Federal Court of Appeal | Cour d'appel fédérale

Date: 20111121

Docket: A-479-10

Citation: 2011 FCA 321

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

ENVISION CREDIT UNION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on October 20, 2011.

Judgment delivered at Ottawa, Ontario, on November 21, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. ***INTRODUCTION***

[1] Two British Columbia credit unions, Delta Credit Union (Delta) and First Heritage Savings Credit Union (First Heritage) (collectively the predecessors) amalgamated under the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82 (CUIA). The amalgamation took effect on January 1, 2001. The amalgamated company is Envision Credit Union (Envision).

[2] This case is about determining the undepreciated capital cost (UCC) of the depreciable assets owned by Envision by virtue of the amalgamation. Taxpayers may deduct capital cost

allowance (CCA) from their business or property income. The CCA is a percentage of the UCC of an asset; the percentage varies according to the class of the depreciable asset in question. The UCC of a depreciable asset is the cost of its acquisition, less the amount of the CCA deductions claimed: see subsections 13(21) and 20(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (Act).

[3] The question to be decided in this case is whether the combined UCC of the predecessors' depreciable assets immediately before the merger is attributable to Envision at the start of the first taxation year after the amalgamation. Or, may Envision claim as the UCC the original price paid by the predecessors and ignore the amounts of CCA that the predecessors had already deducted from their income for tax purposes?

[4] The UCC would flow through to Envision as tax attributes of the predecessors if either (*a*) section 87 of the Act applied to the amalgamation, or (*b*) the principles in *The Queen v. Black & Decker Manufacturing Company*, [1975] 1 S.C.R. 411 (*Black & Decker*) applied to the predecessors' UCC.

[5] In its returns for the taxation years 2001-2004, Envision claimed CCA based on a starting UCC of $50,979,759, the capital cost of the depreciable assets when the predecessors acquired them. On reassessment, the Minister reduced the CCA to reflect a starting UCC of $20,103,228, the amount of the predecessors' UCC balances immediately before the merger. The Minister reached this figure by taking the original purchase price of $50,979,759 and subtracting $30,876,531, the amount claimed by the predecessors as CCA in the years after they acquired the assets.

[6] Envision appealed the reassessments to the Tax Court of Canada. Justice Webb (Judge) allowed Envision's appeal in respect of the 2001 taxation year, on the ground that the reassessment was statute-barred. The Minister has not appealed this aspect of the decision. However, the Judge dismissed Envision's appeal of the Minister's reassessments for its 2002, 2003, and 2004 taxation years. Envision has appealed this aspect of the decision to this Court. The Tax Court decision is reported as *Envision Credit Union v. Canada*, 2010 TCC 576.

[7] The Judge accepted Envision's argument that section 87 of the Act did not apply to the amalgamation and therefore the predecessors' UCC did not flow through to Envision under subsection 87(2). However, he also held that the corporate law principles established in *Black & Decker* did apply and that, as a continuation of the predecessors, Envision took over their UCC balances as they were immediately before the amalgamation. The Judge noted (at para. 8) that, if Envision's argument was correct, and the predecessors' UCC balances did not flow through to Envision as the amalgamated corporation, a CCA of $30,876,531 could be claimed twice in respect of the same assets: once by the predecessors, and once by Envision.

[8] In my view, the Judge was correct to conclude that the UCC of the predecessors' assets flowed through to Envision by virtue of the principles established by *Black & Decker*. This would be sufficient to dispose of the appeal.

[9] However, in case I am wrong on the applicability of *Black & Decker* to the facts of this case, I shall also deal with whether section 87 applies. This issue was decided by the Tax Court, was

thoroughly and ably canvassed by counsel in this Court, and is of some general importance in the profession. With all respect to the Judge, I have concluded that section 87 does apply to the amalgamation of the predecessors and that their UCC balances flowed through to Envision under subsection 87(2).

[10] For the reasons that follow, I would dismiss the appeal.

