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Amalgamation and Windup: What's the Difference?

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AMALGAMATION AND WINDUP: WHAT'S THE DIFFERENCE?

INTRODUCTION

The objective of this paper is to provide a practical refresher on merger techniques, specifically focusing on the similarities and differences of amalgamations and windups.[*] The focus will be on the basic corporate aspects as they pertain to the Prairie Provinces and the federal jurisdiction, as well as the tax aspects under Sections 87 and 88 of the Income Tax Act[1]. The discussion will include an overview of the corporate and tax provisions; including recent technical amendments and Canada Customs and Revenue Agency ("CCRA") views; common tips and traps for practitioners to be aware of; and guidance on the "bump."[2] The paper draws upon and supplements the many recent papers[3] addressing amalgamations and windups.

The title to this paper "What's the Difference?" probably leads you to respond "not much!" When comparing a vertical amalgamation of a parent and subsidiary wholly-owned corporation with the windup of a subsidiary wholly-owned corporation into a parent, this is generally true. Tax accounts get added together and you eliminate a tax return or two. Simple. But not really. Fundamental differences in the underlying nature of these transactions create distinct legal and business issues. As will be discussed, there are significant differences in the application of the Act, especially when an amalgamation takes on other forms and when direct ownership interest in a subsidiary before a combination is less than 100 percent. Careful attention must be given to the facts at hand. With thorough attention to detail, one can likely achieve a benefit such as optimizing loss utilization, maximizing the corporate group's capital cost allowance claims or minimizing overall costs resulting from the reorganization.

The bump, which has evolved into one of the more complex areas of the Act, is also examined in this paper. The mechanics of the bump will be reviewed and a summary of important issues related to the bump, such as the definition of ineligible property, is included.

AMALGAMATION, LIQUIDATION AND DISSOLUTION

Both amalgamations and windups fundamentally affect a corporation's existence. The end result of either procedure is similar: the assets and liabilities of two or more corporations are combined to form a single corporate entity. However, the means by which this is achieved are very different legally and may have different tax consequences.

Regard must be had to the corporate law of the jurisdiction(s) where the subject corporations are incorporated. This paper reviews the relevant statutory provisions applicable to corporations incorporated in Alberta[4] ("ABCA"), Saskatchewan[5] ("SBCA"), Manitoba[6] ("MCA"), the Northwest Territories[7] ("NWTBCA") and federally under the Canada Business Corporations Act[8] ("CBCA"). Proposals for relevant amendments to the ABCA are also reviewed.

Legal Effect of Amalgamation

A merger by way of amalgamation has the effect of joining two or more corporations (called "predecessors") into a single entity, which is legally not a new corporation but is rather a continuation of all of the predecessors. The effect of amalgamation is the same in all jurisdictions reviewed in this paper, and can be summarized as follows:[9]

- The predecessors continue as one corporation ("Amalco");
- The property of each predecessor continues to be the property of Amalco;
- Amalco continues to be liable for the obligations of each predecessor;

- Existing actions, claims or liabilities to prosecution are unaffected, and actions or proceedings against a predecessor may continue to be prosecuted against Amalco;
- Convictions, rulings, orders and judgments for or against a predecessor may be enforced by or against Amalco; and
- The articles of amalgamation are deemed to be the articles of incorporation of Amalco and the certificate of amalgamation is deemed to be the certificate of incorporation of Amalco.

Notwithstanding the legal effect of an amalgamation, the Act deems Amalco to be a new corporation for certain purposes. For other purposes, however, the Act deems Amalco to be a continuation of the predecessors. These provisions are discussed in more detail later.

Types of Amalgamations

The legal requirements and procedures for amalgamations differ, depending on the corporate structure involved. Illustrations of the key corporate structures are reproduced below. The specific procedures for each type of amalgamation are discussed in more detail under "Legal Requirements and Procedures".

Most Canadian corporations statutes provide for a "short-form" amalgamation procedure in certain situations. Short-form amalgamations can be vertical or horizontal. Where the corporations to be merged have a parent-subsidiary relationship, the process is referred to as a *vertical* amalgamation (Figure 1). Where the subject corporations are sisters (i.e. each is owned by the same parent) their merger is a *horizontal* amalgamation (Figure 2).

An amalgamation of unrelated corporations requires a "long-form" procedure (Figure 3), as does a *triangular* amalgamation (Figure 4). A triangular amalgamation is one in which the shareholders of the predecessors receive shares of another corporation on the amalgamation, instead of shares of Amalco.

Figure 1

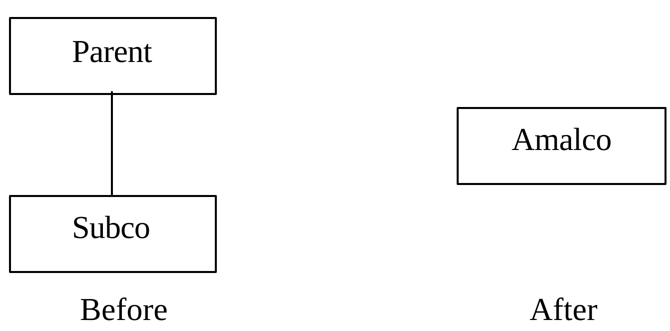


Figure 2

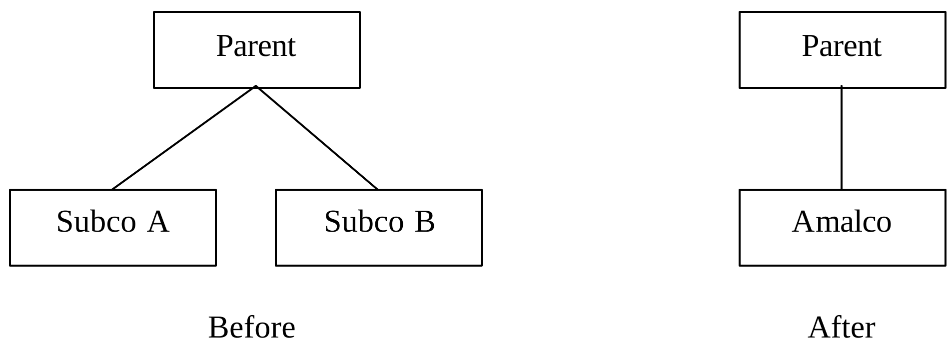


Figure 3

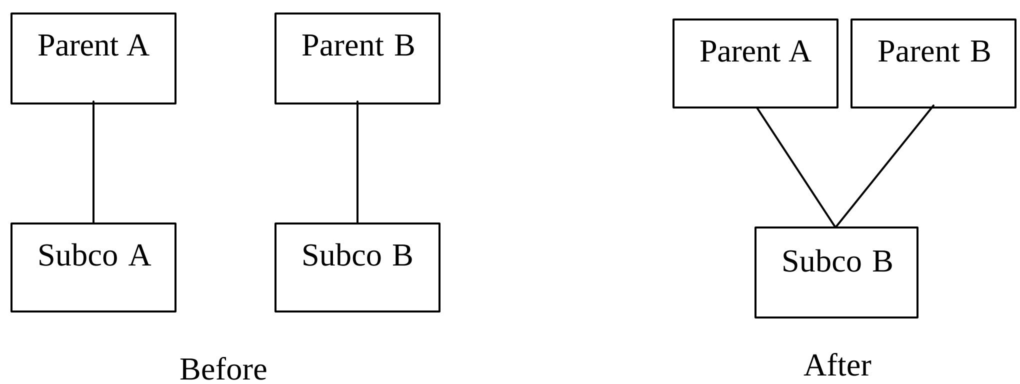
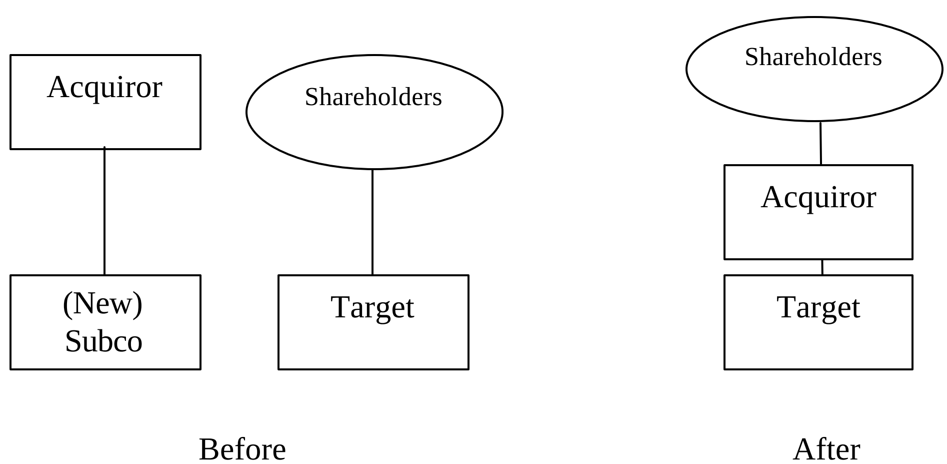


Figure 4



Legal Effect and Nature of Windup

The term "windup" is not used in corporate law. The process of winding up is a tax concept, which is effected in corporate law by the dissolution, or liquidation and dissolution, of a corporation, and the concurrent transfer of the dissolved corporation's assets and liabilities to that corporation's shareholders. The corporation ceases to exist as a legal entity on the date shown in the certificate of dissolution.

Any corporation can be dissolved, but a windup in the income tax context is by its nature a *vertical* procedure. Tax practitioners refer to winding up a subsidiary "into" its parent corporation, as one way to merge the two entities. This language leads to some confusion about the legal steps required to accomplish a windup.

Regardless of the method of dissolution, if the subsidiary has any assets or liabilities these must first be dealt with. In a typical windup, this is accomplished by transferring all assets to the parent corporation and having the parent corporation assume all of the subsidiary's liabilities.[10] Once all of the subsidiary's assets have been distributed and its liabilities have been discharged, the corporate existence of the subsidiary can be terminated. The parent corporation remains intact, holding the assets and liabilities that were previously held by the subsidiary.

Methods of Dissolution

The appropriate method of dissolving a corporation is determined by the particular circumstances of the corporation, and whether the dissolution is proposed by the shareholders or by a third party.

Any interested person may apply for a *Court order* to dissolve a corporation in specific circumstances, e.g. the corporation has failed to hold annual shareholder meetings for at least two consecutive years.[11] A shareholder may apply to the Court to dissolve the corporation in response to conduct which is oppressive or unfairly prejudicial, or which unfairly disregards the interests of a security holder, creditor, director or officer of the corporation.[12]

The directors or shareholders of a corporation may propose *voluntary liquidation and dissolution*. This must be approved by a special resolution of each class of shareholders. Notice of the intent to dissolve must be sent to all known creditors of the corporation, and published in the prescribed manner. The corporation must then proceed to collect its property, dispose of property that will not be distributed to shareholders in kind, discharge its liabilities, and otherwise liquidate its business. Only after adequately providing for the payment or discharge of all its obligations may the corporation distribute its remaining property to its shareholders.[13] At any time during liquidation, an interested person may ask the Court to supervise the liquidation process.

Court-ordered dissolution, and voluntary liquidation and dissolution are uncommon in the context of tax planning. Tax practitioners generally dissolve a corporation by a special resolution of each class of shareholders approving the dissolution, and authorizing the directors to *distribute* the corporation's property and *discharge* its liabilities prior to filing articles of dissolution.

An abbreviated dissolution procedure is available if the subsidiary *has no property or liabilities*.[14] The procedure is further simplified if the subsidiary has no property or liabilities, and *has not issued any shares*.[15]

The Registrar or Director of corporations may unilaterally dissolve a corporation in certain cases. The rules vary depending upon the jurisdiction but are generally related to inactivity or failure to file annual returns, so that the corporation is eventually said to *lapse* and is struck from the corporate registry. Appendix A summarizes the variations in lapse provisions among the jurisdictions reviewed in this paper. Once the triggering event has occurred and sufficient time has elapsed, the Registrar must give notice to the corporation of the decision to dissolve the corporation.[16] The Registrar must also publish notice of the dissolution.

In any case, dissolving a subsidiary to effect a windup is much different than completing a vertical amalgamation, where the parent and subsidiary are joined and become one corporation. If the tax consequences of an amalgamation and a windup are similar, the business and corporate law implications will determine which method is preferable.

Choosing a Jurisdiction

The legal requirements and results of amalgamation and dissolution are similar across most Canadian jurisdictions, but there are some noteworthy differences. In certain situations and where a choice is available, these differences could warrant a preference of one jurisdiction over another.

A corporation can only be incorporated in one jurisdiction. This is its "home base" for corporate law. In order to do business in other provinces and territories, the corporation must "extra-provincially" or "extra-territorially" register pursuant to the law of that other jurisdiction. If a corporation plans to do business in multiple locations, regard should be had to a number of factors, including each jurisdiction's corporate law, to determine where best to incorporate and in which other jurisdictions the corporation should simply register to do business. The primary considerations for determining the jurisdiction of incorporation are where the corporation will carry on business and what type of business will be conducted. The same principles apply to determining the jurisdiction of amalgamation because the amalgamated entity is deemed to be incorporated in that place.

The dissolution process must always comply with the law of the "home base" jurisdiction of the corporation to be dissolved. After a windup the parent corporation's jurisdiction will be the "home base" for the combined entity.

