Crocodile Gold Corporation & Anor v Commissioner of Territory Revenue
[2015] NTSC 13

	IN THE MATTER OF AN APPEAL UNDER THE *TAXATION ADMINISTRATION ACT*
PARTIES:	CROCODILE GOLD CORPORATION
	and
	CROCODILE GOLD INC
	v
	COMMISSIONER OF TERRITORY REVENUE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 10 of 2013 (21342761)
DELIVERED:	6 March 2015
HEARING DATES:	27 and 28 October 2014
JUDGMENT OF:	KELLY J

CATCHWORDS:

STAMP DUTY – Appeal against assessment of stamp duty under the land holding provisions in the Stamp Duty Act Division 8A – Whether a company acquired shares in a land holding corporation within the meaning of s 56C(1)(a) – Canadian land holding corporation amalgamated with a second

Canadian company – Shares in amalgamated company (the second respondent) issued to the first respondent – Whether issue of shares in the amalgamated company amounts to an issue of shares in the pre-amalgamation land holding company –Amalgamating companies continue to exist within the new amalgamated company – Amalgamated company is not identical to pre-amalgamation companies – Issue of shares in amalgamated company is not an issue of shares in a pre-amalgamation company – Appeal allowed

Canada Corporations Act s 137
Ontario Business Corporations Act ss 8, 168(1)(a), 174, 175, 178, 179
Stamp Duty Act ss 4E(3), 56C, 56K, 56N, 56NA, 56P, 56Q, 56C, 86
Taxation Administration Act ss 6, 12, 44, 115

Envision Credit Union v The Queen [2013] 3 SCR 191; *Gesco Industries Inc v Hong Kong Bank of Canada* (1990) 78 CBR (2d) 109; *Heidelberg Canada Graphic Equipment Ltd v Arthur Anderson Inc; Re Bankruptcy of Kennedy Park Litho Limited* (1992) 7 BLR (2d) 236; *Loeb Inc v Cooper, Cooper v Cooper* (1991) 5 OR (3d) 259; *Stanward Corporation v Denison Mines Ltd* (1966) 57 DLR (2d) 674; *The Queen v Black & Decker Manufacturing Company Limited* [1975] 1 SCR 411; *Witco Chemical Company, Canada, Limited v The Corporation of the Town of Oakville* [1975] 1 SCR 273, followed.

REPRESENTATION:

Counsel:

Appellants:	R Hamilton SC with T Anderson
Respondent:	A Slater QC with S Brownhill

Solicitors:

Appellants:	Squire Patton Boggs (AU)
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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No. LA 10 of 2013 (21342761)

IN THE MATTER OF AN APPEAL
UNDER THE *TAXATION*
ADMINISTRATION ACT

BETWEEN:

CROCODILE GOLD CORPORATION
First Appellant

And:

CROCODILE GOLD INC
Second Appellant

AND:

COMMISSIONER OF TERRITORY REVENUE
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 6 March 2015)

Summary

[1] This is an appeal against an assessment of stamp duty under the land-holding provisions of the *Stamp Duty Act.*[1]

[1] Division 8A of the Act as in force at the time of the transactions in question, namely 3 November 2009.

[2] A Northern Territory land-holding corporation was formerly owned by a Canadian corporation. That Canadian corporation amalgamated with another corporation under the provisions of a Canadian statute (the *Ontario Business Corporations Act*) – a process unknown to Northern Territory law. As part of the process of amalgamation, the shares in both amalgamating corporations were cancelled, the amalgamated corporation issued shares in itself to a second Canadian company, and the second Canadian company in turn issued shares in itself to the former shareholders of the first Canadian corporation.

[3] At the end of this process, the Northern Territory land-holding corporation (formerly owned by the first Canadian corporation) was owned by the amalgamated Canadian corporation, and the amalgamated Canadian corporation was owned by the second Canadian corporation.

[4] Before the amalgamation, both the Northern Territory corporation and the first Canadian corporation were land-holding corporations within the meaning of the Northern Territory *Stamp Duty Act*. After the amalgamation, both the Northern Territory corporation and the amalgamated Canadian corporation were land-holding corporations within the meaning of that Act, as was the second Canadian corporation.