B. *FACTUAL BACKGROUND*

[11] The relevant facts are not in dispute and can be stated briefly. Merger discussions between Delta and First Heritage started in 1999. Shareholders approved an amalgamation agreement in July 2000 and an amalgamation agreement was signed later that month. In a letter dated August 15, 2000, the Financial Institutions Commission of British Columbia confirmed that it had approved the amalgamation, and a certificate of amalgamation was subsequently issued by the British Columbia Registrar of Companies pursuant to paragraph 20(7)(*b*) of the CUIA. The amalgamated corporation was initially called First Heritage Credit Union, but its name was later changed to Envision Credit Union.

[12] The merger was based on business considerations: faster growth and efficiencies of scale which, it was hoped, would increase the parties' competitiveness *vis-à-vis* other financial institutions. Nonetheless, tax considerations shaped transactions related to the merger.

[13] In particular, the accountants and lawyers advising the parties on the merger structured it in a way that they believed would take it outside the scope of section 87. This would enhance Envision's preferred rate amount and thereby increase the amount of its income that would be subject to the small business tax rate. This was the principal tax consideration in the transactions described below. However, as it turned out, Envision was entitled to the same tax credit in the taxation years in question, whether or not the preferred rate amount was carried forward to it.

[14] In June 2000, the predecessors' advisors began wondering how to report the UCC of Envision's assets on its income tax returns. No decision was taken until December 2000, when it was decided that Envision should report a UCC of $50,979,759 at the start of the first taxation year after the amalgamation. This decision was made largely on the ground that the structure of the merger prevented a flow-through of the predecessors' tax accounts, including both the preferred rate amount and the UCC.

The scheme

[15] If the proposed merger of the two credit unions fell within section 87, it is common ground that the predecessors' UCC balances would flow through to Envision under paragraph 87(2)(*d*). The parties' advisors took the view that the merger would fall outside section 87 if not all the predecessors' assets became property of Envision by virtue of the amalgamation.

[16] If this was correct, Envision should be able to claim an opening UCC balance that took no account of the CCA previously claimed by the predecessors because those deductions were notional

tax accounts, which exist only within the Act. Accordingly, they could not remain in existence without an express statutory provision to that effect, such as those in subsection 87(2). If the merger was not an amalgamation for the purpose of section 87, it was irrelevant that it was an amalgamation under British Columbia's CUIA.

[17] The basis of the view that section 87 can be avoided in this way is the proposition that subsection 87(1) defines an "amalgamation" as a merger of two or more corporations to form one corporate entity

…in such a manner that	… de façon que,
(a) all of the property … of the predecessor corporations immediately before the merger becomes property of the new corporation by virtue of the merger,	a) à la fois les biens […] appartenant aux sociétés remplacées immédiatement avant l'unification deviennent des biens de la nouvelle société en vertu de l'unification;
…	[…]

The corollary is that a merger that does not fall within the definition in subsection 87(1) is not an amalgamation for the purpose of section 87.

[18] Accordingly, the advisors identified, as surplus to requirements, four real estate lots owned by the predecessors immediately before the merger that would not become property of the amalgamated corporation by virtue of the amalgamation. The transactions described below were designed to achieve this result.

[19] All the documents related to the transactions, which had been executed a few days earlier, were dated to take effect simultaneously with the amalgamation itself, that is, on the earliest moment of January 1, 2001. The transactions were thus intended to be simultaneous.

[20] First, the predecessors entered into a purchase and sale agreement with 619547 B.C. Ltd. (619), a corporation that had been incorporated for this purpose in mid-December 2000. Under this agreement, the predecessors contracted to sell the surplus real estate to 619, the legal title of which was held in trust by the predecessors for 619. Second, in consideration of the transfer of the beneficial interest in the properties, 619 issued preferred shares in the name of the predecessors, which simultaneously passed to Envision. The aggregate redemption/retraction amount of the shares in 619 was equal to the fair market value of the surplus real estate.

[21] As a result, the beneficial interest in the surplus real estate owned by the predecessors immediately before the merger did not become property of Envision on January 1, 2001 “by virtue of the merger”. On amalgamation, Envision only became owner of the legal title to the surplus properties, which it held in trust for 619, and the issued shares in 619.