Differences Between Selected Canadian Jurisdictions

Solvency Requirements

Before two or more corporations may amalgamate, prescribed solvency tests must be met. The tests themselves are the same in all jurisdictions reviewed; however, Alberta applies the test more narrowly. Alberta requires that there be reasonable grounds to believe that Amalco will be able to pay its liabilities as they become due, but each of Saskatchewan, Manitoba, NWT and the CBCA require that this test be met for Amalco *and* each of the predecessor corporations.[17] As a result, in all jurisdictions except Alberta, a director or officer of each predecessor corporation must swear a statutory declaration as to this and other matters. Alberta requires only one statutory declaration, to be sworn by a proposed director of Amalco.

If the solvency of one predecessor is questionable, but there are reasonable grounds to believe that the amalgamated entity will meet the solvency test, Alberta's law may offer a way to complete an amalgamation that would not be possible in other jurisdictions. In such a situation, however, one must carefully consider whether a notice to creditors is necessary. Notice will be required if the proposed director of Amalco is unable to swear that no creditor would be prejudiced by the amalgamation. A merger of one solvent and one insolvent entity may prejudice the creditors of the solvent entity. If a creditor objects after notice is given, the amalgamation will not be allowed.

Vertical Amalgamation with an Extra-Provincial Corporation

The ABCA permits an Alberta corporation, other than a professional corporation, to amalgamate with a corporation that is incorporated elsewhere, but extra-provincially registered in Alberta.[18] This effectively eliminates the need to continue the extra-provincial corporation into Alberta before completing the amalgamation. A similar procedure is allowed in NWT.[19]

The ABCA and NWTBCA specifically require that one corporation be the wholly-owned subsidiary of the other and that the extra-provincial or extra-territorial corporation be permitted by its own governing statute to amalgamate in this fashion.

The problem is that none of the corporate law statutes reviewed for this paper (including the ABCA and NWTBCA) clearly permit a corporation to amalgamate with an entity whose "home base" is in another jurisdiction.[20] So, while the presence of this short-cut provision is interesting, its utility appears to be severely limited. Perhaps further amendments to the ABCA will be proposed to address this anomaly.

Dissolution of Insolvent Corporations

Manitoba is the only jurisdiction of those reviewed, whose corporate law statute does not expressly preclude the voluntary liquidation and dissolution of an insolvent corporation. The ABCA and NWTBCA provide that dissolution proceedings are stayed (halted) if at any time the subject corporation is found to be insolvent within the meaning of the *Bankruptcy and Insolvency Act* (Canada).[21] The entire division relating to liquidation and dissolution in each of the CBCA and ABCA does not apply to bankrupt or insolvent corporations.[22] The definition of "insolvent person" in the *Bankruptcy and Insolvency Act* includes one who is not bankrupt but who is unable to meet obligations as they become due, who has ceased paying current obligations in the ordinary course of business as they become due, or whose property is not sufficient to enable payment of all obligations due and accruing due.[23]

The apparent flexibility afforded by the MCA may be useful only in very limited situations. Keep in mind that a corporation must discharge its liabilities, or make adequate provision for them, before dissolving voluntarily. If assets are insufficient to satisfy the corporation's liabilities, the dissolution procedures in the MCA are likely to take a back seat to other legislation governing insolvency, creditors' rights and bankruptcy.

Variation on Voluntary Liquidation and Dissolution

The ABCA is the only statute reviewed which permits a corporation to proceed with voluntary liquidation and dissolution, despite the fact that it does not have sufficient assets to discharge all of its liabilities.[24] Once the requisite notices of intent to dissolve have been sent to creditors and published, a director of the corporation may submit a statutory declaration establishing to the satisfaction of the Registrar that:

i. The corporation has no assets; and
ii. During the past 13 months the corporation has not distributed any of its property to its shareholders (by dividend or otherwise), or conferred a benefit on a director by way of payments exceeding an amount that fairly represents reasonable remuneration for services performed for the corporation, by the director.

Again, the application of this provision may be limited since the ABCA precludes voluntary dissolution if the corporation is insolvent within the meaning of the *Bankruptcy and Insolvency Act* (Canada).[25]

Fees

Appendix B contains a summary of charges made by corporate registries to complete the filings required for amalgamation, dissolution, and other related corporate steps. These costs are relatively insignificant and do not vary largely between the jurisdictions noted. One would not expect such costs to be a determining factor in choosing a jurisdiction of incorporation or amalgamation.

Recent Proposals for Change in Alberta

The Alberta government recently released a discussion paper containing numerous recommendations and proposals for amendments to the ABCA.[26] The proposals relating to amalgamations and windups are summarized below.

Short Form Dissolution Procedure

All of the statutes reviewed permit the dissolution of a corporation that has no property and no liabilities, by a special resolution of each class of the corporation's shareholders.[27] Where the corporation does have property or liabilities, the shareholders must resolve to distribute the property and discharge the liabilities, and the directors must complete this before filing articles of dissolution.

In a typical windup the parent corporation assumes the subsidiary's liabilities immediately before the subsidiary is dissolved. However, this does not necessarily meet the requirement of "discharging" the subsidiary's liabilities. The parent's assumption of liabilities does not always operate to release or discharge the subsidiary from its obligations. Such a release must come from the third party to whom the liability is owed. The process of obtaining releases from the subsidiary's creditors and other contracting parties can be cumbersome and indeed, the releases may not always be forthcoming.

It is proposed that the ABCA be amended to permit dissolution by a special shareholders' resolution, where the parent corporation assumes all liabilities of the corporation to be dissolved. The discussion paper requests input as to whether the application of this amendment should be restricted to Canadian parent corporations holding at least 90 percent of the shares of the corporation to be dissolved.

This amendment is clearly intended to provide relief and eliminate the uncertainty surrounding the propriety of filing of articles of dissolution in the context of a tax-effective windup.

Dissolution Where No Issued Shares

A corporation that has not issued any shares, and has no property or liabilities, may be dissolved by a resolution of all the directors of the corporation.[28] The Alberta proposal is to permit the Registrar of Corporations, or any interested person, to apply to dissolve the corporation in these circumstances.[29]

The utility of this proposal is unclear. The Registrar already has the right to dissolve inactive corporations and those who fail to file required notices and documents. "Interested persons", such as creditors, employees, and persons having contractual relationships with the corporation, are usually more interested in reviving a corporation for the purpose of commencing a legal action by or against the corporation, than dissolving it. Assuming that an interested person wished to dissolve an early-stage corporation, this amendment could be useful because it would permit a dissolution where the corporation has no directors (the current provision for a corporation which has not issued any shares requires a resolution of directors to dissolve).

Legal Requirements & Procedures

Following is a brief summary of the legal documents and filings required to complete an amalgamation or windup using the most common corporate law procedures.[30]

Amalgamation

Pre-Amalgamation Considerations

All amalgamating corporations must be incorporated in the same jurisdiction[31]. If that is not already the case, one or more of the predecessors will have to be "continued" into the desired jurisdiction of amalgamation. Continuation is the process by which a corporation moves its "home base" from one jurisdiction to another. If continuation is not feasible,[32] a windup should be considered as an alternative method of merging the corporations' businesses.

Determine whether the consent of any third parties is required. Although the subsidiary continues as part of Amalco and therefore no conveyance of assets or liabilities is required, certain contracts (particularly banking documents and leases) may specifically prohibit the subsidiary from amalgamating without the other party's consent, or without prior notice. In any event, since Amalco will have a different name than at least one of the predecessors, notice to third parties of the name change is warranted.

Determine whether a short-form or long-form amalgamation procedure applies, based on the relationship of the predecessor corporations. Consider taking steps prior to the amalgamation, to put the predecessors in position for a short-form amalgamation. For example, minority interests might be purchased or redeemed so that a wholly-owned subsidiary exists.

A short-form amalgamation is permitted where the predecessors are:

- A holding corporation and one or more of its wholly-owned subsidiaries (a short-form vertical amalgamation);
- In the Northwest Territories and under the CBCA, a holding corporation and one or more of its subsidiaries (not necessarily wholly-owned by the holding corporation), where all of the issued shares of the subsidiaries are held by other predecessor corporations (also a short-form vertical amalgamation, although the corporate structure could include shareholdings between the subsidiaries); or
- Two or more wholly-owned subsidiary corporations of the same holding body corporate (a short-form horizontal amalgamation). *Note that the parent corporation does* <u>*not*</u> *need to be incorporated in the same jurisdiction as the amalgamating subsidiaries.*

In addition, the terms of the amalgamation must meet the requirements of the governing statute to qualify for a short-form amalgamation. For a vertical short-form procedure:

- The shares of each amalgamating subsidiary must be cancelled without any repayment of capital;
- The articles of incorporation of the parent corporation must become the articles of amalgamation for Amalco;
- In Alberta, Manitoba, NWT and under the CBCA, no securities may be issued by Amalco in connection with the amalgamation; and
- In Saskatchewan, NWT and under the CBCA, the stated capital of Amalco must be the same as that of the parent corporation.[33]

For a horizontal short-form procedure:

- The shares of all but one of the predecessors must be cancelled without any repayment of capital;
- The articles of incorporation of the predecessor whose shares are not cancelled must become the articles of amalgamation for Amalco;
- The stated capital of the predecessor(s) whose shares are cancelled must be added to the stated capital of the predecessor whose shares are not cancelled;

A long-form amalgamation will be required if the subject corporations are unrelated, or if their relationship does not fit within the requirements for a horizontal or vertical short form procedure (e.g. a triangular amalgamation must use the long form procedure, as must a vertical amalgamation involving a parent and its 90 percent owned subsidiary). A long-form amalgamation may also be necessitated if the amalgamation is to take place on terms that differ from the prescribed terms listed above. A long-form amalgamation gives rise to a right of each shareholder to dissent and be paid the fair value of its shares.[34]

For both long- and short-form amalgamations, one or more individuals will be required to swear a statutory declaration to the effect that there are reasonable grounds to believe:

- Amalco will be able to (and, in all jurisdictions but Alberta, each predecessor can) pay its liabilities as they become due;
- The realizable value of Amalco's assets will not be less than the aggregate of its liabilities and stated capital of all classes; and
- Either that no creditor will be prejudiced by the amalgamation, or that 30 days notice of the amalgamation has been published in the prescribed manner, as well as sent directly to

all known creditors with claims in excess of $1000,[35] and no creditor has a legitimate objection.

Short-form Amalgamation Procedure

The following documents are required to complete a short-form amalgamation:

- Directors' resolutions of each predecessor approving the amalgamation and providing for the prescribed terms on which the amalgamation will take place (see Pre-Amalgamation Considerations, *supra*);
- Articles of amalgamation in the same form as the parent corporation's articles of incorporation (for a vertical amalgamation), or the same form as the predecessor whose shares are not cancelled on the amalgamation (for a horizontal amalgamation);
- In Alberta, a statutory declaration of a proposed director of Amalco attesting to the solvency of Amalco and matters relating to creditors;
- In NWT, Saskatchewan, Manitoba and under the CBCA, a statutory declaration of a director or officer of each predecessor, attesting to the solvency of the predecessors and of Amalco, and matters relating to creditors;
- A NUANS name search report if Amalco's name is to be different than all of the predecessors; and
- Notice of address and notice of directors for Amalco.

Long-Form Amalgamation Procedure

In addition to all of the documents required for a short-form amalgamation, the following documents are necessary to complete a long-form amalgamation:

- Amalgamation agreement among all predecessor corporations, setting out:
  - The information normally included in articles of incorporation (name, authorized share capital, number of directors, etc.) as it applies to Amalco;
  - Names and addresses of each proposed director of Amalco;
  - The manner in which the predecessors' shares will be converted to securities of Amalco, and if any such shares are not to be converted, the amount of money or securities that the shareholders will receive instead;
  - The manner of payment of money for fractional shares which would otherwise be issued on the amalgamation;
  - A copy of the proposed bylaws, or a statement that Amalco's bylaws will be the same as one of the predecessors' bylaws; and
  - Details of any arrangements necessary to perfect the amalgamation and to provide for subsequent management and operation of Amalco.
- Shareholders resolutions of each predecessor corporation to approve the amalgamation agreement, including separate resolutions of each class or series of shareholders, whether or not they are otherwise entitled to vote.

Windup and Dissolution

Pre-Dissolution Considerations

From a practical perspective the major difference between a vertical amalgamation and a windup is that the assets and liabilities of the subsidiary must be legally transferred or assumed by the parent to effect a windup. The primary business reason for favouring an amalgamation over a windup is that, unless contractually obligated to do so, the amalgamating predecessors need not take any steps to *transfer* assets or liabilities to Amalco.

When considering a windup, one must review the subsidiary's balance sheet and the legal steps required to transfer assets and liabilities to the parent corporation. Obtaining the consent of third parties may be cumbersome, transfer fees and taxes can be significant, and the preparation and registration of conveyance documents can take time and create additional costs.

Dissolution Procedure

This section describes the documents necessary to wind up a subsidiary which has assets and liabilities, but whose business will not be liquidated before the assets are transferred to the parent:

- Special shareholders' resolution to dissolve, authorizing the directors to distribute all property and discharge all liabilities of the subsidiary (including separate resolutions for each class of shares, whether or not they are otherwise entitled to vote).
- Conveyances of assets (bill of sale, transfer of land, assignment of contracts & warranties, etc.). These must be registered or filed as appropriate.
- Assumption of liabilities and obligations by the parent corporation. This is sometimes documented using a Dissolution Agreement between the parent and the subsidiary.
- Releases or discharges from third parties in respect of all of the subsidiary's liabilities. This point is often overlooked when the parent corporation is assuming the subsidiary's liabilities. A proposed amendment to the ABCA would specifically permit dissolution of a subsidiary where its parent has assumed its liabilities, without the need to obtain discharges from third parties. For now, however, it is good practice to obtain them.
- Articles of dissolution in prescribed form.