[5] The respondent issued stamp duty assessments on both transactions – the amalgamation and the issue of shares in the amalgamated Canadian

company.[2] The parties are agreed that stamp duty was properly assessed on the amalgamation.[3] The sole remaining issue is whether stamp duty is payable in the Northern Territory on the issue of shares in the amalgamated Canadian company to the second Canadian company. This depends upon whether the issue of shares falls within s 56C(1), paragraph (a) of the definition of "acquire" in the Northern Territory *Stamp Duty Act*: that is to say, whether it can be characterised as the issue of shares in a land-holding corporation.

[6] That, in turn depends upon whether the issue of shares in the amalgamated Canadian company can be characterised as an issue of shares in the first Canadian company (one of the two amalgamating entities), and the answer to that question is governed by Canadian law.

[7] The respondent contends that the end result of the transactions was that there was a change of ownership of <u>two</u> land-holding corporations, the Northern Territory company (about which there is no dispute) and the first Canadian company, and that duty is payable on both. The appellants contend that there was no change of ownership of the first Canadian company: it ceased to exist on the amalgamation. What was issued to the second Canadian company was not shares in the first Canadian company, but shares in a different company – the amalgamated Canadian company. The

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2 Other assessments, not relevant to the issues on this appeal, were also issued. These are set out below.

3 The parties agree that this was dutiable as a relevant acquisition for the purposes of s 56NA, being a "merger vesting of shares" within the meaning of s 56C(1) para (cf) of the definition of "acquire".

respondent contends that under Canadian law, the first Canadian company (as one of the amalgamating companies) and the amalgamated company are the same.

[8] Understanding the sequence of events is complicated by the fact that some of the corporate entities have very similar names and the fact that the second Canadian company changed its name. In both written and oral submissions, counsel for the appellants and counsel for the respondent used different abbreviated names for the various corporate entities. Counsel for the appellants used names which emphasised the difference between the first Canadian company and the amalgamated Canadian company and counsel for the respondent used abbreviations that emphasised their similarity. This is despite the fact that there is no suggestion that the outcome is in any way determined by the names of the corporations in question. In the reasons which follow, I have thought it best to use the name of each corporation in full, along with the corporation numbers in the case of the Canadian corporations, apart from the First Appellant, whose Ontario Corporation Number is not given in any of the documents filed with the Court.

The parties

[9] Crocodile Gold Australia Pty Ltd is and was, at all material times, a company incorporated in Australia.

[10] On 5 June 2009 Crocodile Gold Australia Pty Ltd executed an asset sale agreement (sale agreement) under which it agreed to purchase, inter alia, approximately 365 (later reduced to 345) exploration licences, exploration retention licences and mining tenements in the Northern Territory and Western Australia.

[11] Northern Territory stamp duty of $2,264,347.10 was assessed and paid on the sale agreement and the associated instruments of transfer. There is no dispute about this assessment.

[12] Until 3 November 2009 Crocodile Gold Australia Pty Ltd was a wholly owned subsidiary of a Canadian company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565).

[13] Before 3 November 2009 the first appellant was known as Franc-Or Resources Corporation (Ontario Corporation Number unknown) and traded on the Toronto Stock Exchange under that name.

[14] On 12 August 2009 the first appellant became the sole shareholder in 2214656 Ontario Incorporated (Ontario Corporation Number 2214656).

[15] On 3 November 2009 the following things occurred pursuant to an agreement[4] between Franc-Or Resources Corporation (Ontario Corporation Number 2214656), its subsidiary 2214656 Ontario Incorporated (Ontario

[4] The agreement was made in accordance with *Ontario Business Corporations Act* s 175.

Corporation Number 2214656), and Crocodile Gold Incorporated (Ontario Corporation Number 2115565).