C. *LEGISLATIVE FRAMEWORK*

[22] I have appended to these reasons the provisions of the Act and the CUIA related this appeal. However, for the reader’s convenience, I reproduce below most of subsection 87(1). Envision relies heavily on paragraph 87(1)(*a*). The underlined words are of particular importance.

87. (1) In this section, an amalgamation means a merger of two or more	87. (1) Au présent article, « fusion » s’entend de l’unification de plusieurs

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,

….

sociétés dont chacune était, immédiatement avant l'unification, une société canadienne imposable (chacune de ces sociétés étant appelée une « société remplacée » au présent article) destinée à former une société (appelée la « nouvelle société » au présent article) de façon que, à la fois :

a) les biens (à l'exception des sommes à recevoir d'une société remplacée ou des actions du capital-actions d'une société remplacée) appartenant aux sociétés remplacées immédiatement avant l'unification deviennent des biens de la nouvelle société en vertu de l'unification;

b) les engagements (à l'exception des sommes payables à une société remplacée) des sociétés remplacées, existant immédiatement avant l'unification, deviennent des engagements de la nouvelle société en vertu de l'unification;

c) les actionnaires (à l'exception des sociétés remplacées) qui possédaient des actions du capital-actions d'une société remplacée immédiatement avant l'unification reçoivent des actions du capital-actions de la nouvelle société en raison de l'unification,

[…]

[23] Subsection 87(2) spells out in detail the tax consequence of a section 87 amalgamation. If section 87 applies to the amalgamation of the predecessors, paragraph 87(2)(*a*) deems the amalgamated entity to be "a new corporation". In broad terms, paragraph 87(2)(*d*) provides that the starting UCC of the "new corporation" is the original capital cost of the assets, less the CCA claimed by the predecessors until immediately prior to amalgamation.

[24] The merger of Delta and First Heritage took effect on January 1, 2001, as an amalgamation pursuant to section 20 of British Columbia's CUIA. Subsection 20(1) and paragraph 23(*a*) of the CUIA provide that two or more credit unions may amalgamate in accordance with section 20 and continue as one credit union. Section 23 prescribes the consequences of an amalgamation under section 20.

D. *DECISION OF THE TAX COURT*

[25] The first issue addressed by the Judge was whether section 87 of the Act applied to the merger. He accepted Envision's argument that subsection 87(1) defined an "amalgamation" and that there was no "amalgamation" for the purpose of section 87 if not all of the property owned by the predecessors immediately before the merger became property of Envision by virtue of the merger.

[26] He held (at para. 32) that the intention of the parties determined when the ownership of property passed (*Hewlett Packard (Canada) Ltd. v. Canada*, 2004 FCA 240, 32 N.R. 201 at para. 59), and that the transfer to 619 of the predecessors' surplus real estate therefore occurred at the same moment as the amalgamation (paras. 24 and 45) since this was the clear intention of the

parties. Consequently, he stated that although the predecessors owned the surplus real estate immediately before the merger, it did not become property of Envision by virtue of the merger. Accordingly, the merger was not an amalgamation for the purpose of section 87.

[27] In view of these findings, the Judge stated (at para. 24) that it was irrelevant whether shares in 619 were issued at the same moment as the amalgamation, or at some later time. He also said (at para. 50):

> 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.

[28] Having concluded that section 87 did not apply to the amalgamation, and therefore the predecessors' UCC did not flow through to Envision under paragraph 87(2)(*d*), the Judge considered whether the corporate law principles established in *Black & Decker* nonetheless applied so as to continue the predecessors' UCC in Envision.

[29] He held that they did. As already noted, subsection 20(1) of the CUIA, under which the merger had occurred, provides that, on the merger of two or more credit unions, they "continue as one credit union". The legislation considered in *Black & Decker* also adopted the "continuation" model of amalgamation. Consequently, the Judge said (at para. 70), just like the predecessors in *Black & Decker*,

> … Delta and First Heritage are continued without subtraction and therefore are continued with the amounts that had been allowed to each of them before amalgamation.