Consideration should also be given to obtaining clearance certificates pursuant to subsection 159(2) of the Act and section 270 of the *Excise Tax Act* (Canada). These certificates protect the directors and officers of the subsidiary from personal liability for unpaid income tax, CPP and EI premiums, GST, interest and penalties. The directors and officers may wish to forego the clearance certificates, relying instead on an indemnity from the shareholder(s) who are receiving the dissolved corporation's assets. The professional advisor ought to impress upon the individuals the risk in accepting such an indemnity,[36] and if acting on behalf of the dissolved corporation or its shareholders, recommend that the directors and officers seek independent advice.

AMALGAMATION VERSUS WINDUP

The tax discussion begins by summarizing the technical requirements for obtaining a rollover on an amalgamation, under section 87, and a windup, under subsection 88(1). Next, the paper will compare and contrast the application of these provisions to select balance sheet items, tax accounts and issues pertinent to most amalgamations and windups. The discussion is primarily focused on the rollover treatment resulting on an amalgamation and a windup of a subsidiary corporation ("Subco") that is a "subsidiary wholly-owned corporation," which is the most common situation in which an amalgamation or windup is initiated. A "subsidiary wholly-owned corporation" is a corporation of which all the issued share capital (except director's qualifying shares)[37] belongs to the corporation to which it is subsidiary."[38] Some of the more relevant issues pertaining to certain minority shareholder situations will also be discussed.

For certain amalgamations the definition of subsidiary wholly-owned corporation is extended to individuals and in certain situations the direct ownership requirement found in the above definition is eliminated.[39] The extended definition provides special treatment in limited circumstances, including the resource property continuity rules[40] and the more generous loss carryback rules,[41] discussed below. Figures 5 and 6 illustrate simple examples where Subco and an intermediate corporation ("Mco") can be subsidiary wholly-owned corporations of a parent corporation ("Parentco") and an individual.

Figure 5

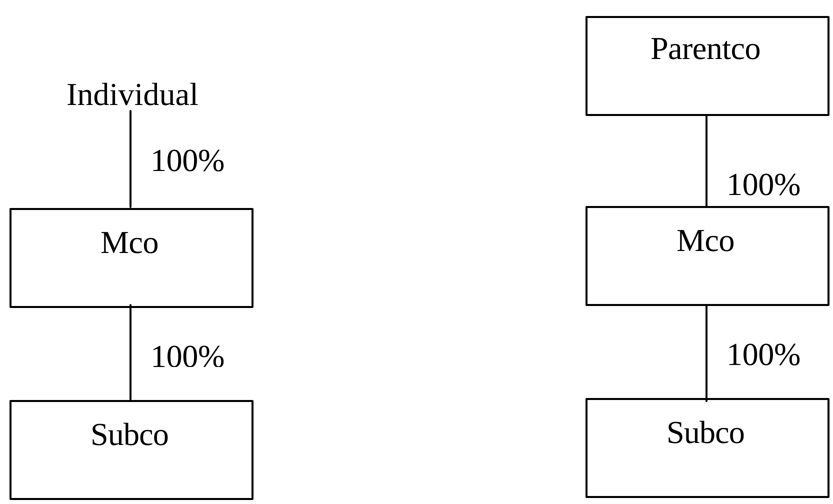
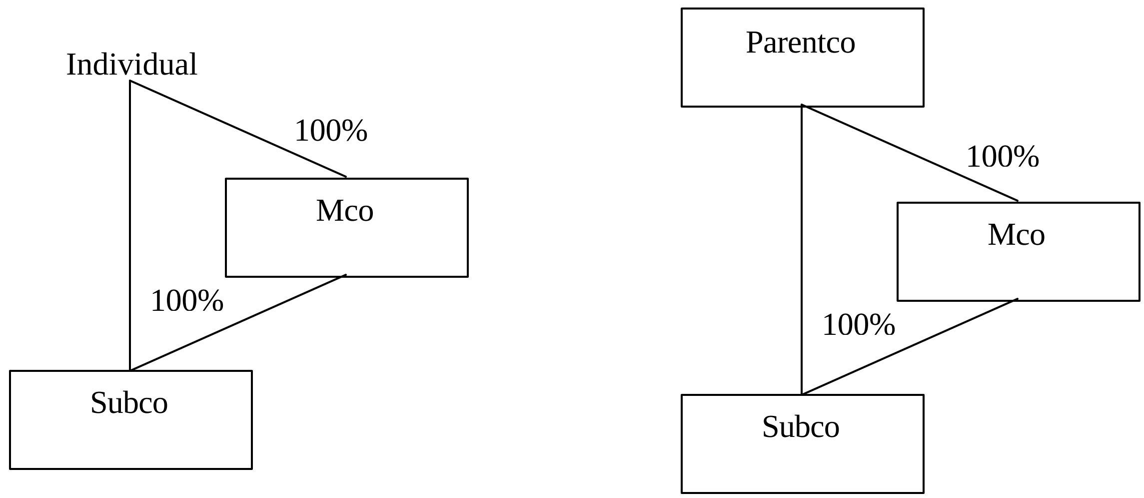


Figure 6



TECHNICAL REQUIREMENTS

Amalgamation

The amalgamation of Parentco and Subco,[42] where Subco is a subsidiary wholly-owned corporation,[43] will be tax-deferred if the requirements in subsection 87(1) are met.[44] They are:

i. Immediately before the merger, Parentco and Subco are taxable Canadian corporations[45] and are combined to form one amalgamated corporation (Amalco);
ii. All of the property (except inter-predecessor receivables and shares in Subco) and liabilities (except inter-predecessor payables) of Parentco and Subco become the property and liabilities of Amalco;
iii. All of the shareholders of Parentco immediately before the amalgamation receive only shares of Amalco; and
iv. The property and shares noted above are not purchased, acquired or otherwise obtained on a windup of a corporation.

The shares of Parentco will not be cancelled and new shares will not be issued under corporate law on the vertical short-form amalgamation of Parentco and Subco. In the absence of a correcting provision, such a merger would fail one of the requirements for obtaining rollover treatment. The provision that corrects this problem deems the shareholders of Parentco to have received shares of Amalco on the amalgamation.[46]

On a minority squeeze-out, a dissenting shareholder's rights, other than the right to receive fair value for its shares in a predecessor corporation, cease on the date of amalgamation, or the date the dissenting shareholder demands payment for his shares, depending on the jurisdiction.[47] CCRA's administrative position is that an amalgamation will not be disqualified "by reason only of certain shareholders of predecessor corporations receiving consideration *other than shares* of the new corporation, such as cash, by virtue of exercising the statutory right available in certain jurisdictions to dissent in regard to the amalgamation."[48] If the minority shareholder's right to fair value is settled by the predecessor corporation and the amount paid is in excess of the paid-up capital ("PUC"), the excess will be taxed in the hands of the minority shareholder as a deemed dividend.[49] If Amalco pays out the minority shareholder, CCRA's position is that the amount will be proceeds of disposition and a gain or loss will result.[50]

Windup

Parentco can achieve a tax-deferred dissolution of Subco, where Subco is a subsidiary wholly-owned corporation, if the requirements of a windup set out in the preamble to subsection 88(1) are met. They are:

i. Subco must be wound up;
ii. Parentco and Subco are both taxable Canadian corporations;
iii. Parentco owned 90 per cent or more of *each* class of shares of Subco immediately before the commencement of winding-up; and
iv. The minority shareholders, if any, deal at arm's length[51] with Parentco.[52]

On a qualifying windup of Subco, where Subco is not a subsidiary wholly-owned corporation, Parentco is entitled to rollover treatment on its share of Subco property, but the minority shareholder is not. Taxation of the minority shareholder is discussed below. It is interesting to note that section 87 does not contain an ownership test as does subsection 88(1). This distinction may dictate the merger technique used to facilitate a transaction. Alternatively, reorganization steps may be undertaken prior to completing the merger transaction.

The phrases "immediately before the winding-up," "on the winding-up," and "has been wound-up" are used throughout the provisions dealing with a tax-deferred windup. Their usage underscores two points in time and a period of time. The phrase "immediately before the winding-up" refers to the point in time immediately before the resolutions authorizing the windup of Subco are passed. When the phrase is used in reference to a disposition of property, "a particular disposition will be considered to mean immediately before that particular disposition."[53] The phrase "on the winding-up" refers to the period beginning at the time of resolution authorizing the windup of Subco and ending at the time Subco "has been wound-up." The assets of Subco are distributed to Parentco and its liabilities are discharged during this period. The phrase "has been wound-up" generally refers to the date on Subco's certificate of dissolution.[54] CCRA's administrative position is that "where the formal dissolution of a corporation is not complete but there is substantial evidence that the corporation will be dissolved within a short period of time, for the purpose of subsections 88(1) and (2), the corporation is considered to have been wound up."[55]

Tax Results – Differences and Similarities

The greatest similarity between section 87 and subsection 88(1) is that, if the technical requirements are met, the rollover provisions automatically apply. However, disclosure of an amalgamation is required on Amalco's first tax return year and disclosure of a windup is required on Parentco's tax return in the year Subco is wound-up. Recognition in the tax returns of the related consequences will also differ as discussed below.

Section 87 attempts to provide rollover treatment, in certain situations, recognizing the legal reality that the assets and liabilities of Parentco and Subco become the assets and liabilities of Amalco on an amalgamation. The provisions do not describe the "distribution" of the predecessor corporations' assets to Amalco as a *disposition* by the predecessor corporations. However, the provisions deem Amalco to have *acquired* or *purchased* the property from the predecessor corporations. The tax cost of the predecessor corporations generally flows through to Amalco. Section 87 also has continuity rules that generally provide for flowing tax accounts, certain income calculations and valuation methods through to Amalco. The language used to achieve this end deems Amalco to be the same corporation as and a continuation of each predecessor corporation.[56] This deeming provision creates confusion by apparently contradicting the provision in the Act that deems Amalco to be a new corporation.[57] As well, if there is no specific reference to the continuity of an item within section 87, then it is possible that items may be lost. Given the comprehensiveness of the provisions, however, this would be a rare occurrence.

Subsection 88(1) recognizes the legal reality that the property of Subco is distributed to Parentco. The windup provisions generally deem Subco to have *disposed* of its property for proceeds equal to its cost amount.[58] Subsection 88(1) does not deem Parentco to have *acquired* Subco's property, rather the deemed proceeds to Subco for the property distributed to Parentco is deemed to be Parentco's tax cost. Generally, the balances of the tax accounts of Subco flow through to Parentco.

Determining the correct application of section 87 to an amalgamation and subsection 88(1) to a windup is confusing because of the interaction between the two provisions. There are no less than 45 provisions in section 87 that are modified by paragraph 88(1)(e.2), which determine the tax cost of property received by and the flow-through of tax accounts to Parentco on a windup. Subsection 87(11) provides for a "bump" (that was not previously available on amalgamations occurring before 1995) of certain non-depreciable capital property on an amalgamation of a subsidiary wholly-owned corporation;[59] confusion ensues because the cost of the property to Amalco is also determined as if the property was otherwise distributed on a windup.

An otherwise tax-deferred amalgamation or windup could be taxable if the transaction falls within the ambit of the anti-avoidance provisions of subsection 69(11). This provision denies a vendor rollover treatment on a disposition of assets where proceeds are less than fair market value and where the main purpose of the sale was to obtain the benefit of any deduction, available to a non-affiliated person, on a subsequent disposition of the assets within three years of the original disposition. On an amalgamation, the Act deems a predecessor corporation to have *disposed* of its property for the purposes of this anti-avoidance provision, notwithstanding that there is no disposition in law and for the purposes of the Act.[60]

Disposition of Shares of Subco

Amalgamation

Where a predecessor corporation is continued from one jurisdiction in Canada to another, as may be required to effect an amalgamation, CCRA's position is that the continuance is neither a disposition of assets by the predecessor corporation nor a disposition of shares by its shareholders for tax purposes.[61]

On an amalgamation of Parentco and Subco, where Subco is a subsidiary wholly-owned corporation,[62] Parentco will be deemed to have disposed of its shares of Subco for proceeds of disposition equal to the greater of:

i. The lesser of:
   a. Paid up capital of the Subco shares; and
   b. The tax cost of Subco's net assets; and
ii. Parentco's adjusted cost base ("ACB") of the Subco shares.[63]

This formula can result in a capital gain, but not a capital loss. Generally, paid up capital is a good thing; however, all of the facts must be examined to avoid a trap.

Consider, for example, that if Parentco paid $1,000,000 for all of the shares of a troubled corporation that had $10,000,000 of PUC, knowing that the target had significant financial upside. Parentco turns Subco's financial fortunes around. Several years (and chief financial officers) later, Parentco decides to simplify the corporate structure by amalgamating Subco with Parentco on a tax-deferred basis. The tax cost of Subco's net assets is approximately $5,000,000 at the time of amalgamation. All the formal paper work is finalized and the amalgamation is tax-deferred. Or is it? Parentco has just stepped into a $4,000,000 capital gain problem given that the deemed proceeds are $5,000,000. Once the corporate registry filings have been made, a rectification order might be the only way to repair the damage. However, it would be difficult to show why the doctrine of rectification should apply in this case.[64]

There are measures that one can take to deal with this beforehand, namely a reduction of legal stated capital. However, you must know that you have a potential problem so it can be dealt with properly, prior to the merger.