(a) Franc-Or Resources Corporation (Ontario Corporation Number unknown) changed its name to Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant).[5]

(b) Crocodile Gold Incorporated (Ontario Corporation Number 2115565) and 2214656 Ontario Inc (Ontario Corporation Number 2214656) amalgamated under the *Ontario Business Corporations Act* to form Crocodile Gold Incorporated (Ontario Corporation Number 1809071) (the second appellant). Articles of amalgamation were sent to the director appointed under the *Ontario Business Corporations Act* in accordance with s 178(1) of that Act and the director issued a certificate of amalgamation specifying that name and corporation number in accordance with s 178(4).

(c) As part of the amalgamation process all of the shares in the amalgamating companies [Crocodile Gold Incorporated (Ontario Corporation Number 2115565) and 2214656 Ontario Incorporated (Ontario Corporation Number 2214656)] were cancelled.

(d) The amalgamated company, Crocodile Gold Incorporated (Ontario Corporation Number 1809071) issued 126,490,434 shares in itself to

[5] The corporation number remained the same as the change of name did not affect the identity of the corporation. The change of name is accomplished by amending the articles of incorporation: *Ontario Business Corporations Act* s 168(1)(a).

the first appellant, Crocodile Gold Corporation (Ontario Corporation Number unknown) making the first appellant the sole shareholder of the amalgamated company Crocodile Gold Incorporated (Ontario Corporation Number 1809071) (the second appellant).

(e) Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant) issued 126,490,433 shares in itself to the former shareholders of Crocodile Gold Incorporated (Ontario Corporation Number 2115565) whose shares had been cancelled as part of the amalgamation.

[16] The respondent is the Commissioner established by s 6 of the *Taxation Administration Act*. He is responsible for the general administration and enforcement of the taxation laws and the person against whom this proceeding may be brought pursuant to s 12 of that Act.

Assessment of stamp duty

[17] The respondent assessed duty payable in relation to the above transactions. Those assessments were raised on the basis that the agreement effected three dutiable transactions under the land-holder provisions of the *Stamp Duty Act*[6] as follows.

[6] These are contained in Division 8A of the *Stamp Duty Act* (as it applied at the relevant time) and impose duty on relevant acquisitions (as defined) in land-holding corporations – ie corporations entitled to land that has an unencumbered value of $500,000 or more [s 56N(1)].

(a) The amalgamation of Crocodile Gold Incorporated (Ontario Corporation Number 2115565) and 2214656 Ontario Incorporated (Ontario Corporation Number 2214656) was assessed to duty as an acquisition by 'merger vesting' (as defined in s 4E(3) of the *Stamp Duty Act*) of shares in a land-holding corporation.[7]

(b) The issue of shares in Crocodile Gold Incorporated (Ontario Corporation Number 1809071) (the second appellant) to Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant) was assessed to duty as an acquisition by transfer of those shares in a land-holding corporation.[8]

(c) The issue of shares in Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant) to the former shareholders of Crocodile Gold Incorporated (Ontario Corporation Number 2115565) was assessed to duty as an issue of shares in a land-holding corporation.[9]

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[7] Duty was assessed in respect of the merger vesting on a memorandum prepared under s 86 of the *Stamp Duty Act*.

[8] Duty was assessed on the "share transfer" on a statement made by the appellants under s 56K of the *Stamp Duty Act*. (Section 56K requires a person who acquires an interest in a land-holding corporation to prepare and lodge with the Commissioner a statement in relation to that acquisition.)

[9] Duty was assessed on the share issue on a memorandum prepared under s 86 of the *Stamp Duty Act*. (Section 86 empowers the Commissioner to prepare a memorandum of a transaction where he suspects that a dutiable transaction has occurred and no instrument has been lodged in relation to that transaction.)

[18] Interest and penalty tax were also imposed. Some of the penalty tax was remitted in the exercise of the respondent's discretion under s 44 of the *Taxation Administration Act*.

Objection to the assessment of duty and the respondent's determination

[19] The appellants lodged a notice of objection setting out the grounds upon which they objected to the assessments of duty; the respondent requested, and the appellants provided, further information in relation to the objection; and by letter dated 1 August 2013 the respondent determined the objection.

[20] In the determination, the respondent allowed the objection against the assessment of duty on the issue of shares in Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant) to the former shareholders of Crocodile Gold Incorporated (Ontario Corporation Number 2115565)[10] and confirmed the other assessments.

