required to provide a statutory declaration that the liabilities of the subsidiary corporation have been fully assumed.	
Planning	

General

Item	Comments
principal business corporation, small business corporation, etc.	
Other matters	
Consider whether it is necessary to register a business name following the windup.	
Advance tax ruling	
If windup is complex or involves unclear issues, consider obtaining a ruling.	Refer to IC 70-6R5 " " " for information.

Appendix 3: Price Adjustment Clause for Subsection 87(4) Exception

Notwithstanding anything herein contained, the parties hereto covenant and agree with each other that it is their intention that

1) the shares issuable by the amalgamated corporation to a shareholder of a predecessor corporation (the "share consideration") should be an amount equal to the fair market value of the shares in the capital of the predecessor corporation exchanged by a shareholder of a predecessor corporation on the amalgamation (the "exchanged shares") as at the effective date; and

2) the aggregate fair market value of the share consideration should be equal to the aggregate fair market value of the exchanged shares at the effective date. Accordingly, if at any time hereafter, for the purposes of administering the Income Tax Act (Canada) (or any corresponding provincial income tax legislation) and determining the income tax consequences, if any, of this agreement and the amalgamation hereunder,

   a) the minister of national revenue (or any other competent taxing authority in Canada or a subdivision thereof) proposes to issue or issues any assessment or reassessment that would impose or imposes any liability for income tax on a basis that the fair market value of the exchanged shares or the fair market value of the share consideration is, at the effective date, different from the amount herein specified in relation thereto; and

   b) the shareholders agree or a competent tribunal finally determines that the fair market value of the exchanged shares is a greater or lesser amount,

   then this agreement shall be altered in order to ensure that the share consideration issued by the amalgamated corporation to a shareholder of a predecessor corporation for the exchanged shares and the amount and value of the share consideration received by such shareholder in relation to the exchanged shares, are, and are deemed to have been from and after the effective date, respectively, equal to the final determination of the fair market value of the exchanged shares and all necessary

adjustments will be made by either increasing or decreasing the number of shares issuable by the amalgamated corporation pursuant to this agreement.

2013 CR 8: p.81-87 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

Notes

2013 CR 8 Footnote-1 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

1 Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this paper are to the Act.

2013 CR 8 Footnote-2 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

2 See, for example, Timothy P. Kirby and Christopher J. Montes, "Practical Issues Encountered When Winding-Up a Corporation," in *2011 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2011), 11:1-37; Aimee Hass, "Amalgamations Revisited: The Application of Paragraph 87(2)(a)," in Corporate Tax Planning feature (2010) 58:1 *Canadian Tax Journal* 187-207; Ian D. Heine and Dion J. Legge, "Merger Building Blocks: Amalgamations and Windups," in *Report of Proceedings of the Fifty-Sixth Tax Conference*, 2004 Conference Report (Toronto: Canadian Tax Foundation, 2005), 37:1-60; and Catherine A. Brayley, "Merging Companies: A Practical Checklist for Amalgamations and Windups," in *Report of Proceedings of the Fifty-Second Tax Conference*, 2000 Conference Report (Toronto: Canadian Tax Foundation, 2001), 6:1-62. For a discussion of the GST implications of an amalgamation or windup transaction, see, for example, John A. Jeninga, "GST Tips and Traps in Corporate Reorganizations," in *2006 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2006), 11:1-22.

2013 CR 8 Footnote-3 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

3 The information in this paper is current to December 31, 2013. Although section 87 also deals with mergers of foreign corporations, that topic is not covered in this paper.

2013 CR 8 Footnote-4 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

4 2013 SCC 48; rev'g. 2011 FCA 321; rev'g. 2010 TCC 576.

2013 CR 8 Footnote-5 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

5 [1904] 2 Ch. 268, at 282 (Ch. D.), per Buckley J.

2013 CR 8 Footnote-6 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

6 Ibid., at 287. See also *In re. Walker's Settlement; Corporation of the Royal Exchange Assurance v. Walker*, [1935] Ch. 567, at 586 (CA), and *Attorney General for Ontario v. Electrical Development Co. Limited* (1919), 45 OLR 186, at 190 (SC), which considered *South African Supply*, supra note 5.