On an amalgamation of Parentco and Subco, where Subco is not a subsidiary wholly-owned corporation and all shareholders hold their shares of the predecessor corporations as capital property, Parentco and the minority shareholder(s) are deemed to have disposed of their shares without realizing any gain or loss.[65] This rollover treatment is conditional: Parentco and Subco shareholders can receive no consideration on the amalgamation other than shares of Amalco.[66] Parentco and the minority shareholder are deemed to have acquired their shares of Amalco at the ACB of their old Subco shares.[67] If any non-share consideration is received, the shareholders are deemed to have disposed of all of their shares at fair market value and must report a gain or loss on disposition;[68] however, CCRA provides administrative relief in situations where cash of less than $200 is received in lieu of fractional shares.[69]

Windup

Each shareholder of a dissolving corporation is entitled to receive a portion of the corporation's assets, after its liabilities are discharged, as determined by the Articles of Incorporation. When the corporation is ultimately dissolved, its issued shares will be cancelled.

On the windup of Subco, whether it is a subsidiary wholly-owned corporation or not, but otherwise qualifies under subsection 88(1), Parentco will be deemed to have disposed of its shares of Subco for proceeds of disposition equal to the amount determined using the same formula as on an amalgamation of Parentco with a subsidiary wholly-owned corporation and be subject to a potential capital gain as discussed above.[70] The property distributed to Parentco will be subject to the rollover provisions discussed above.

Subsection 88(1) does not allow a minority shareholder to be "cashed-out" on a tax-deferred basis. On a qualifying windup that includes a minority shareholder, Subco is deemed to have disposed of the property distributed to the minority shareholder at fair market value, which means Subco will realize gains or losses on distribution.[71] Whatever the minority shareholder receives will be treated as proceeds of disposition for the Subco shares and a gain or loss will be realized on the disposition.[72]

Paid-Up Capital

Amalgamation

On the amalgamation of Parentco and Subco, where Subco is a subsidiary wholly-owned corporation, the shares of Subco are cancelled and the shares of Parentco become the shares of Amalco, with no corresponding increase in the legal stated capital. The PUC of all the classes of shares of Amalco will therefore be the equal to the PUC of Parentco immediately before the amalgamation.[73]

On any other amalgamation where an increase in legal stated capital is not otherwise prohibited by corporate law, the PUC of Amalco will be restricted to the combined PUC of Parentco and Subco.[74] This PUC "grind" is deducted proportionately from each class of Amalco shares and could result in a deemed dividend to the shareholders in certain situations.

It is possible to "shift" PUC among the shareholders on an amalgamation not involving a subsidiary wholly-owned corporation.[75] CCRA's view is that "in and by itself, the fact that a shareholder exchanges shares of a predecessor corporation for shares of the new corporation having a paid-up capital in excess of or below the paid-up capital of the former shares will not attract application of subsections 15(1), 84(1), 84(4) or 245(2). Further, the provisions of section 84 will not apply to deem a dividend to have been paid or received by virtue of an amalgamation to which section 87 is applicable."[76] For example, a PUC shift would be useful in certain minority squeeze-outs where the minority shareholder would prefer capital gains treatment to a dividend.[77] CCRA could object to the shifting of PUC in situations where PUC is shifted primarily for the benefit of certain corporate and non-resident shareholders and where the recovery of tax is significantly reduced.[78]

Windup

On the windup of Subco, whether it is a subsidiary wholly-owned corporation or not, but otherwise qualifies under subsection 88(1), the shares of Subco are cancelled and there is no adjustment to the PUC of Parentco's shares.[79] There is no deemed dividend to the shareholders on a winding-up to which subsection 88(1) applies.[80]

Taxation Year

Amalgamation

Parentco and Subco's taxation year is deemed to end immediately before the amalgamation and final tax returns must be filed for both corporations. Amalco is deemed to be a new corporation with its taxation year commencing at the time of the amalgamation.[81] Amalco is free to select a new taxation year that ends not more than 53 weeks after the date of amalgamation without the concurrence of CCRA.[82]

If a short taxation year results on the deemed year-end for either Parentco or Subco, the following tax consequences should be considered when contemplating the amalgamation:

- Income inclusions for shareholders on outstanding loans under subsection 15(2) are accelerated;
- Income inclusions for unpaid amounts under subsection 78(1) are accelerated;[83]
- Deductions for cumulative eligible capital ("CEC"), capital cost allowance ("CCA") and certain resource deductions are pro-rated;[84]
- The business limit is pro-rated for short taxation years; and
- The short taxation year will count as a full carryover year in respect of non-capital losses, restricted farm losses, farm losses and allowable investment losses reverting to capital losses.[85]

Amalgamating a shell company with an operating company to circumvent obtaining Ministerial concurrence for a change in taxation year-end is viewed by CCRA as a misuse of subsection 87(1) and in such circumstances the general anti-avoidance rules ("GAAR") would be applied.[86] It has been argued that GAAR should not apply in circumstances where a valid business reason exists for using subsection 87(2) to trigger a taxation year-end.[87]

Windup

There is no deemed taxation year-end for either Parentco or Subco on the windup of Subco. Subco will continue to exist and be required to file tax returns for its regular taxation year until a certificate of dissolution is issued. Subco will file a final tax return up to the date of the certificate of dissolution.

Trade Receivables from Third Parties

Amalgamation

Parentco and Subco would not report a disposition of trade receivables in the tax return of their respective deemed year-end. The cost amount of the receivables flows through to Amalco[88] for the purposes of calculating potential capital gains or losses on any subsequent dispositions,[89] and for the purposes of calculating reserves for doubtful accounts and deductions for bad debts subsequent to the amalgamation, discussed below.[90]

Windup

On a windup, Subco is deemed to have *disposed* of its trade receivables for their cost amount[91] and Parentco is deemed to have *acquired* the receivables for the same amount.[92] Subco would report a disposition of trade receivables in its tax return in the taxation year that includes the windup, generally realizing no gain or loss. The treatment of allowances for doubtful debts and bad debts on a windup is also discussed below.[93]

Prepaid Expenses and Matchable Expenditures

The limitation on the deductibility of prepaid expenses[94] and matchable expenditures[95] flows through to Amalco on an amalgamation,[96] and to Parentco on a windup.[97] On an amalgamation, if either predecessor corporation was denied a deduction under these provisions, Amalco will be entitled to a deduction in the year in which the outlay relates, notwithstanding that Amalco did not pay the amount. On a windup, Subco is not entitled to deduct any amount in respect of prepaid expenses or matchable expenditures in the taxation year that includes the windup. Parentco is entitled to deductions for prepaid expenses and matchable expenditures in taxation years commencing after Subco is wound-up.

Inventory

Amalgamation

Amalco is deemed to have *acquired* inventory from a predecessor corporation at the beginning of its first taxation year. The opening cost of inventory to Amalco is the value used to compute the predecessor's income in its last taxation year.[98] CCRA's view is that this opening cost represents Amalco's acquisition cost for the purpose of the lower of cost or fair market value test in subsection 10(1) (i.e. the original cost to the predecessor does not flow through).[99] CCRA considers that Amalco "has the right to choose any inventory valuation methodology permitted by subsection 10(1). However, the amalgamated corporation must use a method for determining the cost or fair market value of its inventory (i.e. FIFO, average cost, etc.) which yields a true picture of its profit."[100] This is a reversal of CCRA's previously published position. CCRA caveats its current position by stating: "in circumstances where an amalgamation is undertaken principally to effect a change in an inventory valuation method used by a predecessor corporation, we would consider the application of the general anti-avoidance rule."[101]

Amalco can claim a deduction in its first taxation year for the amount of an inventory allowance in respect of depreciation, obsolescence or depletion included in the income of a predecessor corporation in its last taxation year.[102]

Windup

Subco is deemed to have disposed of its inventory for proceeds equal to its cost amount, which is defined in the Act as the value determined for the purpose of computing Subco's income.[103] This amount is the lower of cost or fair market value, or fair market value where that method is chosen under the Regulations.[104] Subco will have to adjust the cost amount of its inventory immediately before it is distributed to Parentco[105] using its previously adopted valuation method,[106] which may result in an income inclusion or deduction. Although there is no deemed taxation year-end on a windup, the definition of cost amount as it applies to inventory on a windup achieves the same result. The actual distribution of inventory is inherently reported on Subco's tax return in the taxation year of the distribution, using the adjusted value resulting in no net tax consequence.

Parentco's opening cost of inventory received from Subco is equal to Subco's cost at the time the inventory is distributed.[107]

Partnership Interests

Amalgamation

The tax treatment of partnership interests on an amalgamation will depend on whether the predecessor corporation(s) and Amalco are related.[108] If the predecessor corporation is related to Amalco, the cost of the partnership interest to the predecessor corporation is deemed to be the cost to Amalco. Any negative ACB of the partnership interest will flow through to Amalco and will only be realized on any subsequent disposition by Amalco.[109] However, if the predecessor corporation and Amalco are not related, the predecessor corporation will realize a gain in its final taxation year on any negative ACB balance of a partnership interest.[110] Having the predecessor corporation make capital contributions to the partnership before the amalgamation could eliminate any negative ACB consequences.

Members of a limited partnership, with limited exceptions under the related grandfathering rules,[111] are required to bring negative ACB into income as a capital gain at the end of the limited partnership's fiscal period.[112] Amalco would realize a capital gain post-amalgamation equal to the negative ACB of its limited partnership interest unless the grandfathering rules otherwise still applied. [113]

CCRA's view is that that "where a Canadian partnership ceases to exist because of an amalgamation involving one or more of the corporate partners, subsection 98(5)[114] will not be applicable to provide a rollover" where Amalco carries on the business of the former partnership.[115] CCRA points out that this problem can be avoided by dissolving the partnership prior to amalgamation relying on the rollover provision in subsection 98(3).[116] A detailed discussion of this rollover provision is beyond the scope of this paper; however, it is important to note that tax can be inadvertently triggered on partnership interests in certain situations, but it can be avoided through careful planning.

Windup

A partnership interest distributed by Subco to Parentco on a windup is deemed not to be a disposition by Subco.[117] This provision relieves Subco from realizing a capital gain on the distribution of a partnership interest with a negative ACB and flows the negative ACB to Parentco for any subsequent dispositions, as discussed on an amalgamation above.[118]

However, where Parentco and Subco are the only members of the partnership, the partnership would cease to exist at law. In this case, Subco would be deemed to have disposed of its partnership interest to Parentco for the purposes of the rollover provisions in subsection 98(5).

Other Non-Depreciable Capital Property

Amalgamation

Amalco is deemed to have *acquired* other non-depreciable capital property, such as land and shares of non-predecessor corporations, at the ACB of the property of the predecessor corporation immediately before the amalgamation.

On an amalgamation of a subsidiary wholly-owned corporation,[119] the cost base of certain non-depreciable capital property held by Subco can be increased or bumped by an amount determined by formula. The bump is discussed below.

Windup

On a windup, Subco is deemed to have disposed of interests in non-depreciable capital property for proceeds equal to its ACB, determined immediately before the property is distributed to Parentco, realizing no gain or loss for tax purposes. On the winding-up, property could be distributed before and after Subco's regular taxation year-end.

Parentco picks up Subco's ACB for the purposes of calculating any future gains or losses. Parentco can bump certain non-depreciable property acquired from Subco on the windup. The bump is calculated under paragraph 88(1)(d) and is discussed below.

Depreciable Capital Property

Amalgamation

The capital cost and undepreciated capital cost ("UCC") of depreciable capital property held by Parentco and Subco flow through to Amalco for the purposes of calculating CCA, recapture and terminal loss.[120] The amounts from both predecessor corporations are added together to form the opening UCC balances on Schedule 8 of Amalco's first tax return.

The original UCC class in which a particular asset resided in a predecessor corporation *may* also flow through to Amalco.[121] For example, Parentco may have a building that is included in Class 1, whereas Subco may have buildings in Class 3. There is a clear advantage to being able to flow through the prescribed class post-amalgamation and claim higher CCA in this example.

If Amalco's first taxation year is less than 365 days, this CCA claim must also be prorated for short taxation years.[122] The "half-year rule" for CCA claims will not apply to Amalco in its first taxation year if the predecessor corporation and Amalco owned the property continuously for a period of at least 364 days before the end of Amalco's first taxation year.[123]

CCRA takes the position that Amalco may make CCA revisions in respect of either predecessor corporation as long as the criteria for making CCA revisions is otherwise met.[124]

Parentco and Subco may claim CCA in their last taxation year before the amalgamation, but they do not report a disposition of property in Schedule 8 of their final return (i.e. no terminal loss or recapture is reported). If their last taxation year is less than 365 days, their CCA claims must be pro-rated.[125]

Windup

CCRA's position on CCA claims by Subco on the winding-up is as follows:

> "The subsidiary cannot claim capital cost allowance in the taxation year during which its depreciable property is distributed to the parent as it no longer owns depreciable property at the end of that taxation year. If a taxation year of the subsidiary ends after the commencement of the winding-up but before the distribution of depreciable property of a class, capital cost allowance may be claimed in that particular year."[126]

The disposition of the depreciable assets would be reflected in Subco's tax return, in the taxation year in which the particular assets are distributed to Parentco. No recapture, capital gain or terminal loss is realized. Parentco would reflect the acquisition of the assets and claim CCA on its tax return in the taxation year in which it received the assets from Subco. If the half-year rule would have otherwise applied to Subco in respect of CCA claims, it will also apply to Parentco.

CCRA suggests in its Information Circular dealing with revisions of CCA claims, that Parentco could make revisions to Subco's prior year CCA claims.[127] The amendment of tax returns could prove difficult if Subco has been legally dissolved. A revival procedure is available, but would unattractive if the only purpose is to amend returns. One is well advised to deal with these issues prior to filing articles of dissolution for Subco.