[21] The appellants have since conceded that duty was properly assessed on the amalgamation of Crocodile Gold Incorporated (Ontario Corporation Number 2115565) and 2214656 Ontario Inc (Ontario Corporation Number 2214656) as an acquisition by merger vesting of shares in a land-holding corporation.[11]

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10 See [17](c) above.

11 See [17](a) above.

This appeal

[22] The appellants have appealed to this Court under s 115 of the *Taxation Administration Act* against the respondent's decision on the objection confirming the assessment of duty on the issue of shares in Crocodile Gold Inc (Ontario Corporation Number 1809071) (the second appellant) to Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant) as an acquisition of shares in a land-holding corporation.[12]

Payments made by the appellant

[23] It is common ground that the appellants have paid the respondent a total of $3,868,111.80 made up as follows:

(a) $1,053,565.65 duty on the merger vesting;

(b) $18,312.10 interest on the merger vesting from 4 January 2010 (the date on which the respondent alleged duty was payable in relation to the three dutiable transactions) until 1 March 2010;

(c) $2,107,131.30 duty by the s 56K assessment;

(d) $421,426.25 penalty tax on the s 56K assessment;

[12] See [17](b) above. [When the appeal was first instituted, there were further issues. This is the sole issue remaining for determination. The respondent no longer contends that this was an acquisition by transfer of shares, but rather an acquisition by the issue of shares within the meaning of s 56C(1)(a).]

(e) $36,624.25 interest on the s 56K assessment from 4 January 2010 (the date on which the respondent alleged duty was payable in relation to the three dutiable transactions) until 1 March 2010; and

(f) $231,052 interest at the statutory interest rate (accrued after 8 March 2012) on overdue amounts.

Northern Territory statutory provisions

[24] The relevant land-holding provisions in the *Stamp Duty Act* are as follows.

> **56K When statement to be lodged**
>
> (1) Where, by a relevant acquisition, a person acquires an interest in a land-holding corporation, that person shall prepare and lodge with the Commissioner a statement in respect of that acquisition.
>
> …
>
> (3) The statement under subsection (1) must be lodged within 60 days after the occurrence of the relevant acquisition.
>
> …
>
> **56N Corporation to which Division applies**
>
> (1) This Division applies to a land-holding corporation in which a person acquires a relevant acquisition.
>
> (2) A land-holding corporation is a corporation entitled to land that has an unencumbered value of at least $500,000.

56P Meaning of relevant acquisition

(1) An acquisition of an interest in a corporation by a person is a ***relevant acquisition*** for this Division:

(a) if it is an acquisition that alone constitutes a significant interest in the corporation; or

(b) if, when aggregated with other interests in the corporation held by the person, or the person and related persons, it constitutes a significant interest in the corporation; or

(c) if, by the acquisition, a person who has a significant interest in the corporation or an interest referred to in paragraph (b) acquires a further interest in the corporation.

56Q Interest and significant interest in corporation

(1) A person has an interest in a corporation if the person has or would have, on the winding up of the corporation, an entitlement as a shareholder to a distribution of the corporation's property.

…

(4) A person has a significant interest in a corporation if the person's entitlement, as mentioned in subsection (3), is:

(a) for a listed corporation or listed unit trust scheme:

(i) for a merger vesting of shares – 50% or more of all the property of the corporation or scheme; or

(ii) otherwise – 90% or more of all the property of the corporation or scheme; or

(b) for another corporation or unit trust scheme – 50% or more of all the property of the corporation or scheme.

56C Interpretation

(1) In this Division:

acquire, in relation to an interest or a shareholding in a land-holding corporation, includes acquire the interest or shareholding in any of the following ways:

(a) the allotment or issue of a share, not being the issue of a share to a member on registration of the corporation;

....

(cf) a merger vesting of shares;[13]

...