2013 CR 8 Footnote-7 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

7 [1975] 1 SCR 411, at 420-21, per Dickson J.

2013 CR 8 Footnote-8 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

8 For example, the Canada Business Corporations Act (CBCA), RSC 1985, c. C-44, provides, inter alia, that each corporation proposing to amalgamate must enter into an agreement setting out (1) the terms and means of effecting the amalgamation and (2) procedures for vertical and horizontal short-form amalgamations.

2013 CR 8 Footnote-9 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

9 See, for example, section 181 of the CBCA.

2013 CR 8 Footnote-10 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

10 Given the language in section 186(g) of the CBCA, it may be argued that the effect of this provision is to create a new corporation on amalgamation. However, the Ontario Court of Appeal in *Re Canada Business Corporations Act* (1991), 3 OR (3d) 366 (CA), accepted without discussion that upon an amalgamation, the amalgamating corporations continue as one corporation.

2013 CR 8 Footnote-11 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

11 Interestingly, the former Ontario Companies Act provided that the companies amalgamated to form a new corporation. See *Stanward Corporation v. Denison Mines Ltd.*, [1966] 2 OR 585 (CA) and the comments on that case in *Black & Decker*, supra note 7.

2013 CR 8 Footnote-12 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

12 65 DTC 313 (TAB).

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13 The Manitoba and Quebec corporate statutes were amended following the decision in *Fawcett* to provide that the amalgamating predecessor corporations continue to exist as one corporation.

2013 CR 8 Footnote-14 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

14 Supra note 7, at 417-18 and 422.

2013 CR 8 Footnote-15 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

15 94 DTC 6412, at 6414 (FCA). See also *The Queen v. Guaranty Properties Limited et al.*, 90 DTC 6363 (FCA).

2013 CR 8 Footnote-16 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

16 In 1950, only Quebec, Ontario, and Manitoba provided for statutory amalgamations. New Brunswick adopted rules in 1954 and Newfoundland adopted rules in 1957.

2013 CR 8 Footnote-17 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

17 See A.D. McAlpine, A.J. Little, and Ernest J. Brown, "Corporate Amalgamations under the Income Tax," in *Report of Proceedings of the Tenth Annual Tax Conference*, 1956 Conference Report (Toronto: Canadian Tax Foundation, 1957), 64-107, at 69.

2013 CR 8 Footnote-18 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

18 By An Act To Amend the Income Tax Act, SC 1958, c. 32, section 35.

2013 CR 8 Footnote-19 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

19 A.J Little, R.J. Cudney, and Alan Sweatman, "Company Amalgamations," in *Report of Proceedings of the Twelfth Annual Tax Conference*, 1958 Conference Report (Toronto: Canadian Tax Foundation, 1959), 30-58, at 42.

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20 [1973] CTC 494 (FCTD).

2013 CR 8 Footnote-21 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

21 A "taxable Canadian corporation" is defined in subsection 89(1) " " " to mean a corporation that is a "Canadian corporation" and not exempt from tax under part I. A "Canadian corporation" is defined in subsection 89(1) to mean a corporation that is resident in Canada and either incorporated in Canada or resident in Canada since June 18, 1971. For this purpose, a corporation resulting from the amalgamation of Canadian corporations is considered to be incorporated in Canada. By virtue of subsection 250(5.1) " " ", a corporation continued into Canada from outside Canada is considered after the time of continuation to have been incorporated in Canada.

2013 CR 8 Footnote-22 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

22 See, for example, the definition of "specified corporation" in subsection 55(1) " " "; subsection 80.01(3) " " "; and paragraph 256(7)(b) " " ".

2013 CR 8 Footnote-23 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

23 Subsections 7(1.4) " " "; 7(1.5) " " "; repealed 20(18) definition of "qualifying inventory"; 53(6); 59(3.4) definition of "successor corporation"; 66(12.6013); 66.2(5) definition of "cumulative Canadian development expense"; sections 66.6 " " "; 66.7; subsection 69(13) " " "; paragraph 80(8)(a) " " "; subparagraph 80.03(3)(a)(ii) " " "; section 83 " " "; subsection 89(1) " " " definition of "Canadian corporation"; paragraph 95(2)(d) " " "; subsection 100(2.1) " " "; paragraph 110.6(7)(b) " " "; section 128.2 " " "; subparagraph 142.7(2)(a)(iii) " " " definition of "Canadian affiliate"; paragraph 204.8(2)(c) " " "; section 204.85 " " "; subsection 211.7(2) " " ";

subsection 225.1(8) " " " definition of "large corporation"; subsection 248(1) " " " definition of "disposition"; subsection 251(3.1) " " "; subsection 251(3.2) " " "; subsection 251.1(2) " " " definition of "affiliated persons"; and subsection 261(19) " " ".