Resource Property

Amalgamation

On a vertical or horizontal amalgamation of a subsidiary wholly-owned corporation(s), under the extended definition,[128] Amalco is deemed to be the same corporation as and a continuation of each predecessor corporation for the purposes of the successor rules and the calculation of resource deductions.[129] Thus the successor rules would not apply to Amalco post-amalgamation.[130] The predecessors' resource expenditure pools are combined to form Amalco's opening pool balances. Amalco can claim resource deductions, as otherwise permitted by the Act, in its first taxation year.

The deeming provision does not affect the determination of any predecessor corporation's fiscal period, taxable income or tax payable, which means that the predecessor corporations are entitled to claim resource deductions, as otherwise determined in the Act, in their final taxation year.[131]

CCRA's view is that "in an amalgamation to which section 87 applies, resource properties are considered to become property of the new corporation and no disposition occurs."[132]

Windup

On a windup, Subco is deemed to have disposed of its Canadian Resource property, foreign resource property and rights to receive production, for proceeds equal to nil.[133] Parentco is deemed to be the same corporation as and a continuation of Subco; therefore, the successor rules do not apply to Parentco.[134] Subco's resource expenditure pools are added to Parentco's opening pool balances in the year of distribution. Parentco can claim resource deductions, as otherwise allowed in the Act, in respect of Subco's resource expenditure pools in the year the balances are transferred. However, Subco is not entitled to any resource deductions in the year the balances are distributed to Parentco.

Eligible Capital Property

Amalgamation

The predecessor corporations are entitled to a CEC deduction in their final taxation year;[135] however, as noted above, CEC deductions are pro-rated for short taxation years. The 2000 Budget added the pro-ration of CEC deductions for short taxation years for taxation years beginning after December 21, 2000, thereby eliminating the opportunity to double-up on CEC deductions on an amalgamation.

Amalco is deemed to be the same corporation as and a continuation of each predecessor corporation for the purposes of income inclusions, deductions and subsequent recapture and dispositions of eligible capital property.[136] The CEC balance of the predecessor corporations, net of the amounts claimed by the predecessor corporations in their final taxation year, flows through to Amalco and is added to the opening balance on Schedule 10.

Windup

Subco is deemed to have disposed of its eligible capital property for proceeds equal to 4/3 of the balance of the CEC pool, immediately before the distribution, which is generally the balance in Schedule 10.[137] Subco cannot claim a CEC deduction in the year of distribution, except as permitted by CCRA, "where the subsidiary carried on business in the year of winding-up and had a balance in its cumulative eligible capital account immediately before the winding-up but did not have any eligible capital property (e.g., the only eligible capital expenditure of the subsidiary was incorporation expenses), the subsidiary could deduct the balance under paragraph 24(1)(a) in the taxation year in which it wound up and thus ceased to carry on business."[138]

Parentco adds to its CEC balance the deemed proceeds to Subco. Parentco may claim a full deduction in its taxation year in which the property is *acquired* from Subco on the distribution. On a subsequent disposition, Parentco will realize the same recapture that Subco would have realized.[139]

Reserves

Amalgamation

The Act provides for the continuity of treatment of reserve for doubtful or impaired receivables and deduction for bad debts to Amalco.[140] Either predecessor corporation can claim a deduction for bad debts or a reserve for doubtful or impaired receivables in its final taxation year. Amalco is deemed to have deducted, in the year preceding its first taxation year, any reserve and bad debt that was deducted by a predecessor corporation in its last year.[141] Therefore, Amalco will include in income the amount of any reserves previously deducted by a predecessor corporation in its first taxation year. Amalco will also include in income the recovery of bad debts previously deducted by a predecessor corporation in the taxation year the amount is recovered. Amalco can claim a new reserve for doubtful debts and a deduction for bad debts in respect of accounts receivable of a predecessor corporation in its first taxation year.

The rules applicable to the continuity of reserves for doubtful or impaired receivables also apply to reserves for unpaid amounts,[142] reserves in respect of certain future goods and services, manufacturer's warranty reserves, amounts paid for undertaking future obligations[143] and reserves for capital gains and replacement property.[144] There are certain reserves that are not covered by the continuity rules, such as: reserves for quadrennial survey,[145] bad debts from dispositions of depreciable property,[146] bad debts from disposition of timber resource property,[147] and bad debts from dispositions of eligible capital property.[148]

Windup

On a windup, Subco may claim any reserve in the taxation year its assets were distributed to Parentco.[149] Any reserve claimed by Subco in this situation is not included in its income in the taxation year, if any, following the year of distribution. The treatment of reserves and bad debts to Parentco after a windup is identical to the treatment applicable to Amalco on an amalgamation, as discussed above.

Inter-Predecessor Debt and Trade Receivables

Amalgamation

Debt and unpaid interest owing from Subco to Parentco is deemed settled immediately before the time that is immediately before the amalgamation by a payment made by Subco to Parentco equal to Parentco's cost amount of the debt.[150] No election is required to have this provision apply. Where the cost amount of the debt to Parentco is equal to the principal amount of the debt owing by Subco, there would be no forgiven amount; thus, the tax attributes of Subco would not be reduced by any debt forgiveness. However, if the cost amount of the debt to Parentco were less than the principal amount of the debt owing by Subco (for example if Parentco acquired the debt from a third party at a discount), a forgiven amount would reduce the tax attributes of Subco and possibly trigger an income inclusion for Subco. These provisions also apply to debt owing from Parentco to Subco.

Where Parentco has taken a bad debt deduction in respect of the entire amount of a trade receivable from Subco, CCRA's view is that Parentco is deemed to have disposed of the trade debt for proceeds equal to nil.[151] Parentco will not realize an income inclusion on the amalgamation. However, given that the deemed proceeds are nil and the face value of the trade debt is greater than nil, CCRA's view is that Subco will realize a forgiven amount and its tax attributes will reduced accordingly. Presumably, the results to Parentco and Subco are identical when the situation is reversed.[152]

Windup

Where debt and unpaid interest is owing to Subco from Parentco, the debt will be settled on a windup because Parentco will become both the debtor and creditor in respect of the debt. A forgiven amount will result and the debt forgiveness rules will apply where the debt is settled for nil consideration or for consideration that is less than the principal amount of the debt owing by Parentco. However, an election[153] may be filed to have the debt deemed settled for a payment equal to the cost amount of the debt to Subco determined immediately before the distribution to Parentco.[154] Upon making the election, where the cost amount of the debt to Subco is equal to the principal amount of the debt owing by Parentco, there would be no forgiven amount; thus, the tax attributes of Parentco would not be reduced by the debt forgiveness rules. However, if on making the election the cost amount to Subco were less than the principal amount of the debt owing by Parentco (for example if Subco acquired the debt from a third party at a discount), a forgiven amount would reduce the tax attributes of Parentco and possibly trigger an income inclusion for Parentco. These provisions also apply to debt owing from Subco to Parentco.

Losses

Amalgamation

Non-capital losses, net capital losses, restricted farm losses, farm losses and limited partnership losses of Parentco and Subco can be utilized by Amalco commencing in its first taxation year after the amalgamation.[155] The losses of Parentco and Subco will carry forward as otherwise determined in the Act. On an amalgamation of Parentco and Subco, where Subco is a subsidiary wholly-owned corporation under the extended definition,[156] Amalco can carry back losses to Parentco's prior taxation years.[157]

Windup

Non-capital losses, net capital losses, restricted farm losses, farm losses and limited partnership losses of Subco cannot be utilized by Parentco until the first taxation year commencing after the windup.[158] CCRA's view is that Parentco cannot use non-capital losses of Subco until Subco is formally dissolved. When Subco is formally dissolved, non-capital losses can be applied to reduce taxable income in Parentco's first taxation year commencing after the windup.[159] Parentco can elect to have losses incurred by Subco in the year of its winding-up as having arisen in Subco's preceding taxation year.[160] This allows Parentco to utilize losses earlier than it otherwise would have been permitted.

Capital Dividend Account

Amalgamation

The capital dividend account ("CDA") balances of all predecessor corporations, assuming that Parentco, Subco and Amalco are private corporations at all relevant times, are combined to become the CDA balance of Amalco.[161] If Parentco has positive CDA and Subco has negative CDA, Parentco should consider paying out its CDA before the amalgamation. Amalco will then have a negative CDA, which must be brought to a positive amount before any subsequent capital dividends can be paid. Due diligence should be undertaken to ensure that the CDA anti-avoidance provision that recharacterizes payments of capital dividends as taxable dividends does not apply.[162] See the discussion below related to CDA when there is a change in corporate status.

Windup

Mirroring the consequences of an amalgamation, the CDA of Subco on a windup is combined with the CDA of Parentco.[163] Subco's CDA balance immediately before it is wound-up is added to Parentco's CDA and available for payout immediately after dissolution. Parentco could pay out a capital dividend immediately before the commencement of the winding-up to ensure that there is not a netting of its positive CDA with any negative CDA of Subco. Parentco would then begin its post-windup existence with negative CDA. Again, caution should be taken to ensure that the CDA anti-avoidance provision discussed above does not apply.

Refundable Dividend Tax on Hand

Amalgamation

If Parentco and Subco are private corporations during their final taxation year and Amalco is a private corporation immediately after the amalgamation, the refundable dividend tax on hand ("RDTOH") balances of Parentco and Subco are added together to become the opening balance of Amalco.[164] Due diligence should be undertaken to ensure that the anti-avoidance provision related to RDTOH is not applicable to dividends paid by the predecessor corporations immediately before the amalgamation.[165]

Windup

The tax consequences of RDTOH on a windup are identical to those on an amalgamation in that the RDTOH of Subco, in excess of dividend refunds at the end of Subco's taxation year during which its assets were distributed to Parentco, is added to the RDTOH of Parentco at the end of Parentco's taxation year during which it received the assets of Subco on the winding-up.[166]

Corporate Status Issues

When contemplating an amalgamation, consideration should be given to the consequences resulting from a change in the status of the corporations for tax purposes post-amalgamation.

On the amalgamation of a public corporation and one or more private corporations, Amalco will be a public corporation.[167] As a consequence, access to RDTOH and to the CDA would be lost.[168] Prior to amalgamation, the private corporation(s) should consider paying a taxable dividend sufficient to claim a refund of RDTOH and the balance of any CDA should be paid out.

Combining corporations could cause the Amalco shares to fail the 24-month fair market value asset test of a qualified small business corporation share. If so, an amalgamation of Parentco and Subco could result in the potential loss of the enhanced $500,000 capital gains exemption.[169] Certain planning steps could be undertaken to mitigate this problem, such as crystallizing the exemption prior to the amalgamation. A discussion of these is beyond the scope of this paper.[170] Similarly, an amalgamation could cause Amalco to fail the 12-month fair market value test of a small business corporation. This could result in the loss of allowable business investment loss treatment on Amalco shares and debt.[171]

Acquisition of Control

There are a number of considerations when an amalgamation or a windup is being contemplated when there has been a prior acquisition of control of the subsidiary corporation.

- Consideration should be given to the potential net increase in federal large corporations tax[172] and provincial capital tax resulting from the combination.[173] The increase in capital taxes may exceed the benefit of obtaining the bump. Planning can be undertaken reduce this risk.[174]
- The restrictions on the deductibility of non-capital losses after an acquisition of control will continue to apply to Amalco[175] post-amalgamation, and to Parentco[176] after a windup.
- CCRA recently confirmed its position that where there is an acquisition of control of Subco and it is amalgamated with Parentco on the same day, Subco will only have one deemed taxation year in cases where no subsection 256(9) election is made and no time is specified on the articles of amalgamation.[177]

PARAGRAPH 88(1)(d): THE BUMP

The bump has been in existence for a long time – since 1972. Paragraph 88(1)(d) has been refined since its introduction, but not substantially changed. In principle, the bump is a fairly simple concept and for the most part, the technical rules that support it are as well. Essentially, where a taxpayer undertakes to wind up a subsidiary where subsection 88(1) applies, or undergoes an amalgamation with a subsidiary wholly owned corporation[178] where the parent had previously acquired control of that subsidiary, paragraph 88(1)(d) provides the ability to shift the parent's tax basis, or a portion thereof, in the subsidiary's shares to certain property of the subsidiary that become assets of the parent as part of the merger.[179] Thus, the bump allows the parent to preserve some of the economic value of the investment in tax basis of the subsidiary shares and gain advantage when the "bumped" assets are sold in the future for a smaller gain than would otherwise be the case.

With all good things, there are limitations and restrictions. Paragraph 88(1)(d) provides the rules for computing the amount that is available for designation as the bump. The primary restriction, though, arises in paragraph 88(1)(c) which defines the cost of the property that is received by the parent by virtue of the merger, including the bump, as well as circumstances and property to which the bump cannot be applied. This latter point makes reference to "ineligible property,"[180] which is discussed below.

How Does the Bump Work?

The bump is available on a windup to which subsection 88(1) applies and on a vertical short form amalgamation.[181] In essence, subsection 88(1) deems Parentco's cost of the assets to be equal to the deemed proceeds of Subco (i.e. cost to Subco of those assets). One exception is in respect of non-depreciable property where a bump is potentially available.[182]

The conditions required to qualify for the bump include:

- The property must have been owned by the subsidiary at the time the parent last acquired control of the subsidiary and owned by it without interruption until such time as it was distributed to the parent;
- The property must not be ineligible property (discussed later);
- The property must be distributed to the parent; and
- The parent must designate the bump in respect of each applicable property in its tax return for the year in which the subsidiary is wound up or in the parent's first year after the amalgamation, if subsection 87(11) applies.

If these conditions are met, Parentco will be able to increase the tax basis of eligible property such as land and shares of subsidiary corporations held by Subco, subject to the ineligible property tests.