[30] He noted that the position advanced by Envision involved a paradox. On the one hand, Envision claimed that it could reach back to the predecessors in order to determine the original capital cost of its assets but, on the other, could ignore the CCA that they had subsequently claimed.

E. *ISSUES AND ANALYSIS*

[31] Counsel for Envision faces a daunting challenge in arguing that Envision could calculate its CCA on the basis of an opening UCC balance of $50,979,759. This argument requires the Court to accept the proposition that, properly interpreted, the Act permits essentially the same people to claim a CCA of $30,876,207 twice over in respect of the same properties. In my view, only the clearest statutory language could warrant a conclusion that Parliament intended such an anomaly.

Issue 1: Does the merger fall within section 87 of the Act?

[32] It is common ground that if section 87 applies to the merger, the UCC of the predecessors' assets immediately before the amalgamation is attributed to Envision.

[33] As already indicated, the transactions that were intended to occur simultaneously with the merger of the predecessors, and thus keep their amalgamation outside section 87, were: (i) the transfer of the beneficial interest in the predecessors' surplus assets through a declaration of trust in favour of 619; and (ii) the issuance of shares in 619 to the predecessors. At the same metaphysical moment, the amalgamation caused the shares and the legal title to the surplus assets to become property of Envision, even though, on this theory of the timing of the transactions, the shares had not been owned by the predecessors immediately before the amalgamation.

[34] Hence, Envision argued, the amalgamation did not fall within section 87 because it did not comply with paragraph (*a*), since the merger was not effected in such a manner that

(a) all of the property … of the predecessor corporations immediately before the merger becomes property of the new corporation by virtue of the merger, …	a) les biens […] appartenant aux sociétés remplacées immédiatement avant l'unification deviennent des biens de la nouvelle société en vertu de l'unification; […]

[35] In response, the Crown argued that subsection 87(1) is definitional in that it applies only to mergers of taxable Canadian corporations. In other respects, however, it does not purport to define an amalgamation for the purpose of the section. Rather, paragraph 87(1)(*a*), and those following it, merely track the legal consequences of an amalgamation set out in all corporate statutes in Canada, including section 23 of the CUIA. If taxable Canadian corporations merge in accordance with the applicable corporate law, this is an amalgamation for the purpose of section 87.

[36] I do not find it necessary to express an opinion on this argument because I have concluded that, as a result of the transactions related to the merger of the predecessors, all of the property that they owned immediately before the merger became property of Envision "by virtue of the merger". Whether an amalgamation between two Canadian taxable corporations pursuant to the relevant corporate law can ever fall outside section 87 is a question for another day.

[37] For present purposes, paragraph 87(1)(*a*) comprises two elements which must be satisfied in order to bring an amalgamation within its terms. First, "all of the property of the predecessor

corporations immediately before the merger becomes property of the new corporation". Second, this change must come about "by virtue of the amalgamation." In my opinion, both are satisfied here.

[38] As for the first requirement, it is true that immediately before the merger the predecessors were the beneficial owners of the surplus assets and that only the bare legal title became property of Envision "by virtue of the merger". However, this leaves out of account the fact that at the moment of amalgamation Envision also acquired all the shares in 619, which held the beneficial interest in the surplus assets from the moment of amalgamation.

[39] 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.

[40] 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*).

[41] 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.

[42] Hence, in my opinion, if paragraph 87(1)(*a*) is part of the definition of an "amalgamation" for the purpose of the section, the merger of the predecessors satisfied it, and the UCC of the assets immediately before the merger flowed through to Envision under paragraph 87(2)(*b*).

Issue 2: If section 87 does not apply to this merger, do the *Black & Decker* principles apply so as to require Envision to recognize the depreciation of the assets already claimed by the predecessors before the amalgamation?

[43] 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.

[44] 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.

[45] 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".

[46] 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 ….

[47] 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.