2013 CR 8 Footnote-24 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

24 At the same time, a number of provisions, such as paragraph 87(2)(g.1) " " ", specifically provide that for the purposes of a particular provision of the Act, the new corporation is deemed to be the same corporation as and a continuation of each predecessor corporation.

2013 CR 8 Footnote-25 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

25 The postamble to subsection 87(1) " " " adds ambiguity in that its existence and placement in the provision suggests that a property transfer from one corporation to another, or property distribution on a winding up, could also be a merger, but not an amalgamation.

2013 CR 8 Footnote-26 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

26 As required by paragraph 87(1)(c) " " ".

2013 CR 8 Footnote-27 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

27 It may be necessary to continue one or more of the corporations into a different jurisdiction. The continuance itself is not considered to give rise to any tax consequences: see Jack Bernstein, "Corporate Continuance" (2008) 16:10 *Canadian Tax Highlights* 8-9.

2013 CR 8 Footnote-28 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

28 See Kirby and Montez, supra note 2.

2013 CR 8 Footnote-29 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

29 It may still be required if the governing corporate law does not permit continuance to a common jurisdiction, as is often the case when regulated entities are involved. We do not address the complex issues regarding bump, since it is the topic of another presentation at this conference; see Paul Stepak and Eric C. Xiao, "The Paragraph 88(1)(d) Bump: An Update," elsewhere in these proceedings.

2013 CR 8 Footnote-30 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

30 See CRA document no. 2011-0428071E5, December 9, 2011.

2013 CR 8 Footnote-31 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

31 See, for example, section 184(2) of the CBCA; section 184(2) of the Alberta Business Corporations Act (ABCA), RSA 2000, c. B-9; section 274(1) of the British Columbia Business Corporations Act (BCBCA), SBC 2002, c. 57; and section 177(2) of the Ontario Business Corporations Act (OBCA), RSO 1990, c. B.16.

2013 CR 8 Footnote-32 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

32 Section 184(2)(b)(iii) of the CBCA provides for the stated capital of the predecessor corporation whose shares were cancelled to be added to the stated capital of the predecessor corporation whose shares are not cancelled. Similar provisions exist in section 184(2)(b)(iii) of the ABCA and section 177(2)(iii) of the OBCA.

2013 CR 8 Footnote-33 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

33 *Interpretation Bulletin* IT-474R2 " " ", "Amalgamations of Canadian Corporations," January 8, 2008, at paragraph 39.

2013 CR 8 Footnote-34 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

34 See section 192(1) of the CBCA and *Fairmont Hotels & Resorts Inc. (Re)*, 2006 CanLII 57092 (ONSC), where a merger arrangement was approved whereby the separate legal existence of a parent did not cease.

2013 CR 8 Footnote-35 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

35 See CRA document no. 2002-01666973 and CRA document no. 1999-0009805, December 7, 2000. See also CRA document no. 2002-0169775, April 10, 2003, regarding Japanese mergers.

2013 CR 8 Footnote-36 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

36 It is notable that absorptive mergers were addressed for the first time in subsection 87(8.2), enacted on June 26,

2013 (SC 2013, c. 34) to clarify the circumstances in which such mergers will qualify as "foreign mergers." The technical notes state: "This rule is mainly designed to ensure that certain common forms of U.S. mergers qualify for the rollover provisions that are provided for in the foreign affiliate rules, as well as other areas of the Act." See "Explanatory Notes Relating to the Income Tax Act, the Excise Tax Act and Related Legislation," in Canada, Department of Finance, *Notice of Ways and Means Motion and Explanatory Notes Re: Technical Amendments and Other Measures* (Ottawa: Department of Finance, October 24, 2012), 1-159, clause 64, at 148. See also CRA document no. 2012-044937117, March 4, 2013.