The issues

[25] There is no dispute that:

(a) Crocodile Gold Australia Pty Ltd has at all material times been a land-holding corporation because of its interest in the mining tenements;

(b) as the holding company of Crocodile Gold Australia Pty Ltd, before the amalgamation, Crocodile Gold Incorporated (Ontario Corporation Number 2115565) was a land-holding corporation under the linked

[13] "Merger vesting" is defined in s 4E. As the assessment of duty on the basis of merger vesting is no longer challenged, it is not necessary for present purposes to set out that definition.

(c) entity provisions of the Act;[14] and

(d) after the amalgamation, Crocodile Gold Corporation (Ontario Corporation Number unknown) (the first appellant) (as the ultimate holding company of Crocodile Gold Australia Pty Ltd) was a land-holding corporation under the same provisions.

[26] The respondent claims that the transactions which occurred on 3 November 2009 effected a change of ownership of two separate land-holding corporations, Crocodile Gold Australia Pty Ltd and Crocodile Gold Incorporated (Ontario Corporation Number 2115565) [the Canadian company which amalgamated with 2214656 Ontario Inc (Ontario Corporation Number 2214656) to form the second appellant, Crocodile Gold Inc (Ontario Corporation Number 1809071)] and that both changes of ownership were relevant acquisitions for the purposes of the land-holder provisions of the *Stamp Duty Act*. As outlined above, it is not disputed that the change of ownership of Crocodile Gold Australia Pty Ltd was a relevant acquisition and properly assessed to duty. However, the appellants dispute that the amalgamation and issue of shares in the second appellant, to the first appellant, amounted to such an acquisition.

[27] The respondent's contention is that the issue of all of the shares in the second appellant, Crocodile Gold Inc (Ontario Corporation Number

[14] These are set out in ss 56NA and 56NB. Essentially, the unencumbered value of land to which a corporation is entitled for the purpose of assessing whether it is a land-holding corporation is the aggregate of the value of land to which the corporation is entitled in its own right and the value of land it would be entitled to if each "linked entity" were to be wound up. A "linked entity" includes subsidiaries.

1809071) (the amalgamated company) to the first appellant Crocodile Gold Corporation (Ontario Corporation Number unknown) amounted to an acquisition by the first appellant of all of the shares in the pre-amalgamation company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565), and hence amounted to an acquisition of shares in that pre-amalgamation company within the meaning of s 56C(1)(a). (If this is true, it is accepted that it would amount to an acquisition of a relevant interest in a land-holding corporation within the meaning of the division, and the assessed stamp duty would be payable.)

[28] The appellants, however, contend that there has been no such acquisition of shares in the pre-amalgamation company because upon the amalgamation, these things happened simultaneously:

(a) The two amalgamating companies ceased to exist and the amalgamated company (the second appellant) came into existence.

(b) The shares in the two amalgamating companies were cancelled.

(c) Shares in the amalgamated company (the second appellant) were issued to the first appellant.

(d) Shares in the first appellant were issued to the former shareholders of the pre-amalgamation company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565).

[29] Put simply, the first appellant did not acquire shares in the pre-amalgamation company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565): it was issued shares in the amalgamated company Crocodile Gold Inc (Ontario Corporation Number 1809071) (the second appellant).

[30] The respondent contends that, under Canadian law, the pre-amalgamation company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565) and the amalgamated company Crocodile Gold Inc (Ontario Corporation Number 1809071) (the second appellant) are one and the same.

[31] There is no real dispute about the relevant provisions of the *Ontario Business Corporations Act* or the relevant Canadian case law. The difference between the parties, and it is a subtle one, concerns the implication of those provisions for the application of the Northern Territory *Stamp Duty Act*.

[32] The amalgamation occurred pursuant to the provisions of the *Ontario Business Corporations Act.* The relevant provisions of that Act are as follows.

> **Amalgamation**
>
> **174.** Two or more corporations, including holding or subsidiary corporations, may amalgamate and continue as one corporation. R.S.O. 1990, c. B. 16, s. 174.