The calculation of the bump, generally is as follows:

ACB of Parent's shares of the subsidiary, immediately before the winding up[183]		A	______
Cost amount of property, including cash of subsidiary, before the winding up[184]	+		
Debt and obligations of subsidiary, before the winding up[185]	-		
Reserves deducted in computing subsidiary's income in the year of winding up (subject to adjustment)[186]	-		
Taxable & capital dividends received by parent in respect of shares of the subsidiary[187]	+		______
		B	______
Excess Amount (A-B)		C	______
FMV of property when parent last acquired control of subsidiary[188]		D	
ACB of subsidiary's property immediately before the winding up[189]	-	E	______
Maximum bump on specific asset (D-E)		F	______
Designated Bump (Minimum of C and F)			______

As an example, assume Subco owned land with a cost of $500 and a fair market value of $1,500 when Parentco acquired shares of Subco. Parentco's cost for the Subco shares is $1,800.

At the time of windup, Subco's tax balances include $200 cash, other assets of $2,000, including the land, liabilities of $1,500 and dividends paid to Parentco of $500. In this example, Parentco would be able to bump the cost of the land from $500 to $1,100, being limited by the net asset test (item C above).

When is Control Acquired?

As part of the required tests, one must identify the point in time when control of the subsidiary is acquired. Paragraph 88(1)(d.2) provides that where the acquirer acquired control of the subsidiary from a non-arm's length vendor, the acquirer is deemed to have last acquired control generally when the vendor last acquired control of the subsidiary. This can have the effect of reducing the amount of bump that is available to the non-arm's length purchaser given that the fair market value of the property when the non-arm's length vendor originally acquired control may be substantially lower than it would be today.

Another issue impacting when control is acquired is whether parties are considered to be acting in concert. As an example, assume that the purchaser would like the vendor to set up certain assets in a holding company so that it may take advantage of the bump after it acquires the shares of the holding company. If the purchaser and vendor are considered to be acting in concert, then it is possible that paragraph 88(1)(d.2) will deem the purchaser's time of acquisition to be that of the vendor's. One must be careful to assess whether the parties are truly acting in concert or independently, given the facts at hand.[190]

What are "Ineligible Properties?"

The definition of ineligible property in paragraph 88(1)(c) was originally quite simple, but has now become an extremely complex provision by virtue of the introduction of the "backdoor butterfly" rules in the February 22, 1994 budget. The provision has been under constant change since then.[191] These rules were designed to prevent a taxpayer from accomplishing the same result as if it had been able to do a purchase butterfly, which was also severely curtailed with the revisions to Section 55 as part of that budget.

There have been many attempts to refine the rules but this has only added complexity because of layered definitions, double negatives and the like. One author has referred to the series of changes in subparagraph 88(1)(c)(vi) as being akin to the rules having undergone radical surgery since 1994.[192] The Department of Finance has recognized the complexity that it has generated and the fact that it has had difficulty in properly drafting the limitations within their own intent. In this regard, Finance has issued comfort letters that recommend future amendments to the legislation when an unintended result arises from a drafting issue for which a taxpayer should not be penalized.[193] Two of the noted comfort letters resulted in recent technical amendments.[194]

Of course, comfort letters do not have the force of law, so there is some measure of risk in relying on them to complete a transaction. Until the proposed amendment is passed into law, CCRA must apply the Act and regulations as they are written. If you or your clients wish to proceed with a transaction in reliance on a comfort letter, keep in mind that the technical amendment will need to be retroactive to cover your transaction.

Should you be concerned if the recommendation is not included in the very next set of technical amendments? You may wish to inquire as to the source of the delay. Perhaps the

Department of Justice does not agree with Finance's recommendation. On the other hand the amendment could simply be a low priority, or involve a difficult drafting issue.

The authors are not aware of any situation in which a taxpayer has relied on a comfort letter and later been reassessed on the basis that the law applicable to the taxpayer was not amended or interpreted in accordance with the comfort letter.[195] One would expect that a fairness application in respect of interest and penalties in respect of such a reassessment would be favourably received by the Minister. Given the typical wording of the letters, however, an argument that the reassessment of tax itself ought to be reversed would be difficult.

There are four types of ineligible property.[196] The first three are relatively easy to understand. Generally, they are depreciable property, property transferred to the parent as part of a subsection 55(3)(b) butterfly internal reorganization, and property that the subsidiary acquired from the parent or a person not dealing at arm's length with the parent. This latter item is required to prevent the parent from "stuffing" the subsidiary with "bumpable" assets prior to acquiring control of the subsidiary.

In its simplest form, subparagraph 88(1)(c)(vi), the fourth type of ineligible property, was designed to prevent a vendor from selling a package of properties including shares of a subsidiary, followed by the purchaser then performing a windup of that subsidiary, designating a bump on select capital assets of the subsidiary, and then selling those select assets back to the original vendor creating little or no tax on the sale back because of the stepped up basis. Through this mechanism, the original vendor may have increased its cost basis on assets that it effectively retained, without an incidence of tax. Where those assets are sold back to the original vendor or a party related to it, the bump will be denied not only on the property sold back to the vendor, but also on <u>all</u> property that was subject to the bump. This can have significant consequences to the purchaser where the intent was to bump certain assets and sell them to genuine arm's length parties.

The following will provide an appreciation of the intricacy of the bump denial rules.[197] For an in-depth review of the issues, see the specific papers that have dealt with the topic on a detailed basis.[198]

Assume the following in order to follow through the logic of the provision: Parentco owns 100% of the shares of Holdco, which owns a business and marketable securities. Buyco wants to acquire the business. Also assume that Parentco's cost basis in the Holdco shares is high. Parentco sells Holdco to Buyco. Buyco winds up Holdco and designates in its tax return a bump of the cost of the marketable securities. Buyco then sells those marketable securities back to Parentco.

Walking through the provisions of subparagraph 88(1)(c)(vi), we see that it would have application and deem the marketable securities to be an "ineligible property":

i. Property (marketable securities) was distributed to the parent (Buyco) on a windup as part of a series of transactions that includes the windup;
ii. Buyco acquired control of Holdco as part of the series; and
iii. Property distributed (marketable securities) to the parent (Buyco) or any other property in substitution thereof was acquired by a particular person (Parentco) (other than a specified person, (Buyco)) that, at any time during the course of the series and before control of the subsidiary (Holdco) was last acquired by the parent (Buyco), was a specified shareholder of the subsidiary (Holdco).

Ultimately, because Parentco acquired the marketable securities from Buyco, as part of the series of events and it was a specified shareholder of Holdco prior to Buyco acquiring control of Holdco, Buyco's attempt to bump the cost of the marketable securities would be denied. This would then have the result of creating a gain on the sale of these securities for Buyco. As well, had Buyco sought to bump the tax basis of other capital property as part of its designation, this too would be denied.

The above is a very simplistic example. In practice, great care must be taken to understand the identity of all parties to the transactions and the details of the series of events commencing with the sale to Buyco all the way through to the bump and any subsequent dispositions of assets that were subject to the bump, as these facts will have bearing on the availability of the bump. The determination of which particular transactions or events fall within the series is complicated by matters such as the interpretation of the word "series" in and of itself, and because of subsection 248(10), which deems a series of transactions or events to include any related transactions or events completed in contemplation of the series. Further, one must review the definitions of specified shareholder, specified person, substituted property and specified property carefully with the facts in mind. The broadness of the wording of the provision will require one to confirm all the facts and to work through the details of the legislation.

Bump Denial Rules – Further Examples

As a final note, there are two good examples that we will reference for you. The first example deals with death of a shareholder. Where a shareholder of Opco dies, the estate would be taxed on the fair market value of the Opco shares, assuming no rollover provisions apply. The underlying assets in Opco are left with their low basis. One planning idea would be to have the beneficiary create Holdco. Holdco would then acquire the shares of Opco from the beneficiary on a rollover basis, keeping in mind the beneficiary's ACB of Opco shares are likely equal to fair market value. Holdco would then wind up Opco and bump the value of qualifying property of Opco. There have been a number of rulings in this regard that discuss whether or not the bump would be permitted.[199] While ultimately favorable rulings were provided, the wording of the provision could have disallowed the bump. A recent article[200] discussed the potential denial of the bump due to uncertainty as to when control was last acquired by Holdco, which is further complicated by the rules that would potentially throw this time back to when a non-arm's length party originally bought the shares.[201] It was noted that CCRA was still unclear as to their view on this matter. For planning purposes, an easy way to minimize any risk of this plan would be to have the estate itself transfer Opco to Holdco. A simple change in transaction flow should resolve the potential problem.

The second example deals with safe income strips. This is a somewhat standard planning tool when dealing with the sale of a business. The legislative intent is to provide for the tax-free extraction of safe income into a new holding company, while also permitting the use of the bump. The Department of Finance recently noted that technical concerns arose due to the shareholder structure where there exists a controlling shareholder and another significant shareholder (more than 10%).[202] Issues arose due to the deeming provisions regarding the significant shareholder being a notional specified shareholder[203] and the application of the substituted property rule.[204] The Department of Finance acknowledged their drafting deficiencies in this regard and issued a comfort letter[205] indicating that recommendations were being made to the Minister of Finance to rectify the anomalies.

The bottom line is "buyer beware" when it comes to dealing with the bump. Pay particularly close attention to knowing all the involved parties, defining your series of transactions and understanding what is happening with the property that is subjected to the bump.

SO, WHAT IS THE DIFFERENCE?

The best analogy is comparing snow in Edmonton and Calgary. In Edmonton, the snow on the ground in March is generally the same snow as and a continuation of the snow that fell in November. In Calgary, snow is distributed sporadically throughout the year and there is substantial evidence that the snow dissolves within a reasonable period of time by virtue of a Chinook or the fact that it fell in July. There is a difference in how and when the snow gets there and how long it takes to disappear, but in the end when there is snow on the ground in both cities it is white, cold and fluffy.

With the enactment of subsection 87(11), there are few differences in the tax results on an amalgamation with or the windup of a subsidiary wholly-owned corporation, except perhaps for CCA claims. However, there are significant differences in the application of the Act in obtaining these similar results, especially on an acquisition or when the subsidiary is not a subsidiary wholly-owned corporation. For example the 90 percent ownership requirement on a windup is not present on an amalgamation, which can facilitate a minority squeeze-out of up to one third of the shareholders of a target on an acquisition. A disadvantage to this type of minority squeeze out is the potential for a large cash pay-out to the dissenting shareholders. The bump provisions are a minefield of potential issues when considered on either an amalgamation or a windup; however, it is quite helpful in minimizing potential lost basis.

An amalgamation is much less "labour" intensive than a windup. On an amalgamation there is a legal continuation of the corporations whereas on a windup the subsidiary ceases to exist. There are many business issues associated with the conveyance of assets and the discharge of liabilities on windup, including notification of creditors and shareholders' resolutions, which ultimately can result in a windup taking much longer to effect than an amalgamation. On an amalgamation continuance is a relatively easy obstacle to overcome, whereas it is a non-issue on a windup. More compliance effort is required on a windup than on an amalgamation as evidenced by the requirement to obtain clearance certificates and the requirement to file elections for relief from the debt forgiveness rules and to utilize losses incurred by Subco in the year of winding-up.

Where it initially appears that a situation does not qualify for the benefits of an amalgamation or a windup, preliminary steps can be taken to ensure that the tax-deferred results can be achieved. Examples include the shifting of PUC on an amalgamation and making sure that PUC is not greater than ACB on a the windup of or an amalgamation with a subsidiary wholly-owned corporation. Steps such as paying out the CDA and ensuring a refund of RDTOH is obtained before a change in corporate status also come to mind.

Ultimately with solid due diligence and in many cases simple planning, the desired business objectives of a business combination can be achieved and the many potential traps and problems can be avoided.

APPENDIX “A”

Variations in Lapse Provisions
(Dissolution by Registrar or Director of Corporations)

	Corporation has not commenced business within 3 years of incorporation	***Corporation has not carried on / is not carrying on business***	***Corporation is in default of filing a required notice or document***	***Corporation is in default of payment of a fee***	***Corporation has no directors***
ABCA Section 213	Yes	Yes, after 3 consecutive years	Yes, after 1 year	No	No (This is recommended <u>not</u> to be adopted for Alberta)
SBCA Section 205	Yes	Yes, after 3 consecutive years	Yes, if corporate name is struck from the register and has not been restored within 2 years	No	No
MCA Section 205	No	Yes, where Director has reasonable cause to believe the corporation is not carrying on business or is not in operation*	Yes, after 2 years	Yes, with no specified default period	No
NWTBCA Section 214**	No	Yes, where Registrar reasonably believes the corporation has not carried on business for 3 years	Yes, after 1 year	Yes, with no specified default period	Yes, if so according to the most recent notice of directors
CBCA Section 212	Yes	Yes, after 3 consecutive years	Yes, after 1 year	Yes, after 1 year, or (despite anything in this section) if the incorporation fee is not paid	Yes, including where all directors have resigned without replacement

* Where the corporation notifies the Director that it is not carrying on business, the ordinary 90 day notice to the corporation of the Director’s decision to dissolve the corporation does not apply.
** Additional grounds for dissolution by the Registrar under the NWTBCA are where the corporation does not have a registered office address and where the corporation does not carry out an undertaking given in accordance with the regulations.