2013 CR 8 Footnote-37 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

37 CRA document no. 2006-0178571R3, September 27, 2006.

2013 CR 8 Footnote-38 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

38 CRA document no. 2010-0355941R3. For a detailed discussion, see Henry Chong, "Amalgamation Fictions" (2012) 20:6 *Canadian Tax Highlights*.

2013 CR 8 Footnote-39 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

39 Supra note 37, at paragraph 41.

2013 CR 8 Footnote-40 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

40 Foreign Investment in Real Property Tax Act of 1980, Pub. L. no. 96-499.

2013 CR 8 Footnote-41 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

41 Supra note 36, at paragraph 20.

2013 CR 8 Footnote-42 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

42 Aside from acquisitions, triangular amalgamations also serve a useful purpose when Parent and one of the predecessors are incorporated in different jurisdictions, when it is desirable to avoid a tax year-end of Parent, and as a mechanism for squeezing out minority shareholders.

2013 CR 8 Footnote-43 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

43 Triangular amalgamations are permitted under applicable corporate legislation by provisions that envisage an amalgamation agreement providing that the shares of a predecessor corporation are exchanged for shares of a corporation other than the amalgamated corporation. See, for example, section 182(1)(e) of the CBCA, section 182(1)(d) of the ABCA, and section 175(1)(c) of the OBCA.

2013 CR 8 Footnote-44 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

44 See the preamble to subsection 87(9) " " ".

2013 CR 8 Footnote-45 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

45 See, for example, section 183 of the CBCA, section 183 of the ABCA, section 271 of the BCBCA, and section 176 of the OBCA.

2013 CR 8 Footnote-46 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

46 See, for example, part XVII of the CBCA; part 16 of the ABCA; part 9, division 6 of the BCBCA; and part XV of the OBCA.

2013 CR 8 Footnote-47 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

47 Stock exchange rules may require shareholder approval in certain circumstances.

2013 CR 8 Footnote-48 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

48 When cash is offered as partial consideration, this can be accomplished by issuing redeemable preferred shares of the amalgamated corporation or of Parent, which are then redeemed following the amalgamation. If Target shareholders have accrued losses, the transaction can be structured so that Parent delivers cash on the amalgamation. In such a case, the amalgamation will be fully taxable to Target shareholders (allowing losses to be realized) but the amalgamation will nevertheless meet the requirements of subsection 87(1) because the cash delivered was not property of a predecessor corporation.

2013 CR 8 Footnote-49 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

49 For a discussion of triangular amalgamations generally, see Jeffrey Trossman, "Triangular Amalgamations," in *Report of Proceedings of the Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002), 22:1-35.

2013 CR 8 Footnote-50 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

50 See, for example, R. Richler, "Amalgamations and Wind-Ups," presented at Canadian Bar Association, 2010 Tax Law for Lawyers (May 29 to June 4, 2010).

2013 CR 8 Footnote-51 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

51 Paragraph 85.1(1)(b) " " ".

2013 CR 8 Footnote-52 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

52 The designated amount is, in general terms, the amount by which Amalco's cash on hand and the cost amount of its property less the amount of its debt, all immediately after the amalgamation, exceed the total ACB to Parent of all Parentsub and Target shares owned by it immediately prior to the amalgamation, up to a maximum cap of FMV. Subparagraph 87(9)(c)(ii) " " " provides that a designation must be made in Parent's tax return for the year in which the triangular amalgamation occurred, although there is no prescribed form of designation.

2013 CR 8 Footnote-53 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

53 The designation will not be of much practical use in the example described below, where Target is an oil and gas corporation, since Canadian resource properties have no cost for Canadian tax purposes: see CRA document no. 9301065, February 5, 1993.

2013 CR 8 Footnote-54 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

54 For an interesting discussion of the appropriateness of the association made under paragraph 87(9)(c) between net inside basis and outside basis, see Angelo Nikolakakis and Alain Léonard, "The Acquisition of Canadian Corporations by Non-Residents: Canadian Income Tax Considerations Affecting Acquisition Strategies and Structure, Financing Issues, and Repatriation of Profits," in *Report of Proceedings of the Fifty-Seventh Tax Conference*, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2006), 21:1-61.