[48] Envision's principal argument in this Court was that *Black & Decker* does not apply to the merger because section 87 is an exhaustive codification of the circumstances in which the tax attributes of amalgamating corporations flow through to the amalgamated corporation. Hence, counsel submitted, Parliament should be taken to have excluded by implication common law principles established in *Black & Decker* which attribute similar tax consequences to amalgamations that satisfy corporate law but do not fall within section 87.

[49] Whether section 87 creates a comprehensive scheme that implicitly excludes the *Black & Decker* principles is a question of law and, on appeal, is therefore subject to review on the correctness standard.

[50] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008), 442 states the "comprehensive scheme" principle of statutory interpretation as follows:

> Resort to the common law is considered inappropriate when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the matter in question….
>
> Legislation is considered comprehensive when it appears that every aspect of a matter, or every possible response to a matter, has been addressed by the legislature.

[51] While this general interpretative principle is undoubtedly helpful, whether any given statutory provisions impliedly exclude the operation of the common law must also be approached on a case by case basis and with an eye to the particularities of the statutory scheme in question.

[52] Counsel for Envision argued that the detail with which section 87 sets out the tax consequences of an amalgamation impliedly excludes common law principles that extend similar tax treatment to mergers taking effect under corporate law but not constituting an amalgamation under section 87. What would be the point, counsel asked rhetorically, in Parliament's prescribing in detail the tax consequences of a section 87 amalgamation if they apply as a matter of common law to amalgamations that do not fall within section 87?

[53] Counsel for Envision relied on three decisions of the Supreme Court of Canada to illustrate the "comprehensive code" principle of statutory interpretation which, he argued, were analogous to the present case.

[54] First, he took us to *Board of Governors of the Seneca College of Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 *(Seneca College)*, where the issue was whether a breach of Ontario's *Human Rights Code* gave rise to a cause of action in tort for breach of either a statutory duty imposed by the Code or the public policy values expressed in the Code.

[55] Writing for the Court, Chief Justice Laskin stated (at 183) that the plaintiff's case was defeated by "the comprehensiveness of the Code in its administrative and adjudicative features". It

is equally important to note that the Court rejected the plaintiff's attempt to establish a novel cause of action, stating (at 195) that such a development of the common law

> … is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

[56] *Seneca College* is not, however, our case. Absent section 87, the common law would have attributed to Envision the UCC of the predecessors' assets immediately before amalgamation. In the present case, however, Envision relies on the comprehensiveness of section 87 to exclude consequences that the common law would otherwise attribute to the amalgamation, not to preclude the creation of new common law rights.

[57] Second, in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360 (*Regina Police Association*), the issue was whether a disciplinary dismissal of a police officer could be the subject of a grievance by the union before a labour arbitrator, or whether it had to be dealt with under the statutory provisions respecting police disciplinary matters. The Court held that the disciplinary provisions impliedly ousted the arbitral jurisdiction.

[58] Writing for the Court, Justice Bastarache said (at para. 31)

> The detailed provisions in the legislative scheme governing disciplinary matters are a clear indication that the legislature intended to provide a complete code within *The Police Act* and Regulations for the resolution of disciplinary matters involving members of the police force. <u>This is reflective of a well-founded public policy that police boards shall have the exclusive responsibility for maintaining an efficient police force in the community. The ability to discipline members of the force is integral to this role</u>. (Emphasis added)

[59] Third, counsel relied on *Symes v. Canada*, [1993] 4 S.C.R. 695 (*Symes*), as an example of the application to tax law of the comprehensive code principle of statutory interpretation. One question in that case was whether a taxpayer could elect to deduct child care expenses under the general provisions of the Act dealing with the deduction of business expenses, rather than under section 63 which specifically dealt with child care expenses. The Court concluded that she could not, principally because section 63 imposed limitations on the deductibility of child care expenses that did not apply to the general provisions on the deduction of business expenses. Permitting a taxpayer to claim a greater deduction under the general provisions of the Act in respect of a child care expense would undermine the legislative intent expressed in section 63 to limit the deductibility of child care expenses.

