Date: 20090123

Docket: A-176-08

Citation: 2009 FCA 20

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
BLAIS J.A.

BETWEEN:

CGU HOLDINGS CANADA LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 15, 2008.

Judgment delivered at Ottawa, Ontario, on January 23, 2009.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
BLAIS J.A.

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Appellant

and

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Respondent

REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Hershfield J. of the Tax Court of Canada (the Tax Court Judge) confirming an assessment issued by the Minister of National Revenue (the Minister), denying a refund claimed by CGU Holdings Canada Ltd. (CGU or the appellant) in the return filed for its 2000 taxation year.

[2] The appellant's entitlement to the refund is dependent on its standing to make the election provided for under subsection 134.1(1) of the *Income Tax Act*, R.C.S. 1985, ch. 1 (5th Supp.) (the

Act) as a “non-resident owned investment corporation” (an NRO) and whether it had at the relevant time the requisite “allowable refundable tax on hand” (RTOH), as defined in subsection 133(9) of the Act. The existence of this account is dependent on whether the RTOH balance of a predecessor corporation flowed through to the appellant further to an amalgamation which took place in 1999. The Tax Court Judge held that the appellant had the standing to claim the refund but that the predecessor’s ROTH balance did not flow through to it with the result that its ROTH account was *nil*.

[3] On appeal, the appellant supports the Tax Court Judge’s conclusion that it had the standing to claim the refund but contends that he committed a number of errors in holding that the predecessor corporation’s RTOH balance did not flow through to it. The respondent for its part challenges the finding that the appellant had the standing to claim the refund, but supports the Tax Court Judge’s conclusion that its RTOH account was *nil*.

[4] The matter before the Tax Court proceeded on the basis of a Statement of Agreed Facts which the Tax Court Judge summarizes at paragraph 6 of his reasons. I have set out this summary in full with a few modifications which appear in square brackets:

> i) On March 2, 1999 the Appellant was formed on the amalgamation of three companies only one of which [GA Scottish Corporation (Canada) Ltd.] (GA Scottish) was an NRO immediately before the amalgamation;
>
> ii) The Appellant’s first taxation year following the amalgamation commenced at the time of the amalgamation and ended on February 29, 2000;

iii) Immediately before the amalgamation GA Scottish had an unrefunded balance in its refundable tax [on hand] account [(RTOH account)]of $1,265,348.00; cumulative taxable income of $1,917,233.00; and retained earnings of $1,641,791.00;
iv) During its first taxation year, the Appellant paid a taxable dividend (within the meaning of subsection 133(8)) in the amount of $7,706,000.00 to a shareholder that was an NRO;

v) The Appellant made a timely election pursuant to paragraph 134.1(1)(*c*) of the *Act* to be deemed to be an NRO for the 2000 taxation year and applied to the Minister pursuant to subsection 133(6) for an allowable refund from its [RTOH account]; and

vi) The Minister denied the refund on the basis that the Appellant did not satisfy the criteria set out in paragraph 134.1(1)(*a*) for making the election and on the basis that the [RTOH account] of the amalgamated corporation (i.e. the Appellant) was nil.

[Footnote omitted.]

STATUTORY BACKGROUND

[5] The formation of CGU by the merger of the three predecessor corporations constitutes an amalgamation for purposes of the Act (subsection 87(1)). By virtue of paragraph 87(2)(*a*), CGU is deemed to be a new corporation for purposes of the Act:

87. (2) Where there has been an amalgamation of two or more corporations after 1971 the following rules apply	**87.** (2) Lorsqu'il y a eu fusion de plusieurs sociétés après 1971, les règles suivantes s'appliquent :
Taxation year	Année d'imposition
(*a*) for the purposes of this Act, the corporate entity formed as a result of the amalgamation shall be deemed to be a new corporation the first taxation year of which shall be deemed to have commenced at the time of the amalgamation, and a taxation year of a predecessor corporation that	*a*) pour l'application de la présente loi, l'entité issue de la fusion est réputée être une nouvelle société dont la première année d'imposition est réputée avoir commencé au moment de la fusion et l'année d'imposition d'une société remplacée, qui se serait autrement terminée après la fusion, est réputée s'être terminée

would otherwise have ended after the amalgamation shall be deemed to have ended immediately before the amalgamation;

immédiatement avant la fusion;

[My emphasis]

[6] Subparagraph 87(2)(*cc*)(i) provides that where there is an amalgamation and the new corporation is an NRO, the RTOH of a predecessor corporation flows through to it and is computed in accordance with the following rules:

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

…

(*cc*) in the case of a new corporation that is a non-resident-owned investment corporation,

(i) for the purpose of computing its allowable refundable tax on hand (within the meaning assigned by subsection 133(9)) at any time, where a predecessor corporation had allowable refundable tax on hand immediately before the amalgamation, the amount thereof shall be added to the total determined for A in the definition "allowable refundable tax on hand" in subsection 133(9),

…

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

[…]

cc) dans le cas d'une nouvelle société qui est une société de placement appartenant à des non-résidents :

(i) pour le calcul du montant admissible de l'impôt en main remboursable (au sens du paragraphe 133(9)) de cette société à un moment donné, lorsqu'une société remplacée avait un tel montant immédiatement avant la fusion, ce montant doit être ajouté au total représenté par l'élément A de la formule applicable figurant à la définition de «montant admissible de l'impôt en main remboursable » au paragraphe 133(9),

[…]

[My emphasis]

[7] In February 2001, it was announced that the special treatment afforded to NROs would be brought to an end. Section 134.1, which together with the other NRO provisions appears in Division F (Special Rules applicable in certain circumstances), was introduced as a transitional rule to accommodate this change (S.C. 2001, c. 7, s. 132). This is the provision that is at the root of the present dispute:

134.1 (1) This section applies to a corporation that	**134.1** (1) Le présent article s'applique à la société qui répond aux conditions suivantes :
(*a*) was a non-resident-owned investment corporation in a taxation year;	*a*) elle a été une société de placement appartenant à des non-résidents au cours d'une année d'imposition;
(b) is not a non-resident-owned investment corporation in the following taxation year (in this section referred to as the corporation's "first non-NRO year"); and	*b*) elle n'est pas une telle société au cours de l'année d'imposition subséquente (appelée « première année de nouveau statut » au présent article);
(*c*) elects in writing filed with the Minister on or before the corporation's filing-due date for its first non-NRO year to have this section apply.	*c*) elle choisit de se prévaloir du présent article dans un document présenté au ministre au plus tard à la date d'échéance de production qui lui est applicable pour sa première année de nouveau statut.
(2) A corporation to which this section applies is deemed to be a non-resident-owned investment corporation in its first non-NRO year for the purposes of applying, in respect of dividends paid on shares of its capital stock in its first non-NRO year to a non-resident person or a non-resident-owned investment	(2) La société à laquelle le présent article s'applique est réputée être une société de placement appartenant à des non-résidents au cours de sa première année de nouveau statut pour ce qui est de l'application des paragraphes 133(6) à (9) (exception faite de la définition de «société de placement appartenant à des non-résidents » au paragraphe 133(8)), de l'article 212 et

corporation, subsections 133(6) to (9) (other than the definition "non-resident-owned investment corporation" in subsection 133(8)) and section 212 and any tax treaty.	de tout traité fiscal aux dividendes versés sur des actions de son capital-actions au cours de cette année à une personne non-résidente ou à une société de placement appartenant à des non-résidents à une personne non-résidente ou à une société de placement appartenant à des non-résidents.

[My emphasis]

[8] The coming-into-force provision for section 134.1 provides:

132(2) Section 134.1 of the Act, as enacted by subsection (1), applies to a corporation that ceases to be a non-resident-owned investment corporation because of a transaction or event that occurs, or a circumstance that arises, in a taxation year of the corporation that ends after February 27, 2000.	**132(2)** L'article 134.1 de la même loi, édicté par le paragraphe (1), s'applique aux sociétés qui cessent d'être des sociétés de placement appartenant à des non-résidents en raison d'une opération, d'un événement ou d'une circonstance qui se produit au cours de l'une de leurs années d'imposition se terminant après le 27 février 2000.

[My emphasis]

[9] The provision which effectively brings the regime to an end is paragraph 133(8)(*i*) which provides that:

133(8)(*i*) subject to section 134.1, a corporation is not a non-resident-owned investment corporation in any taxation year that ends after the earlier of,	**133(8)*i)*** sous réserve de l'article 134.1, une société n'est pas une société de placement appartenant à des non-résidents au cours d'une année d'imposition se terminant après le premier en date des

(i) the first time, if any, after February 27, 2000 at which the corporation effects an increase in capital, and	moments suivants : (i) le premier moment, postérieur au 27 février 2000, où la société effectue une augmentation de capital,
(ii) the corporation's last taxation year that begins before 2003;	(ii) la fin de la dernière année d'imposition de la société commençant avant 2003.

