

**SUPREME COURT OF CANADA**

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| **Citation:** Envision Credit Union *v.* Canada, 2013 SCC 48, [2013] 3 S.C.R. 191 | **Date:** 20130926**Docket:** 34619 |

**Between:**

**Envision Credit Union**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**(paras. 1 to 60)**Reasons Concurring in the Result:**(paras. 61 to 72) | Rothstein J. (McLachlin C.J. and LeBel, Moldaver, Karakatsanis and Wagner JJ. concurring)Cromwell J. |

Envision Credit Union *v.* Canada, 2013 SCC 48, [2013] 3 S.C.R. 191

Envision Credit Union Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: Envision Credit Union *v.* Canada**

2013 SCC 48

File No.: 34619.

2013:  March 19; 2013:  September 26.

Present: McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the federal court of appeal

 *Taxation — Income Tax — Corporations — Amalgamations — Amalgamating credit unions seeking to avoid flow‑through of certain tax attributes to double claim capital cost allowance and reset preferred rate amount — Whether amalgamation a “qualifying amalgamation” satisfying requirements of s. 87 of the Income Tax Act — Whether “qualifying amalgamation” provisions apply to readjust amalgamated corporation’s tax attributes — Credit Union Incorporation Act, R.S.B.C. 1996, c. 82, ss. 20, 23 — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 87.*

 Two credit unions, D and F (together the “predecessors”) amalgamated to form E. The merger was undertaken for non‑tax reasons, but the transaction was structured to obtain the best possible tax outcome. The amalgamation was carried out under the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82 (“*CUIA*”). In amalgamating, D and F attempted to avoid the application of s. 87 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”) and thereby engage in a non‑qualifying amalgamation by having the beneficial interest in certain real properties that were surplus to their business needs (the “surplus properties”) pass at the moment of amalgamation from the predecessors to a recently created subsidiary, 619. In exchange for those surplus properties, 619 issued shares to the predecessors, which then flowed through to E as a result of the amalgamation. Upon amalgamation, E retained the legal title to the surplus properties as a bare trustee, but the beneficial interest was vested in 619.

 E took the position that its amalgamation was not a qualifying amalgamation under s. 87 because the flow‑through requirement of s. 87 applies only where “all the property” of the amalgamating corporations becomes the property of the amalgamated corporations. E argues that because certain properties were sold at the exact moment of the amalgamation, this precondition to flow‑through was not met. Two particular tax attributes are at issue in this appeal: capital cost allowance (“CCA”) and the preferred rate amount (“PRA”). E says that as a result of the non‑qualifying merger, its PRA was reset to zero, which would have the effect of potentially increasing its ability to claim the PRA tax credit. Although E filed its tax returns in accordance with this assumption, it is undisputed that the PRA reset did not benefit it in the tax years relevant to this appeal. Nevertheless, the PRA was the reason that the decision was made to pursue a non‑qualifying amalgamation. E also took the position that the CCA deductions taken by its predecessors were reset upon amalgamation such that it could claim CCA based on the original capital cost of the assets to the predecessor credit unions. The Minister reassessed E for the taxation years 2001, 2002, 2003 and 2004. The Tax Court dismissed E’s appeal from all reassessments except the reassessment for the 2001 taxation year, which was held to be statute barred. The Federal Court of Appeal dismissed the appeal.

 *Held*: The appeal should be dismissed.

 *Per* McLachlin C.J. and LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: A qualifying amalgamation under s. 87 of the *ITA* has three basic requirements: (a) all of the property of the predecessor corporations immediately before the merger must become property of the amalgamated corporation (“Amalco”) by virtue of the merger; (b) all of the liabilities of the predecessor corporations immediately before the merger must become liabilities of Amalco by virtue of the merger; and (c) all of the shareholders, who owned shares of the capital stock of any predecessor corporation immediately before the merger, must receive shares of the capital stock of Amalco because of the merger. Once the s. 87 requirements are met, the *ITA* provides for the flow‑through of various tax attributes while prohibiting the flow‑through of other tax attributes. All other amalgamations are outside the scope of s. 87. The tax consequences of non‑qualifying amalgamations are not specified in the *ITA*.