[60] Unlike the legislation considered in *Regina Police Association* and *Symes*, section 87 and the principles established in *Black & Decker* are not in conflict: the objectives of section 87 would not be undermined if the predecessors' UCC flowed through to Envision on a "continuation" model of amalgamation that falls outside section 87.

[61] 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.

[62] 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.

[63] Finally, the non-exhaustive nature of 87 is supported by *Guaranty Properties Ltd. v. Canada*, [1990] 3 F.C. 337 (C.A.) at 349, where Justice McGuigan, writing for the Court, said:

> It may be noted that by its initial words subsection 87(1) is limited in its effect to the whole of section 87 ("In this section"), which would tend to negative any legislative ambition to establish a complete code on amalgamations …

[64] Counsel for Envision also argued that if *Black & Decker* applied to the tax consequences of a merger that takes effect outside section 87, subsection 87(2), which specifies the tax consequences of a section 87 merger, would be redundant. Statutory provisions are presumed not to be redundant and are to be interpreted accordingly.

[65] In my opinion, the interpretative presumption against redundancy does not apply here for essentially the same reasons as I have concluded that section 87 is not a complete code which implicitly excludes the application of *Black & Decker* to mergers outside section 87.

[66] Having deemed an amalgamated corporation to be a new corporation, section 87 prescribes the tax consequences of amalgamation in order that amalgamating taxable Canadian corporations would not be subject to the negative tax consequences that would otherwise follow, including deemed dispositions and acquisitions of property, together with their capital gains implications. *Black & Decker* is limited to "continuation" model amalgamations and does not apply to section 87 amalgamations. Redundancy simply does not arise here, especially since section 87 pre-dates *Black & Decker*.

[67] Accordingly, I agree with the Judge that, even if the merger of the predecessors fell outside section 87 (which I have concluded it did not), the common law principles established in *Black & Decker* would attribute the predecessors' UCC to Envision. Consequently, the Minister was correct to disallow Envision's claim for CCA based on a starting UCC of $50,979,759 and to reduce it to $20,103,228. Confirming the reassessments of Envision's taxation years 2002, 2003, and 2004 was therefore appropriate.

F. *CONCLUSIONS*

[68] For these reasons, I would dismiss the appeal with costs.

"John M. Evans"

J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
David Stratas J.A."

APPENDIX A

***Income Tax Act,* R.S.C. 1985 (5th Supp.), c. 1.**

87. (1) 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	87. (1) Au présent article, « fusion » s'entend de l'unification de plusieurs sociétés dont chacune était, immédiatement avant l'unification, une société canadienne imposable (chacune de ces sociétés étant appelée une « société remplacée » au présent article) destinée à former une société (appelée la « nouvelle société » au présent article) de façon que, à la fois :
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,	*a)* les biens (à l'exception des sommes à recevoir d'une société remplacée ou des actions du capital-actions d'une société remplacée) appartenant aux sociétés remplacées immédiatement avant l'unification deviennent des biens de la nouvelle société en vertu de l'unification;
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	*b)* les engagements (à l'exception des sommes payables à une société remplacée) des sociétés remplacées, existant immédiatement avant l'unification, deviennent des engagements de la nouvelle société en vertu de l'unification;
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	*c)* les actionnaires (à l'exception des sociétés remplacées) qui possédaient des actions du capital-actions d'une société remplacée immédiatement avant l'unification reçoivent des actions

capital stock of the new corporation because of the merger,

….

du capital-actions de la nouvelle société en raison de l'unification,

[…]

87(2) Where there has been an amalgamation of two or more corporations after 1971 the following rules apply

87(2) Lorsqu'il y a eu fusion de plusieurs sociétés après 1971, les règles suivantes s'appliquent :