[My emphasis]

[10] Finally, paragraph 133(8)(*g*) specifically provides that a new corporation formed as a result of an amalgamation is not an NRO, unless each of the predecessors had that status:

133. (8) In this section, … (*g*) a new corporation (within the meaning assigned by section 87) formed as a result of an amalgamation after June 18, 1971 of two or more predecessor corporations is not a non-resident-owned investment corporation unless each of the predecessor corporations was, immediately before the amalgamation, a non-resident-owned investment corporation,	**133.** (8) Les définitions qui suivent s'appliquent au présent article. […] *g*) la nouvelle société (au sens de l'article 87) issue de la fusion, après le 18 juin 1971, de plusieurs sociétés remplacées n'est pas une société de placement appartenant à des non-résidents, à moins que chacune des sociétés remplacées n'ait été, immédiatement avant la fusion, une société de placement appartenant à des non-résidents;

[My emphasis]

[11] It is useful to also set out the Department of Finance Technical Notes which were published in March 2001, when the bill bringing the NRO regime to an end was introduced (Reasons, para. 12):

> **March 2001 TN**: New section 134.1 provides special transitional rules to accommodate the phase out of non-resident-owned investment corporations (NROs). The present NRO rules allow an NRO to claim a refund of its 25% refundable tax when it pays dividends to its non-resident shareholders (at which time the dividend withholding tax in Part XIII of the Act applies). However, to access the pool of refundable tax for a given taxation year, the refund mechanism requires dividends to be paid in a subsequent taxation year. Since the amended definition "non-resident-owned investment corporation" in subsection 133(8) calls for the phase-out of NROs over a three-year period, a corporation that ceases to be an NRO would not be able to claim a refund of the 25% refundable tax that it would pay in respect of its last taxation year as an NRO. To accommodate the refund of this tax, new paragraph 134.1(1)(c) provides an election through which a corporation that ceases to be an NRO can elect to have its status as an NRO extended for this specific purpose for its first non-NRO year. In order to access the refund, the dividends paid in the first non-NRO year must be paid to a non-resident person or another NRO.
>
> New section 134.1 applies to corporations that cease to be NROs because of a transaction, event or circumstance that arises in a taxation year of the corporation that ends after February 27, 2000. An election under the section is treated as having been made in a timely manner if it is made on or before the electing corporation's filing-due date for its taxation year that ends after this amendment receives Royal Assent.
>
> [My emphasis]

THE ASSESSMENT

[12] The minister's refusal to grant the refund claimed by CGU is based on two grounds. First, CGU could not avail itself of the NRO phase out rules in section 134.1 as it was not an NRO when formed and was not deemed an NRO under that provision.

[13] Even if CGU could avail itself of section 134.1, this deeming provision does not extend to the definition of an NRO under subsection 133(8) or subparagraph 87(2)(*cc*)(i), with the result that the RTOH account of GA Scottish did not flow through to it.

[14] CGU objected and the matter was eventually brought before the Tax Court which confirmed the assessment. Hence the present appeal.

DECISION OF THE TAX COURT

[15] The Tax Court Judge first focuses on whether CGU had the standing to make the election pursuant to subsection 134.1(1). It is clear from the language of this provision that the corporation that can make the election is the corporation that lost its status from one year to the next (Reasons, para. 22). An amalgamated corporation is not the same as a predecessor (Reasons, para. 24). Subject to paragraph 87(2)(*a*), the general rule is that set out by the Supreme Court in *R. v. Black and Decker Manufacturing Co.*, [1975] 1 S.C.R. 411 (*Black and Decker*), namely that the predecessor corporations continue to exist in the amalgamated corporation (Reasons, para. 25).

[16] According to the Tax Court Judge, paragraph 87(2)(*a*) which deems an amalgamated corporation to be a new corporation (i.e., "the new corporation rule") only applies for certain purposes (Reasons, paras. 26 to 28). The decision of this Court in *R. v. Guaranty Properties Ltd.*, [1990] 2 C.T.C. 94 (*Guaranty Properties*); *Pan Ocean Oil Ltd. v. R.*, 94 D.T.C. 6412 (*Pan Ocean Oil*), and the decision of the Alberta Court of Queen's Bench in *Canadian Roxy Petroleum Ltd. v. Alberta*, 98 D.T.C. 6313 are relied upon. According to the Tax Court Judge, *Pan Ocean Oil* stands for the proposition that the new corporation rule applies only for the purposes of computing income or taxable income. As the present case involves neither, GA Scottish continues to exist as the corporation that was an NRO and as such is entitled to make the election (Reasons, para. 33):