2013 CR 8 Footnote-55 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

55 For a comprehensive discussion of the eligible dividend regime, see, for example, Steven Carreiro and Ian Crosbie, "Update on GRIP and LRIP Calculations: Anomalies in and Problems with the Rules," in *Report of Proceedings of the Sixty-First Tax Conference*, 2009 Conference Report (Toronto: Canadian Tax Foundation, 2010), 12:1-38; and Heather Evans and Pearl E. Schusheim, "Dividend Taxation: The New Regime," in *Report of Proceedings of the Fifty-Eighth Tax Conference*, 2006 Conference Report (Toronto: Canadian Tax Foundation, 2007), 1:1-28.

2013 CR 8 Footnote-56 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

56 See the definition of "excessive eligible dividend designation" in subsection 89(1).

2013 CR 8 Footnote-57 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

57 Under clause 256(7)(b)(iii)(A) " " ", there is no acquisition of control where the predecessor corporations were related immediately before the amalgamation (otherwise than because of a right referred to in paragraph 251(5)(b)).

2013 CR 8 Footnote-58 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

58 See, for example, Trossman, supra note 49. He points out that the provision refers to control of "a corporation," as opposed to control of only "predecessor corporations," indicating a legislative intention that an amalgamation should not result in an acquisition of control of *any* corporation unless paragraph 256(7)(b) " " " deems such an acquisition of control.

2013 CR 8 Footnote-59 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

59 See, for example, *Interpretation Bulletin* IT-474R2, supra note 33, at paragraph 29, and CRA document no. 2001-0064945, January 7, 2002.

60 See Canada, Department of Finance, *Explanatory Notes Relating to Income Tax* (Ottawa: Department of Finance, December 1997), subclauses 246(3) and (4), at 536-37.

61 *Interpretation Bulletin* IT-474R2 " " ", supra note 33, at paragraph 45. The CRA confirmed that this position applies notwithstanding the amendment to the postamble of subsection 87(4) made in the 2010 federal budget: see CRA document no. 2011-0429021E5, October 11, 2012.

62 CRA document no. 2011-039174117, July 18, 2011.

63 RSBC 1996, c. 82, as amended (herein referred to as "the CUIA") The CUIA has provided a continuation model of amalgamation since 1975. It provided a new corporation model from 1958 to 1975.

64 *Envision*, supra note 4, at paragraph 50 (TCC).

65 *Envision*, supra note 4, at paragraphs 43-47 and 61-62 (FCA).

66 Ibid., at paragraphs 39-41 (emphasis in original).

67 Ibid., at paragraph 36.

68 *Envision*, supra note 4, at paragraphs 46, 47, and 50 (SCC) (emphasis in original).

69 Ibid., at paragraph 57.

70 Ibid., at paragraph 58.

71 Ibid., at paragraph 28.

72 See section 182(1)(d) of the CBCA.

73 Section 20(2)(a)(viii) of the CUIA. Note that equity shareholders have the right to have their shares acquired by the amalgamating credit union, for FMV, under sections 24 and 20(2)(a)(ix) of the CUIA.

74 An interesting example of a non-section 87 amalgamation is one involving an Alberta or BC corporation with a non-Canadian corporation. For a discussion of cross-border mergers, which are expressly permitted by the Alberta and BC corporate legislation, see Nathan Boidman, "Cross-Border Amalgamations," in 2000 Conference Report, supra note 2, 26:1-50.

75 See, for example, Ken Buttenham and Heather O'Hagan, "Foreign Affiliate Reorganizations: Where Are We Now?" elsewhere in these proceedings. See also Steve Suarez, "Canada Releases Foreign Affiliate Dumping Amendments" (September 2, 2013) 71:10 *Tax Notes International* 864-69.

76 Paragraph 212.3(10)(a) " " ".

2013 CR 8 Footnote-77 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

77 Paragraphs 212.3(10)(c) " " " and (d) " " ". The notable exception is for a "pertinent loan or indebtedness."

2013 CR 8 Footnote-78 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

78 Paragraph 212.3(10)(f) " " ".

2013 CR 8 Footnote-79 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

79 Canada, Department of Finance, *Explanatory Notes—Proposals in Respect of Foreign Affiliate Dumping Rules* (Ottawa: Department of Finance, August 2013), clause 2 (www.fin.gc.ca/drleg-apl/fa-sea-n-eng.pdf).