(a) for the purposes of this Act, the corporate entity formed as a result of the amalgamation shall be deemed to be a new corporation the first taxation year of which shall be deemed to have commenced at the time of the amalgamation, and a taxation year of a predecessor corporation that would otherwise have ended after the amalgamation shall be deemed to have ended immediately before the amalgamation;

i. pour l'application de la présente loi, l'entité issue de la fusion est réputée être une nouvelle société dont la première année d'imposition est réputée avoir commencé au moment de la fusion et l'année d'imposition d'une société remplacée, qui se serait autrement terminée après la fusion, est réputée s'être terminée immédiatement avant la fusion;

…

(d) for the purposes of sections 13 and 20 and any regulations made under paragraph 20(1)(a),

(i) where depreciable property of a prescribed class has been acquired by the new corporation from a predecessor corporation, the capital cost of the property to the new corporation shall be deemed to be the amount that was the capital cost of the property to the predecessor corporation, and

(ii) in determining the undepreciated capital cost to the new corporation of depreciable property of a prescribed class at any time,

[…]

(d) pour l'application des articles 13 et 20 et des dispositions réglementaires prises en vertu de l'alinéa 20(1)a):

(i) lorsque la nouvelle société a acquis auprès d'une société remplacée des biens amortissables d'une catégorie prescrite, le coût en capital supporté pour les biens par la nouvelle société est réputé être le coût en capital supporté pour ces biens par la société remplacée,

(ii) dans la détermination de la fraction non amortie du coût en capital supporté, à un moment

	donné, par la nouvelle société pour les biens amortissables d'une catégorie prescrite :
(A) there shall be added to the capital cost to the new corporation of depreciable property of the class acquired before that time the cost amount, immediately before the amalgamation, to a predecessor corporation of each property included in that class by the new corporation,	(A) le coût indiqué, pour une société remplacée immédiatement avant la fusion, de chaque bien compris dans cette catégorie par la nouvelle société doit être ajouté au coût en capital pour celle-ci de biens amortissables de cette catégorie acquis avant le moment donné,
(B) there shall be subtracted from the capital cost to the new corporation of depreciable property of that class acquired before that time the capital cost to the new corporation of property of that class acquired by virtue of the amalgamation,	(B) il faut soustraire du coût en capital supporté par la nouvelle société pour les biens amortissables de cette catégorie, acquis avant le moment donné, le coût en capital supporté par la nouvelle société pour les biens de cette catégorie, acquis en vertu de la fusion,
(C) a reference in subparagraph 13(5)(b)(ii) to amounts that would have been deducted in respect of property in computing a taxpayer's income shall be construed as including a reference to amounts that would have been deducted in respect of that property in computing a predecessor corporation's income, and	(C) toute mention au sous-alinéa 13(5)b)(ii) de sommes qui auraient été déduites relativement à un bien dans le calcul du revenu d'un contribuable vaut également mention de sommes qui auraient été déduites relativement à ce bien dans le calcul du revenu d'une société remplacée,
(D) where depreciable property that is deemed by subsection 37(6) to be a separate prescribed class has been acquired by the new corporation from a predecessor corporation, the property shall continue to be deemed to be of that same separate prescribed	(D) lorsque des biens amortissables qui sont réputés selon le paragraphe 37(6) constituer une catégorie prescrite distincte ont été acquis auprès d'une société remplacée par la nouvelle société, les biens sont toujours réputés

class;

Depreciable property acquired from predecessor corporation

(d.1) for the purposes of this Act, where depreciable property (other than property of a prescribed class) has been acquired by the new corporation from a predecessor corporation, the new corporation shall be deemed to have acquired the property before 1972 at an actual cost equal to the actual cost of the property to the predecessor corporation, and the new corporation shall be deemed to have been allowed the total of all amounts allowed to the predecessor corporation in respect of the property, under regulations made under paragraph 20(1)(a), in computing the income of the predecessor corporation;

…

faire partie de cette même catégorie prescrite distincte;

Biens amortissables acquis auprès d'une société remplacée

d.1) pour l'application de la présente loi, lorsque la nouvelle société a acquis auprès d'une société remplacée des biens amortissables (autres que des biens d'une catégorie prescrite), la nouvelle société est réputée avoir acquis ces biens avant 1972 à un coût effectif égal au prix effectif supporté pour ceux-ci par la société remplacée, et la nouvelle société est réputée avoir été autorisée à déduire le total des sommes admises que la société remplacée était autorisée à déduire relativement à ces biens, en vertu des dispositions réglementaires prises en application de l'alinéa 20(1)a), dans le calcul du revenu de la société remplacée;

[…]

***Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82**

20 (1) Two or more credit unions (the "amalgamating credit unions") may amalgamate and continue as one credit union (the "amalgamated credit union"), but must not do so except in accordance with this section.