> … Since the election provided for in section 134.1 does not deal with the calculation of income or taxable income, the case law is clear. GA Scottish has not ceased to exist by virtue of the amalgamation. It can make the election in subsection 134.1(1) as the corporation that was an NRO in 1999 and not an NRO in the following year. It did make the election and is thereby deemed to be an NRO in the 2000 year …
>
> [My emphasis]

[17] The Tax Court Judge then turns to the second issue, i.e., whether GA Scottish's RTOH account flowed through to CGU so as to entitle CGU to the refund which it claimed. The Tax Court Judge first notes that the transfer of a RTOH account of a predecessor corporation to an amalgamated corporation occurs pursuant to subparagraph 87(2)(*cc*)(i). That provision only applies if the new corporation is an NRO. According to the Tax Court Judge (Reasons, para. 36):

> … The problem here for the Appellant is that subsection 134.1(2) sets out that the corporation that lost its NRO status, by virtue of the election is deemed to be an NRO for the purposes of section 212 and subsections 133(6) to (9) excluding the definition of NRO in subsection 133(8). No mention is made of subparagraph 87(2)(cc)(*i*).

[18] The Tax Court Judge rejects the contention that section 134.1 should be construed in order to avoid the double tax which the appellant complains of in this case (Reasons, para. 38). He emphasizes that a corporation that has lost its NRO status is deemed, pursuant to subsection 134.1(2), to be an NRO only for the purposes of section 212 and subsections 133(6) to (9), excluding the definition of NRO in subsection 133(8). According to the Tax Court Judge (Reasons, para. 40):

> … This is entirely consistent with the tax treatment of NROs where there has been an amalgamation. As noted above, the post-amble to the definition of NRO in subsection 133(8) provides that "in no case shall a new corporation (within the meaning assigned by section 87) formed as a result of an amalgamation after June 18, 1971 of two or more predecessor corporations be regarded as a non-resident-owned investment corporation unless each of the predecessor corporations was, immediately before the amalgamation, a non-resident- owned investment corporation"…

[19] The Tax Court Judge concludes his reasons by holding that there is no basis for reading subparagraph 87(2)(*cc*)(i) as a supporting rule to section 134.1 and in particular to the provisions of the Act which it deems applicable (Reasons, para. 45).

POSITION OF THE PARTIES

[20] As previously mentioned, the appellant supports the Tax Court Judge's conclusion that the new corporation rule set out in paragraph 87(2)(*a*) only applies for the purposes of computing income or taxable income. Since the present case involves neither, the appellant is not deemed a new corporation and therefore has the standing to make the election and claim the refund. In this respect, it relies essentially on the reasons advanced by the Tax Court Judge in reaching this conclusion (Appellant's Memorandum, paras. 41 to 56).

[21] With respect to the second issue, the appellant contends that the Tax Court Judge erred in failing to read paragraph 87(2)(*cc*) as a "supporting rule" to subsections 133(6) to (9). According to the appellant, it is impossible to apply subsections 133(6) to (9) without applying paragraph

87(2)(*cc*). In this respect, the appellant relies on the decision of this Court in *Olsen v. R.*, [2002] 2 C.T.C. 64 (Appellant's Memorandum, paras. 16 to 26).

[22] According to the appellant, the broad language of section 132(2) of the Act "… because of a transaction or event that occurs, or a circumstance that arises, in a taxation year … that ends after February 27, 2000.", is sufficiently broad to support its view that the provision applies in the present context i.e., where an NRO corporation amalgamates with one or more non-NROs (Appellant's Memorandum, paras. 33 to 40).

[23] In any event, applying the corporate law principle, GA Scottish and the other predecessor corporations continued as one, with the result that CGU possesses all the rights and characteristics of the predecessors, including GA Scottish's RTOH account (Appellant's Memorandum, paras. 28 to 32).

[24] The respondent for its part submits that there is no basis for the contention that the corporate law continuance principles govern the tax consequences under the Act. Although, GA Scottish survives within CGU, its NRO status prior to amalgamation does not continue on amalgamation as subsection 133(8) expressly precludes this result (Respondent's Memorandum, paras. 31 to 41).