2013 CR 8 Footnote-80 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

80 Relying on the CRA's relieving administrative position described above.

2013 CR 8 Footnote-81 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

81 See, for example, Jack Boultbee, "Amalgamations—Part III," The Taxation of Corporate Reorganizations feature (1981) 29:1 *Canadian Tax Journal* 83-96.

2013 CR 8 Footnote-82 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

82 See paragraphs 50-51 of the decision, supra note 4 (SCC).

2013 CR 8 Footnote-83 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

83 See, for example, paragraphs 87(2)(d) " " " and (d.1) " " ", which refer to depreciable property "acquired by the new corporation from a predecessor corporation." Paragraphs 87(2)(e) " " ", (e.1), (e.2), (e.3), and (e.4) also use the wording "acquired from." Others have argued that the use of the term "acquired" in these provisions is misguided but of no consequence; see, for example, Daniel Sandler, "Character Rolls: Property Transfers and Characterization Issues," (1996) 44:3 *Canadian Tax Journal* 605-79, at 656.

2013 CR 8 Footnote-84 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

84 See, for example, *CGU Holdings Canada Ltd. v. Canada*, 2009 FCA 20; aff'g. 2008 TCC 167, wherein the Federal Court of Appeal rejected the position that paragraph 87(2)(a) " " " only applies to the computation of income and taxable income for certain purposes, stating that the earlier comments of the court in *The Queen v. Pan Ocean Oil Ltd.*, 94 DTC 6412 (FCA) were obiter. Although resolution will await a future court decision, the decision arguably implicitly suggests that the provision should apply for the purposes of the entire Act, consistent with the text of the provision. The CRA adopted this conclusion in CRA document no. 2008-027756117, February 25, 2011.

2013 CR 8 Footnote-85 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

85 See the August 16, 2013 draft legislation (Canada, Department of Finance, *Legislative Proposals in Respect of Foreign Affiliates* (www.fin.gc.ca/drleg-apl/fa-sea-1-eng.asp)). Prior to amendment, subparagraph 212.3(18)(a)(ii) would not apply to exempt the amalgamation from the FAD rules in our example, since Canco, the acquiring CRIC in the second stage of the analysis, is not the corporation formed on the amalgamation.

2013 CR 8 Footnote-86 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

86 It is also interesting to consider the slight variation in facts that would arise if Cansub 1 was an existing subsidiary of Canco, Canco acquired Cansub 2, and then, as part of the same series, Cansub 1 and Cansub 2 were amalgamated. In such a case, the FAD rules would not have applied on the acquisition of Cansub 2 because no foreign affiliates were indirectly acquired. On the amalgamation of Cansub 1 and Cansub 2, the exception in subparagraph 212.3(18)(a)(ii) " " " would not be available due to Cansub 1 and Cansub 2 having dealt at arm's length at some point in the series. Query whether reliance could then be placed on the exception in subparagraph 212.3(18)(a)(i) " " " on the basis that Amalco acquired the shares of Forsub 1 and Forsub 2 from Cansub 1, with which it was related and with which it dealt at all times at arm's length pursuant to the deeming rule in subsection 251(3.1) " " ". Even in such circumstances, however, it appears that the FAD rules would apply at the Canco level, since the exception in subparagraph 212.3(18)(c)(ii) would not be available.

87 To deal with these and other multiple applications of the FAD rules, the Joint Committee of the Canadian Bar Association and the Chartered Professional Accountants of Canada has requested that the reorganization exceptions of subsection 212.3(18) be amended to exempt completely any substitution for an investment in a foreign affiliate by a CRIC that previously triggered the application of subsection 212.3(2): see submission to the Department of Finance: The Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants, "Re: August 14, 2012 Draft Legislative Proposals To Amend the Income Tax Act (Canada)," September 13, 2012 (www.cba.org/CBA/submissions/pdf/12-51-eng.pdf).