Amalgamation agreement

175. (1) Where corporations propose to amalgamate, each such corporation shall enter into an agreement setting out the terms and means of effecting the amalgamation and, in particular, setting out,

(a) the provisions that are required to be included in articles of incorporation under section 5;

(b) subject to subsection (2), the basis upon which and manner in which the holders of the issued shares of each amalgamating corporation are to receive,

(i) securities of the amalgamated corporation,

(ii) money, or

(iii) Securities of any body corporate other than the amalgamated corporation, in the amalgamation;

…

Articles of amalgamation

178. (1) Subject to subsection 176(5), after an amalgamation has been adopted under section 176 or approved under section 177, articles of amalgamation in prescribed form shall be sent to the Director. R.S.O. 1990, c. B. 16, s. 178(1).

…

Certificate of amalgamation

(4) Upon receipt of articles of amalgamation, the Director shall endorse thereon in accordance with section 273 a

certificate which shall constitute the certificate of amalgamation. R.S.O. 1990, c. B. 16, s. 178(4).

Effect of certificate

179. Upon the articles of amalgamation becoming effective,

(a) the amalgamating corporations are amalgamated and continue as one corporation under the terms and conditions prescribed in the amalgamation agreement;

(a.1) the amalgamating corporations cease to exist as entities separate from the amalgamation corporation;

(b) the amalgamated corporation possesses all the property, rights, privileges and franchises and is subject to all liabilities, including civil, criminal and quasi-criminal, and all contracts, disabilities and debts of each of the amalgamating corporations;

(c) a conviction against, or ruling, order or judgment in favour or against an amalgamating corporation may be enforced by or against the amalgamated corporation;

(d) the articles of amalgamation are deemed to be the articles of incorporation of the amalgamated corporation and, except for the purposes of subsection 117(1), the certificate of amalgamation is deemed to be the certificate of incorporation of the amalgamated corporation; and

(e) the amalgamated corporation shall be deemed to be the party plaintiff or the party defendant, as the case may be, in any civil action commenced by or against an amalgamating corporation before the amalgamation has become effective. R.S.O. 1990, c. B. 16, s. 179; 2004, c. 19, s. 3(5).

[33] In *The Queen v Black & Decker Manufacturing Company Limited*[15] the Supreme Court of Canada on appeal from the Ontario Court of Appeal considered the effect of an amalgamation of two companies under equivalent Canadian legislation (the *Canada Corporations Act*) on the criminal liability of one of the pre-amalgamation companies. The court held that the amalgamated company was liable for the criminal acts of one of the pre-amalgamation companies. This conclusion was expressed in the following words:

> … The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.

[34] In reaching this conclusion, Dickson J expressed the following views:

> … as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. … palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition" – *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state; (ii) the statement in s. 137(13)(b) that the "amalgamated company possess all the property, rights …" If corporate birth or death were envisaged, one would have expected to find, in the statute, some provision for transfer or conveyance or transmission of assets and not simply the word "possesses", a word which re-enforces the concept of continuance; (iii) letters patent of amalgamation are obtained for the purpose of "confirming the agreement" (s. 137(11)), in marked contrast to letters patent of incorporation which expressly create a body corporate and politic; …

[15] [1975] 1 SCR 411

> The effect is that of blending and continuance as one and the selfsame company. …

[35] In *Stanward Corporation v Denison Mines Ltd*[16] the Ontario Court of Appeal considered whether an amalgamated company had acquired mining claims owned by one of the pre-amalgamation companies for the purpose of a statute requiring royalty to be paid on all ore mined from "any other claims which you may acquire". The court held that the amalgamated company had not acquired the mining claims in question.

> …
>
> What we have here is an amalgamated company into which, simultaneously, two amalgamating companies have fused along with their assets and liabilities. …
>
> Returning to the view that the amalgamated companies do not form a new company but continue to subsist as one, the conclusion that there is no acquisition is, if anything, more apparent. The language of s. 96 is in my opinion unambiguous in providing that the two amalgamating companies shall continue as one company. While it may be difficult to comprehend the exact metamorphosis which takes place, it is within the Legislature's competence to provide that what were hitherto two shall continue as one. Having done so it is apparent that there was no acquisition by a new entity; the corporate entities were continued in the amalgamated corporation.[17]