[25] Contrary to what was held by the Tax Court Judge, GA Scottish's NRO status was not preserved and CGU did not have the standing to make the election pursuant to subsection 134.1(2). In reaching the conclusion that CGU had the status to make the election, the Tax Court Judge gave

the decision of this Court in *Pan Ocean Oil, supra,* too wide a reach. In particular, there is no reason to restrict the application of the new corporation rule set out in paragraph 87(2)(*a*) to the computation of income and taxable income (Respondent's Memorandum, paras. 45 to 65).

[26] In any event, the respondent submits that the Tax Court Judge correctly held that GA Scottish's RTOH account did not flow through to CGU. In particular, the respondent takes issue with the appellant's contention that subparagraph 87(2)(*cc*)(i) is incorporated into subsection 134.1(2) by necessary implication. The authority on which the appellant relies for this proposition (*Olsen, supra*) is clearly distinguishable (Respondent's Memorandum, paras. 26 to 32).

ANALYSIS AND DECISION

[27] The interpretation of section 134.1 and related provisions raises a question of law which stands to be reviewed on a standard of correctness, as does the question whether the new corporation rule set out in paragraph 87(2)(*a*) applies to Division F and in particular to section 134.1 (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 33 and 36).

[28] Dealing first with the interpretation of section 134.1, it is common ground that if the amalgamation which resulted in the creation of CGU had taken place prior to the introduction of the phase out rules, the RTOH of GA Scottish would have expired as a result of its amalgamation with corporations which were not NROs. Subparagraph 87(2)(*cc*)(i) is capable of no other construction.

[29] The appellant's main contention is that it is being subjected to a form of a double tax, and that section 134.1 should be construed to extend to its situation in order to avoid this result. However, since the early 1970s and throughout the existence of the NRO regime in its present form, Parliament has applied the policy that an NRO which merges with one or more non-NROs loses access to the predecessor's RTOH account. It would be a strange result if provisions intended to accommodate the phasing out of a regime were construed as creating rights that never did exist under that regime.

[30] The better view is that the phase out rules and in particular section 134.1 was intended to preserve on a transitional basis the advantages that were available to NROs while the regime was in place. The fact that Parliament did not intend the phase out rules to apply to the appellant's situation is made clear by the explicit exclusion of the definition of an NRO in subsection 133(8). In my view, Parliament intended section 134.1 to apply to corporations that were NROs but lost this status due to the phasing out of the NRO regime.

[31] The phasing out was effected by the amended definition of an NRO in paragraph 133(8)(*i*). According to this definition, no NRO can be created after February 27, 2000 and existing NROs lose their status when there is an increase in their capital after that date or on December 31, 2003, whichever is earlier. Section 134.1 allows corporations whose status is phased out as a result of these provisions to nevertheless obtain a refund out of their RTOH with respect to qualifying dividends paid in its first non-NRO year.

[32] The appellant recognizes that the phase out rules in subsection 134.1(2) deem a corporation to be an NRO for the purposes of subsections 133(6) to (9) and that the definition of an NRO in subsection 133(8) is expressly excluded from the ambit of that provision. However, it maintains that this is not an obstacle as the deeming provision in subsection 134.1(2) extends to subparagraph 87(2)(*cc*)(i) by necessary implication. According to the appellant subparagraph 87(2)(*cc*)(i) is a "supporting rule" without which subsection 134.1(1) is rendered meaningless (Appellant's Memorandum, paras. 18 to 20).

[33] With respect, subsection 134.1(2) is not thereby rendered meaningless. It retains its full effect and application with respect to NROs which have lost their status as a result of the phase out of the NRO regime. In such a case, subsection 134.1(2) allows the subject corporation to claim a refund of its RTOH computed in accordance with subsection 133(9), which can include the RTOH accounts of its predecessors, so long as they were all NROs immediately prior to the amalgamation.

[34] The decision of this Court in *Olsen, supra*, which the appellant quotes in support of its "supportive rule" argument, is of no assistance. In that case, the Court was confronted with the construction of the word "connected" as used in subsection 84.1(1) of the Act. The Court held that it was to be given the meaning which it had under subsection 186(4), a meaning which could only be understood by reference to the defined meaning of that word in subsection 186(2) (*Olsen, supra*, paras. 9 to 11). In contrast, there is no need in this case to resort to subparagraph 87(2)(*cc*)(i) in order to give effect to subsection 134.1(2).