88 It is to be noted that the joint committee has recommended that the series condition be removed. See submission to the Department of Finance dated October 15, 2013: The Joint Committee on Taxation of the Canadian Bar Association and the Canadian Institute of Chartered Accountants (www.cba.org/CBA/submissions/pdf/13-42-eng.pdf).

89 Comfort letter from Brian Ernewein, General Director—Legislation, Tax Policy Branch, Department of Finance, July 9, 2013. The circumstances involved an acquisition of a Canadian corporation that held a foreign affiliate where the indirect acquisition rule in paragraph 212.3(10)(f) did not apply. Subsequent to the acquisition and an amalgamation involving target and the acquiring corporation, the amalgamated entity wished to transfer the foreign affiliate to another CRIC. The issue was that the acquiring CRIC and the target predecessor to the amalgamated corporation arguably dealt at arm's length at some point in the series. In that situation, the Department of Finance agreed that it would be inappropriate for the FAD rules to apply on the transfer.

90 See August 16, 2013 draft legislation, supra note 85. Prior to amendment, the FAD rules could have applied at the new Canco level due to the lack of any deeming rule in paragraph 212.3(22)(a) " " " applying to shareholders of the predecessor corporations.

91 As defined in subsection 248(1) " " " with reference to subsection 89(1) " " ".

92 2011 SCC 63; aff'g. 2009 FCA 163; aff'g. 2007 TCC 481.

93 Ibid., at paragraph 96 (SCC).

94 See Ron Durand and Lindsay Gwyer, "Surplus Stripping and Domestic Private Corporations," in *Report of Proceedings of the Sixty-Fourth Tax Conference*, 2012 Conference Report (Toronto: Canadian Tax Foundation, 2013), 13:1-20; Monica Biringer, "Surplus Stripping After Copthorne: Non-Resident Corporations," ibid., 14:1-25; and Andrew Bateman, "Selected Developments Affecting Corporate Reorganizations," in *2012 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2012), 6:1-17.

95 *Copthorne*, supra note 92, at paragraphs 99 and 127 (SCC).

96 CRA document no. 9723725F, September 24, 1997. See also *Interpretation Bulletin* IT-474R2, supra note 33, at paragraph 49.

97 Supra note 92.

98 See example 9 of supplement 1 to *Information Circular* 88-2, "General Anti-Avoidance Rule: Section 245 of the Income Tax Act," October 21, 1988.

2013 CR 8 Footnote-99 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

99 See IT-474R2 " " ", supra note 33, at paragraph 47.

2013 CR 8 Footnote-100 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

100 It is worth noting the CRA's administrative position (set out in CRA document no. 2002-0177163, December 20, 2002) that the receipt of rights under a shareholder rights plan of the amalgamated corporation does not, in the appropriate circumstances, result in a loss of the rollover treatment.

2013 CR 8 Footnote-101 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

101 *Husky Oil Limited v. Canada*, 2010 FCA 125. The complicated facts of this decision have been frequently discussed in the literature and will not be repeated here. See, for example, Judith Gorman, "The Proper Role of the Subsection 87(4) Anti-Avoidance Provisions," in Current Cases feature (2010) 58:3 *Canadian Tax Journal* 631-52, at 631-39.

2013 CR 8 Footnote-102 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

102 In *Husky*, supra note 101, the Federal Court of Appeal confirmed that that the only relevant "benefit" for the purposes of the subsection 87(4) " " " exception is the shift in value represented by the gift portion that accrues to the benefit of a related person. Any other benefit is not of relevance.

2013 CR 8 Footnote-103 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

103 Paragraph 87(4)(c) " " ".

2013 CR 8 Footnote-104 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

104 Paragraph 87(4)(e) " " ". Any capital loss otherwise realized by the shareholder on the disposition of the predecessor corporation shares is deemed to be nil pursuant to paragraph 87(4)(d) " " ".

2013 CR 8 Footnote-105 Corporate Combinations: An Update on Canadian Mergers (Nijhawan, A. and G. Richards)

105 For a review of the requirements of a valid price adjustment clause, including the necessity for broad triggering language, see Ian J. Gamble and David J. Christian, "Corporation Reorganizations—An Update on Recent Issues," in *2011 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2011), 6:1-16.

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