(2) Amalgamating credit unions, including any ordered under section 277(g) of the *Financial Institutions Act* to amalgamate, together must propose and submit to the commission an amalgamation agreement that

(a) specifies

(i) the name of the proposed amalgamated credit union,

(ii) the terms and conditions of the amalgamation,

(iii) the manner of carrying the amalgamation into effect,

(iv) the names and addresses of the individuals proposed as the directors and senior officers of the proposed amalgamated credit union,

(v) whether the business proposed to be carried on by the proposed amalgamated credit union is deposit business or both deposit business and trust business,

(vi) the services that the proposed amalgamated credit union intends to offer to its members,

(vii) the common bond of membership of the proposed amalgamated credit union,

(viii) the manner in which the issued and unissued shares of each amalgamating credit union will be exchanged for those of the amalgamated credit union, and

(ix) the fair market value of the equity shares of any class, or a method of determining the fair market value of the equity shares of any class, for the purpose of section 24, and

(b) contains

(i) the constitution prepared in accordance with section 6, and

(ii) the rules prepared in accordance with section 7,

that are proposed as the constitution and rules of the amalgamated credit union.

(3) On receiving a proposed amalgamation agreement submitted to the commission, including one where one or more of the amalgamating credit unions is acting under section 21 through an administrator,

(a) the commission may consent to the proposed amalgamation agreement, or

(b) if the commission considers that the proposed amalgamation agreement is contrary to the interests of one or more of the amalgamating credit unions or its or their members, the commission may refuse to consent to it.

(4) If the commission consents under subsection (3) to a proposed amalgamation agreement under which any of the proposed amalgamating credit unions is one that is not acting under section 21 through an administrator, then this subsection applies to that amalgamating credit union, and it must

(a) submit the proposed amalgamation agreement to its members for approval by special resolution, if it is a credit union that has issued no equity shares or has issued no equity shares other than the membership shares, or

(b) submit the proposed amalgamation agreement

(i) to its members for approval by special resolution, and

(ii) to the holders of each class of equity shares other than the membership shares for approval by a separate resolution of the holders of that class, requiring a majority of 2/3 of the votes cast,

if it is a credit union that has issued 2 or more classes of equity shares.

…

(7) On receiving the executed amalgamation agreement, or the executed amalgamation agreement and a certified copy of each of any resolutions, delivered under subsection (6), the registrar must

(a) register the agreement or the agreement and a certified copy of each resolution, as the case may be,

(b) issue a certificate of amalgamation showing that the amalgamating credit unions are amalgamated and the date of the amalgamation, which must not be earlier than the date the documents are received by the registrar, and

(c) publish in the Gazette a notice of the amalgamation showing the names of the amalgamating credit unions, the name of the amalgamated credit union, the address of its registered office and the date of the amalgamation.

23 On and after the date of the amalgamation shown in a certificate of amalgamation issued under section 20 (7) (b),

(a) the amalgamating credit unions are amalgamated and are continued as one credit union under the name and with the constitution and rules provided in the amalgamation agreement,

(b) 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, including any obligations to members or auxiliary members under section 24, and

(c) every member and auxiliary member of each amalgamating credit union is bound by the amalgamation agreement.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-479-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE WYMAN W. WEBB OF THE TAX COURT OF CANADA DATED NOVEMBER 17, 2010, COURT FILE 2008-2213(IT)G)	
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CONCURRED IN BY:	LAYDEN-STEVENSON AND STRATAS JJ.A.
DATED:	November 21, 2011

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