[35] In short, contrary to what the appellant asserts, subsection 133(9) can be applied without extending the deeming rule in subsection 134.1(2) beyond the provisions which Parliament has expressly referred to. The seemingly broad language of subsection 132(2) on which the appellant relies – "because of a transaction or event or a circumstance that arises" – does not have the effect which it contends. This language merely captures the occurrences which can trigger the termination of NROs under the phasing out provisions i.e., a "transaction" whereby a corporation increases its capital or the "event" or "circumstance" which arises by the passage of time (see paragraph 133(8)(*i*)).

[36] I can detect no error in the Tax Court Judge's conclusion that the deemed NRO status provided by subsection 134.1(2) does not extend to subparagraph 87(2)(*cc*)(i) and that, accordingly, GA Scottish's RTOH account did not flow through to the appellant under that provision.

[37] Prior to reaching this conclusion, the Tax Court Judge did hold that GA Scottish had the standing to elect pursuant to subsection 134.1(1) on the basis that it was continued into CGU in accordance with corporate law principles (Reasons, para. 33). According to the Tax Court Judge, paragraph 87(2)(*a*) did not deem the appellant a new corporation since this provision has no application with respect to Division F, where the NRO provisions are found. He read the decision of this Court in *Pan Ocean Oil, supra,* as authority for this proposition. With respect, I do not believe that *Pan Ocean Oil* has the effect which the Tax Court Judge attributed to it.

[38] In that case, which follows in time the decision of this Court in *Guaranty Properties, supra,* the issue was whether the appellant (*Pan Ocean Oil*) which had been formed as a result of amalgamation was entitled to deduct the exploration and drilling expenses of a predecessor corporation. If *Pan Ocean Oil* was deemed to be a new corporation within the meaning of paragraph 87(2)(*a*), it was a "third successor corporation" under the successor rules and as such denied the deduction. If *Pan Ocean Oil* was not a new corporation, but rather a continuation of the predecessor corporation, it was entitled to the deduction as a "second successor corporation".

[39] In allowing the Crown's appeal, the Court concluded that *Pan Ocean Oil* was deemed to be a new corporation under paragraph 87(2)(*a*) of the Act and therefore that it was not entitled to the deduction. The Court reasoned that:

> a) its earlier decision in *Guaranty Properties Ltd. v. R* is limited to its own facts and was not intended to restrict the application of subparagraph 87(2)(*a*) solely to the timing of a new corporation's first taxation year (*Pan Ocean Oil*, paras. 10 and 11);
>
> b) the provisions of paragraph 87(2)(*a*) are applicable only to the amalgamated company's computation of income under Division B (including the "deductions to which it may be entitled") and, where necessary as a consequence thereof, to its computations of taxable income (Division C) and of tax (Division E) (*idem*, para.13); and
>
> c) a new corporation is manifestly not its predecessor corporation whatever the situation may be under corporate law principles (*idem*, para. 15).

[40] The only issue which the Court had to decide was whether *Pan Ocean Oil* was deemed to be a new corporation for purposes of the successor rules. The observation that an amalgamated corporation is "only" a new corporation for the purpose of the computing income under Division B

and where necessary as a consequence thereof, to Divisions C and E is *obiter*. The Court did not decide, let alone consider whether paragraph 87(2)(a) deems an amalgamated corporation to be a new corporation for the purpose of the NRO provisions in Division F.

[41] Considering this question, it is apparent that the new corporation rule in paragraph 87(2)(*a*) which is said to apply "for the purposes of this Act", would be rendered meaningless in the context of Division F, if its application was restricted, as the appellant suggests, to the computation of income (Division B), and where necessary to the calculation of taxation income (Division C) and tax (Division E). Significantly, this would result in paragraph 133(8)(*g*), which provides that an amalgamated corporation is not an NRO unless all of its predecessors were NROs, being read out of the Act. In my respectful view there is no reason to exclude Division F and in particular section 134.1 from the application of paragraph 87(2)(*a*) of the Act.

[42] Since CGU was a "new corporation" pursuant to that provision, it follows that it never was an "NRO in a taxation year" as contemplated by paragraph 134.1(*a*) and therefore did not have the standing to make the election under that provision.

[43] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
Pierre Blais J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-176-08

(APPEAL FROM A JUDGMENT ORDER OF THE HONOURABLE JUSTICE HERSHFIELD OF THE TAX COURT OF CANADA, DATED March 25, 2008, NO. 2005-1448(IT)G)).

STYLE OF CAUSE:	CGU HOLDINGS CANADA LTD. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 15, 2008
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Létourneau J.A. Blais J.A.
DATED:	January 23, 2009

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