APPENDIX "B"

Fee Comparison

Action	*Alberta*	*Saskatchewan*	*Manitoba*	*Northwest Territories*	*CBCA*
Amalgamation	$100	$260	$250	$300	$250 ($200 on-line)
Continuance	$100	$260	$250	$300	$250 ($200 on-line)
Discontinuance	Nil	$260	$250	Nil	Nil
Extra-provincial registration	$100	$260	$250	$300	N/A
Dissolution	Nil	Nil	$35	Nil	$50 (Nil on-line)
Annual Return	Nil	$50	$40	$80	$40 ($20 on-line)
Name Search	$55	$50	$30	$25	$55

Notes

* The authors wish to thank Sean C. Dooley of Deloitte & Touche LLP for his tireless efforts in completing this paper.

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

2 Paragraph 88(1)(d).

3 For recent comprehensive papers addressing amalgamation and windups see Catherine A. Brayley, "Merging Companies: A Practical Checklist for Amalgamations and Windups," in *Report of Proceedings of Fifty-Second Tax Conference*, 2000 Conference Report (Toronto: Canadian Tax Foundation, 2001), 6:1-58; Robert A. Kopstein, "Current Developments Relating to Amalgamations and Winding Ups", *1996 British Columbia Tax Conference* 3:1-18; Andrew W. Dunn, "Corporate Consolidations: To Amalgamate or Not To Amalgamate?" in *Report of Proceedings of the Forty-Eighth Tax Conference*, 1996 Conference Report, vol. 1 (Toronto: Canadian Tax Foundation, 1997), 13:1-25; Gabrielle M.R. Richards, "Amalgamations," The Taxation of Corporate Reorganizations feature (1996), vol. 44, no. 1, *Canadian Tax Journal*, 241-259; Steven J. Roberts and Mark E. Briggs, "Winding-Up: Part 1," The Taxation of Corporate Reorganizations feature (1996), vol. 44, no. 2 *Canadian Tax Journal* 533-560; and, Alan M. Schwartz, "Statutory Amalgamations, Arrangements, and Continuations: Tax and Corporate Law Considerations," in *Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: Canadian Tax Foundation, 1992), 9:1-77. See also *Taxation of Corporate Reorganizations* (Toronto: Federated Press) (looseleaf), paragraphs 40 – 71.

4 *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended.

5 *Business Corporations Act*, R.S.S. 1978, c. B-10, as amended.

6 *The Corporations Act*, C.C.S.M. c. C225, as amended.

7 *Business Corporations Act*, S.N.W.T. 1996, c. 19, as amended.

8 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended.

9 ABCA Section 186, SBCA Section 180, MCA Section 180, NWTBCA Section 188, CBCA Section 186.

10 See "Short Form Dissolution Procedure", *infra*, for a discussion of issues surrounding this procedure and proposed amendments to the ABCA.

11 ABCA Section 214, SBCA Section 206, MCA Section 206, NWTBCA Section 215, CBCA Section 213.

12 ABCA Section 215, SBCA Section 207, MCA Section 207, NWTBCA Section 216, CBCA Section 214.

13 ABCA Section 212, SBCA Section 204, MCA Section 204, NWTBCA Section 213, CBCA Section 211. Note that NWTBCA paragraph 213(7)(d) permits the corporation to dissolve only after "discharging" its obligations, not simply "adequately providing for" payment or discharge.

14 ABCA subsection 211(2), SBCA subsection 203(2), MCA subsection 203(2), NWTBCA subsection 212(2), CBCA subsection 210(2).

15 ABCA subsection 211(1), SBCA subsection 203(1), MCA subsection 203(1), NWTBCA subsection 212(1), CBCA subsection 201(1). The SBCA, MCA and CBCA do not expressly require the corporation to have no property or liabilities to dissolve under these provisions. Practically, however, if a corporation has not issued any shares, it is unlikely (though not impossible) that it has any property or liabilities.

16 SBCA subsection 205(2), MCA subsection 205(2). ABCA subsection 213(2), NWTBCA subsection 214(2) and CBCA subsection 212(2) also require notice to be given to each director of the corporation. The NWTBCA requires 60 days notice, the MCA 90 days notice, and the ABCA, SBCA and CBCA require 120 days notice. Subsection 212(3.1) of the CBCA is an overriding provision permitting the Director to issue a certificate of dissolution (without notice) if the incorporation fee has not been paid.

[17] ABCA subsection 185(2), SBCA subsection 179(2), MCA subsection 179(2), NWTBCA subsection 187(2), CBCA subsection 185(2).

[18] ABCA section 187.

[19] NWTBCA section 189. Unlike Alberta, the NWT legislation does not exclude professional corporations from this provision.

[20] It is arguable that the combined effect of provisions relating to amalgamation and continuance are sufficient to imply the necessary permission; however, the language of the statutes is far from clear.

[21] ABCA Section 207, NWTCA Section 209. The NWTCA goes on to clarify that the stay only applies to voluntary proceedings, i.e. not a forced liquidation and dissolution.

[22] SBCA subsection 201(1), CBCA subsection 208(1).

[23] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, subsection 2(1).

[24] ABCA subsection 212(14).

[25] ABCA Section 207.

[26] Alberta Government Services, February 2003. The discussion paper is available at the Alberta Government Services website: www.gov.ab.ca/gs/depts/disc/papers_toc.cfm.

[27] ABCA subsection 211(2), SBCA subsection 203(2), MCA subsection 203(2), NWTBCA subsection 212(2), CBCA subsection 210(2).

[28] ABCA subsection 211(1), NWTBCA subsection 212(1). None of SBCA subsection 203(1), MCA subsection 203(1) and CBCA subsection 210(1) specifically refers to the corporation not having any property or liabilities. Practically, however, if a corporation has not issued any shares it is unlikely (though not impossible) that it has any property or liabilities.

[29] The discussion paper relating to this proposal also suggests that a shareholder could apply to dissolve the corporation. If the corporation has not issued any shares then such a provision should be unnecessary.

[30] All of the statutes reviewed permit an application to the Court for approval of an "arrangement," but only where it would be impractical to use the methods of amalgamation and dissolution, which are otherwise provided. The CBCA and MCA also preclude a Court-approved arrangement where the corporation is insolvent.

[31] But see the discussion of Section 187 of the ABCA under "Amalgamating with an Extra-Provincial Corporation," *supra*.

[32] For example, it is not possible to continue a corporation from Quebec to another jurisdiction.

[33] This provision is currently a proposed addition to the ABCA.

[34] ABCA paragraph 191(1)(c) and subsection 191(3), SBCA paragraph 184(1)(c) and subsection 184(3), MCA paragraph 184(1)(c) and subsection 184(3), NWTBCA paragraph 193(1)(c) and subsection 193(3), CBCA paragraph 190(1)(c) and subsection 190(3).

[35] In NWT, notice must only be sent to creditors with claims in excess of $2000.

[36] The value of any contractual indemnity depends upon the indemnitor's ability and will to pay. A director or officer of a dissolving subsidiary might be particularly concerned about the difficulty in enforcing an indemnity if his or her position will be made redundant as a result of the windup.

[37] Subsection 192(7) includes certain prescribed shares issued after May 22, 1985 and before 1987.

[38] Subsection 248(1), "subsidiary wholly-owned corporation."

[39] Subsection 87(1.4).

[40] Subsection 87(1.2).

[41] Subsection 87(2.11).

[42] In this paper, "Parentco and Subco," as predecessors to Amalco, are also referred to as "predecessor corporation(s)."

[43] As defined in subsection 248(1) or subsection 87(1.4). Unless otherwise indicated hereafter, references to "subsidiary wholly-owned corporation" is a reference to the definition in subsection 248(1).

[44] See Brayley, *supra* note 3, at 6:6 – 7, for a discussion of the consequences where an amalgamation does not qualify under section 87.

[45] Subsection 89(1), "taxable Canadian corporation."

[46] Subsection 87(1.1).

[47] ABCA subsection 191(14), and NWTBCA subsection 193(14) provide that rights cease upon the amalgamation becoming effective, or upon the shareholder and corporation agreeing as to the payment to be made for the dissenting shareholder's shares. SBCA subsection 184(11), MCA subsection 184(11) and CBCA subsection 190(11) all state that the shareholder's rights cease upon the shareholder sending a demand for payment to the corporation.

[48] See *Interpretation Bulletin* IT-474R, "Amalgamations of Canadian Corporations," March 14, 1986, at paragraph 8, and *Information Circular* IC 88-2, "General Anti-Avoidance Rule – Section 245 of the Income Tax Act," October 21, 1998, at paragraph 28.

[49] Subsection 84(3).

[50] CCRA document no. 4M09660, February 7, 1994, at question 56.

[51] Subsection 251(1).

[52] The last two criteria would never be applicable to a windup of a subsidiary wholly-owned corporation, but they have been included here for the sake of continuity in the discussion of minority shareholders *infra*.

[53] See *Interpretation Bulletin* IT-126R2, "Meaning of Winding-up", March 20, 1995, at paragraph 7. See also *Interpretation Bulletin* IT-488R2, "Winding-up of 90% - Owned Taxable Canadian Corporations," June 24, 1994, at paragraph 13.

[54] See IT-126R2, Ibid., at paragraph 3.

[55] Ibid., at paragraph 5. CCRA outlines criteria for meeting the "substantial evidence" test.

[56] See for example 87(2)(j.6) which provides for continuity in respect of 27 provisions in the Act, including share issue costs, investment tax credits, inducement payments and foreign tax credits. It is beyond the scope of this paper to address every single provision, however, the paper provides readers with an approach to interpreting these and other similar provisions not discussed in the paper.

[57] Paragraph 87(2)(a).

[58] Subsection 248(1), "cost amount."

[59] As defined by subsection 248(1) only.

[60] Subsection 69(13) and clause 88(1)(c)(ii)(A).

[61] Schwartz, *supra* note 3, at 9:23.

[62] As defined by subsection 248(1) only.

[63] Paragraph 87(11)(a). See also CCRA document no. 2001-0104355, November 1, 2002.

[64] Rectification is not a new legal concept. It has recently been applied in the tax context: see *A.G. of Canada v. Juliar*, 99 DTC 5743, affirmed 2000 DTC 6589 (Ont. C.A.), leave denied [2000] S.C.A.A. No. 621; *Dale v. The Queen*, 97 DTC 2525 (F.C.A.); *the Queen v. Sussex Square Apartments Ltd*., 2000 DCT 6548 (F.C.A.). A rectification order corrects an error, where the written document does not reflect the parties' actual agreement. It is not a method of avoiding the unintended result of a particular transaction. CCRA has taken a strict view of rectification orders, to ensure that they will not be used for retroactive tax planning.

[65] Paragraph 87(4)(a). Double tax could arise if the fair market value of the shares of Amalco is less than the combined fair market value of the shares of Parentco and Subco under paragraphs 87(4)(c) to (e).

[66] Subsection 87(4).

[67] Paragraph 87(4)(b).

[68] See subsection 248(1), "disposition," subparagraph (a)(iii) and CCRA document no. 9431755, January 31, 1995.

[69] See IT-474R, *supra* note 48, at paragraphs 38 and 39. CCRA's position in document no. 2002-0177163, December 20, 2002, is that a right under a shareholder rights plan, obtained by the Target shareholders on a triangular amalgamation in connection with the acquisition of a common share of Parent will not constitute 'consideration' other than a share for the purposes of subsection 87(4).

[70] Paragraph 88(1)(b).

[71] Paragraph 69(5)(a).

[72] The cancellation of a share is disposition under subsection 248(1), "disposition," subparagraph (b)(i). See also IT-488R2, *supra* note 53, at paragraph 46, "the minority shareholder's proceeds of disposition of the shares of the subsidiary will equal the fair market value of the property distributed on winding-up". The proceeds of disposition are not adjusted for a deemed dividend because under paragraph 88(1)(d.1), subsection 84(2) does not apply to a subsection 88(1) windup.

[73] In CCRA document no. 2002-0136985, September 9, 2002, CCRA has indicated that it will apply paragraph 9 of IT-474R (*infra* note 81) for the purposes of determining PUC in the thin capitalization rules in subsection 18(4). Where an "amalgamation took place on the first day of the calendar month, Amalco will have PUC and contributed surplus at the 'beginning' of the month for purposes of subsection 18(4)."

[74] Subsection 87(3).

[75] Subsection 87(3.1).

[76] See IT-474R, *supra* note 48, at paragraph 52.

[77] See IC 88-2, *supra* note 48, Supplement 1, July 13, 1990, at paragraph 9.

[78] Schwartz, *supra* note 3, at 9:51-52.

[79] IT-488R2, *supra* note 53, at paragraph 41.

[80] Paragraph 88(1)(d.1).

[81] Paragraph 87(2)(a). See also IT-474R, *supra* note 48, at paragraph 9: "The effective date of amalgamation is governed by corporate law and is generally the date of issuance of letters patent or the date shown or set forth in the certificate of amalgamation, as the case may be. The time of the amalgamation is the earliest moment on that date in the absence of a particular time specified in the certificate of amalgamation."

[82] See *Interpretation Bulletin* IT-179R, "Change in Fiscal Period," May 28, 1993, at subparagraph 5(e).

[83] See subsection 78(2) for the treatment of unpaid amounts on a windup.

[84] Paragraph 20(1)(b), Regulations 1100(3) and 1700(2), and subsection 66(3.1).

[85] Subsection 111(1).

[86] Subsection 249.1(7) and IC 88-2, *supra* note 48, at paragraph 21. See also Edwin G. Kroft, "Tax Avoidance Update," *2001 British Columbia Tax Conference*, (Vancouver: Canadian Tax Foundation, 2001), 3:1-31, at 3:4-5.

[87] See Schwartz, *supra* note 3, at 9:3.

[88] Paragraph 87(2)(h) and subsection 248(1), "cost amount."