[36] In *Witco Chemical Company, Canada, Limited v The Corporation of the Town of Oakville*[18] the issue was whether a writ issued in the name of one of the pre-amalgamation companies should be struck out as issued in the name of a non-existent plaintiff, or leave given to amend naming the plaintiff as

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16 (1966) 57 DLR (2d) 674
17 *Ibid* per Kelly JA at 681
18 [1975] 1SCR 273

the amalgamated company. Holding that leave should be given to amend the writ, Spence J of the Supreme Court of Canada adopted the view expressed by Kelly JA in *Stanward Corporation v Denison Mines Ltd* and concluded:

> I am, however, of the opinion that in the present case there was not an extinguishment of the corporate identity of the *Witco Chemical Company, Canada, Limited,* sufficient to justify the Court inholding that the writ had been issued in the name of a non-existent plaintiff.

[37] A similar conclusion was reached in *Loeb Inc v Cooper, Cooper & Cooper*[19] in which it was held that in the case where a tenant had amalgamated with another company, the amalgamation did not constitute a breach of the covenant not to assign the lease without the landlord's consent.

[38] In *Gesco Industries Inc v Hong Kong Bank of Canada*[20] the British Columbian Court of Appeal held that since by virtue of similar provisions in another Canadian Act amalgamated companies are "continued as one", mortgages granted by amalgamating companies and registered in accordance with the Act before the amalgamation continue in existence at the time of amalgamation. It is not necessary for them to be registered again after amalgamation.[21]

[39] In *Envision Credit Union v The Queen*[22] two credit unions amalgamated to form the appellant *Envision Credit Union*. As part of the merger agreement the two amalgamating companies agreed that certain properties that were

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19 (1991) 5 OR (3d) 259
20 (1990) 78 CBR (2d) 109
21 See also *Heidelberg Canada Graphic Equipment Ltd v Arthur Anderson Inc; Re Bankruptcy of Kennedy Park Litho Limited* (1992) 7 BLR (2d) 236
22 [2013] 3 SCR 191

surplus to continuing business needs would pass at the moment of amalgamation from the amalgamating companies to a recently created subsidiary. In exchange for those surplus properties, the subsidiary issued shares to the amalgamating companies which then flowed through to *Envision* as a result of the amalgamation. The agreement provided that the sale of the surplus properties to the subsidiary was to take place at the exact moment of the amalgamation as set out in the amalgamation agreement. The desired result was to ensure that the vendors of the surplus properties were the pre-amalgamation companies and not the amalgamated company *Envision* as this would produce certain tax benefits under relevant Canadian legislation. The court held that this attempt was ineffective.

> [45] Two agreements were entered into to provide for the sale of the surplus properties. These agreements were structured so that the vendors were Delta and First Heritage. The agreements further provided that the sale of the surplus properties was to take place at the exact moment of the amalgamation as set out in the amalgamation agreement. Envision argues that since the vendors were the predecessors they were the parties that sold the surplus properties. Therefore Envision did not and could not have sold the properties to the subsidiary. I cannot agree.
>
> [46] At the moment of amalgamation, the predecessors, Delta and First Heritage, no longer had separate legal personalities capable of fulfilling the terms of the sale agreements. While they were continued under the *CUIA*, they were continued inside Envision: *Black and Decker*, at p. 422. Any legal obligations that the predecessors had entered into that needed to be fulfilled, at or after the time of the amalgamation, had to be fulfilled by Envision. …
>
> …
>
> [50] When Envision was seized of the property, it was not by virtue of an agreement for purchase and sale. Envision's seizure of the

> property cannot be equated to a conveyance: *Black and Decker*, at p. 417. Instead, it is more appropriate to think of Envision's being seized of the assets of its predecessors as similar to changing the name of the legal owner. Distinguishing seizure from a conveyance makes sense given the adoption of the continuation model of amalgamation. A conveyance requires that the seller and the buyer be separate legal entities at the time of the transfer of the property. At the moment Envision was created, the predecessors ceased to have any independent legal existence, so there were not two parties capable of engaging in a conveyance. In this case, there was no point in time when Delta, First Heritage *and* Envision existed as separate legal entities such that Delta and First Heritage could convey their property to Envision. At the moment of amalgamation, only Envision continued to exist as a separate legal entity.[23]

[40] Cromwell J agreed.