[89] See *Interpretation Bulletin* IT-188R, "Sale of Accounts Receivable," May 22, 1984, at paragraph 7. See also David T. Tetreault, "Canadian Tax Aspects of Asset Securitization," in *Report of Proceedings of Forty-Fourth Tax Conference*, 1992 Tax Conference (Toronto: Canadian Tax Foundation, 1993), 23:1-32, at 23:14.

[90] See “Reserves,” *infra*.

[91] Paragraph 88(1)(a).

[92] Paragraph 88(1)(c)(ii).

[93] See “Reserves,” *infra*. See also IT-188R, *supra* note 89, at paragraph 9: “an election under section 22 is not available when debts are distributed to the parent on winding-up under the provisions of section 88 because a sale did not take place.”

[94] Subsection 18(9).

[95] Section 18.1.

[96] Paragraph 87(2)(j.2).

[97] Paragraph 87(2)(j.2), as modified by paragraph 88(1)(e.2).

[98] Paragraph 87(2)(b).

[99] CCRA document no. 9423775, January 31, 1995.

[100] CCRA document no. 1999-0010677, May 1, 2000.

[101] Ibid.

[102] Paragraph 87(2)(j.1).

[103] Subparagraph 88(1)(a)(iii) and subsection 248(1), “cost amount,” paragraph (c).

[104] Subsection 10(1) and Regulation 1801.

[105] See IT-488R2, *supra* note 53, at paragraph 13.

[106] See “Revenue Canada Round Table” in *Report of Proceedings of the Forty-Second Tax Conference*, 1990 Conference Report (Toronto: Canadian Tax Foundation, 1991), 50:1-68, question 40 at 50:21.

[107] *Supra* note 92.

[108] See subsections 251(3.1) and (3.2) for the definition of “related persons” as it pertains to an amalgamation.

[109] Paragraph 87(2)(e.1). In the absence of the exclusion in paragraph 40(3)(a), subsection 40(3) deems the negative ACB of a capital property to be a gain in the year in which the adjustments under 53(2) result in the negative ACB. The exclusion of paragraph 53(2)(c) deductions in paragraph 40(3)(a) and subsection 100(2) operate to deem the negative ACB of a partnership interest to be a gain only on a *disposition*.

[110] Subsection 100(2.1).

[111] The grandfathering rules that excepts certain members of limited partnerships from deemed gain realization.

[112] Subsections 40(3.1) and (3.15).

[113] CCRA’s view is that the grandfathering rules that except members of limited partnerships from deemed gain realization do not necessarily flow through to Amalco under of 87(2)(e.1), and in the case where Amalco and the predecessor corporation are related, “an amalgamation in and of itself, would not result in a realization of, or an income inclusion in respect of, any negative ACB of such predecessor corporation in respect of its interest in the partnership.” See CCRA document no. 2000-0001355, April 5, 2000.

[114] Subsection 98(5) allows Parentco to bump certain non-depreciable capital property prior to the dissolution of the partnership and thereby minimize capital gains and maximize capital losses.

[115] See IT-474R, *supra* note 48, at paragraph 53.

[116] Ibid.

[117] Paragraph 88(1)(a.2).

[118] CCRA's view on the windup of a wholly-owned subsidiary is that if the grandfathering rules (see *supra* note 113), "the winding-up of Subco into Parentco under subsection 88(1) of the Act should not, in and of itself, result in the application of subsection 40(3.1) of the Act. See CCRA document no. 9805795, November 4, 1998.

[119] *Supra* note 62.

[120] Paragraph 87(2)(d). This capital cost is not deemed to be the capital cost for determining future capital gains.

[121] See Daniel Sandler, "Character Rolls: Property Transfers and Characterization Issues," (1996), vol. 44, no. .3, *Canadian Tax Journal*, 605-679, at 658.

[122] Regulation 1100(3).

[123] Regulation 1100(2.2). See also IT-474R, *supra* note 48, at paragraph 14.

[124] See IT-474R, *supra* note 48, at paragraph 18.

[125] *Supra* note 122.

[126] See IT-488R2, *supra* note 53, at paragraph 16.

[127] See IT-488R2, *supra* note 53, at paragraph 17.

[128] As defined in subsection 87(1.4).

[129] *Supra* note 40.

[130] Paragraph 66.7(6)(a).

[131] *Supra* note 40.

[132] See *Interpretation Bulletin* IT-125R4, "Disposition of Resource Properties," April 21, 1995, at paragraph 5.

[133] Subparagraph 88(1)(a)(i).

[134] Paragraph 66.7(6)(a).

[135] See IT-474R, *supra* note 48, at paragraph 20.

[136] Paragraph 87(2)(f).

[137] Paragraph 88(1)(a)(ii) and subsection 248(1), "cost amount," paragraph (d). See also IT-488R2, *supra* note 53, at paragraph 10.

[138] See IT-488R2, *supra* note 53, at paragraph 11.

[139] Paragraph 88(1)(c.1).

[140] Paragraph 87(2)(h).

[141] Paragraph 87(2)(g).

[142] Paragraphs 87(2)(i) and (ll).

[143] Paragraph 87(2)(j).

[144] Paragraphs 87(2)(l.3), (m) and (ll).

[145] Paragraph 20(1)(o).

[146] Subsection 20(4).

[147] Subsection 20(4.1).

[148] Subsection 20(4.2).

[149] Paragraph 88(1)(e.1)

[150] Subsection 80.01(3). Cost amount for the purposes of this provision is the creditor's adjusted cost base of the debt.

[151] See IT-488R2, *supra* note 53, at paragraph 12. See also, the interaction of subparagraph 80.01(3)(c)(i) with subsection 248(1), "cost amount," paragraph (f).

[152] See CCRA document no. 9130405, June 3, 1992. See also *Interpretation Bulletin* IT-293R, "Debtor's Gain on Settlement of Debt," July 16, 1979, at subparagraph 19(e) and paragraph 25.

[153] See *Form T2027*: Election to Deem Amount of Settlement of a Debt or Obligation.

[154] Subsection 80.01(4).

[155] Subsection 87(2.1). "The utilization of losses are still subject to the restrictions in subsections 111(3) to (5.4) and paragraph 149(10)(d) as to the order and extent to which to losses are used and the effect of an acquisition of control," *Interpretation Bulletin* IT-302R3, "Losses of a Corporation – The Effect that Acquisition of Control, Amalgamations, and Winding-ups Have on Their Deductibility – After January 15, 1987," February 28, 1994, at paragraph 27.

[156] As defined in subsection 87(1.4).

[157] *Supra* note 41.

[158] Subsections 88(1.1) and (1.2). See Roberts and Briggs, *supra* note 3, at 555, for a detailed discussion on losses.

[159] See CCRA document no. 2001-0067105, March 19, 2001. See also, David M. Williamson and Sheryl Mapa, "Timing Issues in subsection 88(1) Wind-ups," *Corporate Structures and Groups* (Toronto: Federated Press, 2002), vol. VII, no.4, 391-396.

[160] See paragraph 88(1.1)(f) to elect in respect of non-capital losses, restricted farm losses, farm losses and limited partnership losses and paragraph 88(1.2)(d) to elect in respect of net capital losses. See also IT-302R2, supra note 155, at paragraphs 30 and 33.

[161] Paragraph 87(2)(z.1).

[162] Subsection 83(2.1).

[163] Paragraphs 88(1)(e.2) and 87(2)(z.1).

[164] Paragraph 87(2)(aa).

[165] Subsection 129(1.2). See also *Interpretation Bulletin* IT-243R4, "Dividend Refund to Private Corporations," February 12, 1996, at paragraph 6.

[166] Paragraphs 88(1)(e.2) and 87(2)(aa).

[167] Paragraph 87(2)(ii). See also subsection 248(1), "public corporation," "Canadian-controlled private corporation," and "private corporation."

[168] Only a private corporation can pay a capital dividend. See subsection 83(2) and *Interpretation Bulletin* IT-66R6, "Capital Dividends," May 31, 1991, at paragraph 2. Only a private corporation that pays a taxable dividend can claim a refund of RDTOH. See subsection 129(1) and *Interpretation Bulletin* IT-243R4, "Dividend Refund to Private Corporations," February 12, 1996, at paragraph 1.

[169] Subsection 110.6(1), "qualified small business corporation share" and subsection 110.6(2.1).

[170] See Andrew W. Dunn, "Mergers and Combinations of Businesses" in *Income Tax and GST Planning for the Purchase, Sale and Canada-US Expansion of a Business,* 1996 Corporate Management Tax Conference, (Toronto: Canadian Tax Foundation, 1996), 16:1-35.

[171] Subsection 248(1), "small business corporation" and paragraph 39(1)(c).

[172] Part I.3 of the Act.

[173] See Richards, *supra* note 3, Roberts and Briggs, *supra* note 3, for a detailed discussion.

[174] See Antony Schiefer, "Buyer Beware – Structuring to Minimize Capital Tax Consequences of a Share Purchase," *Corporate Structures and Groups* (Toronto: Federated Press, 2000), vol. VI, no.1, 300-305.

[175] Subsection 87(2.1) and (2.11).

[176] Subsection 88(1.1).

[177] CCRA document no. 2002-0156725, October 11, 2002.

[178] *Supra* note 62.

[179] Subsection 87(11) was added in the 1995-1997 Technical Bill, effective for amalgamations occurring after 1994. Prior to this time, no bump was available for an amalgamation. Subsection 87(11) deems an amalgamation of a "subsidiary wholly-owned corporation," as defined in subsection 248(1), to be treated similar to a windup, including for purposes of the bump.

[180] Subparagraphs 88(1)(c)(iii) to (vi).

[181] Subsection 87(11) deems a short form amalgamation to be treated as if a windup for tax purposes occurs. Paragraph 87(11)(b) deems the cost to the new corporation of each capital property of the subsidiary to be the amount that would have been the cost to the parent of the property if the property had been distributed at that time on a winding-up of the subsidiary and the provisions of subsections 88(1) and (1.7) had applied.

[182] Paragraph 88(1)(d).

[183] Paragraph 88(1)(d) and subparagraph 88(1)(b)(ii).

[184] Clause 88(1)(d)(i)(A).

[185] Clause 88(1)(d)(i)(B).

[186] Clause 88(1)(d)(i)(C).

[187] Subparagraph 88(1)(d)(i.1).

[188] Subparagraph 88(1)(d)(ii).

[189] Ibid.

[190] See *Interpretation Bulletin* IT-419R, *"Meaning of Arm's Length,"* April 24, 1995, for a discussion of acting in concert.

[191] See Marc N. Ton-That, "The Bump Denial Rules: In History and In Practice," in *Report of Proceedings of Fifty-Second Tax Conference*, 2000 Tax Conference (Toronto: Canadian Tax Foundation, 2001), 27:1-61, for the detailed history of paragraph 88(1)(c).

[192] See Judith Woods and Jerald Wortsman, "The Bump Denial Rule in Subparagraph 88(1)(c)(vi)," in *Report of Proceedings of Fiftieth Tax Conference*, 1998 Tax Conference (Toronto: Canadian Tax Foundation, 1999), 14:1-40.

[193] The Department of Finance has issued several comfort letters in recent years including letters dated: December 19, 2001 regarding the denial of the bump in a safe income crystallization; September 28, 2000, regarding the application of the specified property rule; April 22, 2002, regarding the application of the substituted property rules; and May 2, 2002, regarding an amendment to the definition of substitute property. These comfort letters are found in the 23rd Edition of the Practitioner's Income Tax Act (Toronto: Thomson Carswell, 2003).

[194] Canada, Department of Finance, Draft Legislation and Explanatory Notes: Technical Amendments to the Income Tax Act, December 20, 2002. Amendments to paragraph 88(1)(c.3) and subparagraph 88(1)(c.4)(i) result from proposed changes to the legislation as a result of the issuance of comfort letters.

[195]But see *Donat Flamand Inc. v. Her Majesty the Queen*, 2000 DTC 6566 (F.C.T.D.) the taxpayer was unsuccessful in relying on a comfort letter, which the Court held had been obtained through misrepresentation of the facts.

[196] Subparagraphs 88(1)(c)(iii) to (vi).

[197] Subparagraph 88(1)(c)(vi)

[198] See Ton-That, s*upra* note 191, and Woods and Wortsman, *supra* note 192. See also Ewald Kacnik, "Paragraph 88(1)(d) Bump has More Warts," *Corporate Structures and Groups* (Toronto: Federated Press, 2000), vol. VI,

no.2, 320 to 321; and Rhonda Rudick, “Bump Denial Rules in Post Mortem Planning”, *Corporate Structures and Groups* (Toronto: Federated Press, 2001), vol. VII, no. 1, 355 to 358.

[199] CCRA documents no. 2001-0093363 and no. 2002-0148283.

[200] See Rhonda Rudick, “Bump Denial Rules: Time of Acquisition of Control in the Context of Post-Mortem Estate Planning,” *Corporate Structures and Groups* (Toronto: Federated Press, 2001), Volume VII, No. 1, 355 to 358.

[201] Paragraph 88(1)(d.3) would deem control to be acquired by the beneficiary immediately after death of a person. However, it was unclear whether this rule would apply to Holdco in our example as Holdco was not the beneficiary. Paragraph 88(1)(d.2) possibly could have deemed the acquisition of control to have occurred when the deceased acquired control of Opco due to the related party extension of the provision.

[202] *Supra* note 193, The Department of Finance, comfort letter dated December 19, 2001.

[203] Clause 88(1)(c)(vi)(II).

[204] Paragraph 88(1)(c.3).

[205] *Supra* note 193, The Department of Finance, comfort letter dated December 19, 2001.

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