> [61] CROMWELL J. – I agree with my colleague Rothstein J. that this appeal should be dismissed with costs. I reach this conclusion on the basis set out in para. 50 of my colleague's reasons. In essence, the appellant's position must be rejected because it is premised on a sequencing of events that is not reflected in the transaction that the parties undertook. As my colleague points out, at the moment that Envision was created, the predecessor corporations ceased to have any independent legal existence. There was thus no point in time when Delta Credit Union, First Heritage Savings Credit Union and Envision Credit Union existed as separate legal entities such that Delta and First Heritage could convey their property to Envision because, at the moment of amalgamation, only Envision was a separate legal entity.[24] …

[41] It is apparent both from the statutory provisions and the case law that the amalgamating companies continue to exist "inside" the amalgamated company. The amalgamated company owns all of the assets and has all of the liabilities (including criminal liabilities, and liabilities under mortgages) of each of the pre-amalgamation companies. It does not "acquire" those assets, it possesses them as a consequence of the amalgamation. There is no

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23 Supra, p 210 at [50] per Rothstein J

24 Supra, p 213 at [61]

point at which the pre-amalgamation companies and the amalgamated company all exist. At the moment of amalgamation, the two become one.

[42] It is also plain that the amalgamated company is not identical to either of the pre-amalgamation companies. It consists of a fusion of both. In that sense, it is something new.

[43] The question for determination in this case is whether the issue of shares in the amalgamated company, at the moment of amalgamation, amounts to an issue of shares in one of the pre-amalgamation companies. None of the Canadian cases to which I was referred provides a definitive answer to that question.

[44] In my view, the issue of shares in the amalgamated company cannot be said to be an issue of shares in one of the pre-amalgamation companies. Although the pre-amalgamation companies continue to exist in the amalgamated company, the amalgamated company is not identical to either of them. Both companies continue in the amalgamated company, and the amalgamated company possesses all of the assets and liabilities of both of them. Counsel for the respondent sought to emphasise the artificial nature of the amalgamation in the present case by pointing out (without objection) that the second amalgamating company 2214656 Ontario Inc (Ontario Corporation Number 2214656) was essentially a $2 shelf company, purchased for the purpose of the amalgamation exercise and owned no other assets. However, it was not suggested that this in any way affected the

outcome of this proceeding: or that the issues would be different or the analysis by which the issues would be resolved would be different if the second amalgamating company had been a trading corporation of long standing owning substantial assets.

[45] Also, nothing turns on the fact that the amalgamated company was given the same name as one of the pre-amalgamation companies. It is not suggested that the issues or analysis resolving those issues would be any different if the amalgamated company had been given a different name.

[46] The other telling factor in my view is that the amalgamated company has a different corporation number from both pre-amalgamation companies. Section 8 of the *Ontario Business Corporations Act* provides:

> **Assignment of number**
>
> 8. (1) Every corporation shall be assigned a number by the Director and such number shall be specified as the corporation number in the certificate of incorporation and in any other certificate relating to the corporation endorsed or issued by the Director. R.S.O. 1990, c. B. 16, s. 8(1).
>
> (2) Where no name is specified in the articles that are delivered to the Director, the corporation shall be assigned a number name. R.S.O. 1990, c. B. 16, s. 8(2).

[47] The fact that upon amalgamation the pre-amalgamation company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565) continued to exist in the second appellant does not mean that the issue of shares in the second appellant to the first appellant amounted to an issue of shares in the

pre-amalgamation company, Crocodile Gold Incorporated (Ontario Corporation Number 2115565) to the first appellant. What was issued to the first appellant on 3 November 2009 was shares in a merged entity in which both Crocodile Gold Incorporated (Ontario Corporation Number 2115565) and the second amalgamating company 2214656 Ontario Inc (Ontario Corporation Number 2214656) continue to exist, an entity with a different corporation number to either, possessing all of the assets and liabilities of both.

[48] For these reasons, the appeal is allowed. I will hear the parties on the formulation of any necessary ancillary orders.