 Credit unions in B.C. are not permitted to amalgamate except in accordance with the requirements of s. 20 of the *CUIA*. While s. 20 empowers predecessor credit unions to set terms and conditions of amalgamation, those terms and conditions cannot contradict or override the automatic consequences of amalgamation specified in s. 23 of the *CUIA*. Under the *CUIA*, an amalgamated credit union is a continuation of the predecessor credit unions: ss. 20(1) and 23(a). The amalgamated credit union is “seized of” all the property and liabilities of its predecessors: s. 23(b). Nothing in s. 20 or s. 23 of the *CUIA* permits amalgamating credit unions to contract out of any of the express statutory consequences of an amalgamation, and there is no independent common law power that permits credit unions to amalgamate in a manner that would contradict the terms of the *CUIA*. To permit amalgamating credit unions to contract out of s. 23 of the *CUIA* would undermine the statutory scheme constructed by the legislature by jeopardizing the role of s. 23(b) as a protection for creditors. Protection for creditors is a key issue in an amalgamation. Amalgamations are not intended to permit corporations to split liabilities from assets.

 In this case, the requirements of s. 87 of the *ITA* are satisfied by this amalgamation and the amalgamation was a qualifying amalgamation. By virtue of s. 23(b), E was seized of the surplus properties at the exact moment of amalgamation. This caused the condition in s. 87(1)(*a*) of the *ITA* to be fulfilled. All of the property of the predecessors was property of E by virtue of the merger. It was not open to the parties, through the *CUIA*, to have some property that belonged to the predecessors not become property of E by virtue of the amalgamation. The provisions of the *ITA* that provide for the flow‑through of CCA and PRA apply and E’s tax attributes must be adjusted accordingly. Despite the fact E was seized of the surplus properties at the time of amalgamation, an outcome that the predecessors were trying to avoid, the contracts for sale of the surplus properties and the amalgamation agreement are still effective. The effect of these agreements was identical to the effect that the predecessors had planned for, with the sole exception of the tax consequences which could not have been achieved because of s. 23(b) of the *CUIA*. Tax consequences which flow from the application of tax law cannot be tailored to avoid negative corporate law consequences.

 *Per* Cromwell J.: At the moment that E was created, the predecessor corporations ceased to have any independent legal existence. There was thus no point in time when D, F and E existed as separate legal entities such that D and F could convey their property to E because, at the moment of amalgamation, only E was a separate legal entity. That is sufficient to fully answer this appeal and the analysis should stop there.

 It is both unnecessary and undesirable to resolve this appeal using s. 23(b). Having found that there was no inconsistency between the actual transaction and the result of an amalgamation as described in s. 23, it is not necessary to speculate on what would have happened if that were not the case. The proposed interpretation of s. 23 has potentially far‑reaching effects beyond the construction of the *CUIA*. In effect, it lays down a rule that all amalgamations under the *CUIA* (and therefore under similarly worded provisions in other corporations statutes) cannot, as a matter of law, fall outside the provisions of s. 87(1)(*a*) and (*b*) of the *ITA*. This is a significant holding but there is no authority to support it.

 Moreover, there is reason to be concerned about the correctness of the proposed interpretation given the text and structure of the statute. Section 23 does not set out the conditions for amalgamation; that is the role of s. 20. Rather, s. 23 simply describes the effects of an amalgamation, recognizing that the amalgamation agreement plays a central role in spelling out those effects. Given that credit unions operate in a highly regulated environment, it also seems rather unlikely that creditor protection depends heavily on s. 23(b). Section 20 addresses this concern through the requirement for regulatory approval of the proposed amalgamation. Further, it is acknowledged that this interpretation has the potential to give rise to significant practical problems in future cases.

**Cases Cited**

By Rothstein J.

 **Discussed:** *R. v. Black and Decker Manufacturing Co.*, [1975] 1 S.C.R. 411; **referred to:**  *Manco Home Systems Ltd., Re*, 1989 CanLII 2819; *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952.

**Statutes and Regulations Cited**

*Business Corporations Act*, S.B.C. 2002, c. 57, s. 279(b)(ii).

*Company Act*, R.S.B.C. 1996, c. 62, s. 251.

*Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82, ss. 16 to 18, 20 to 24.

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 87, 137(4.3)(*b*), 256(1.2).

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 APPEAL from a judgment of the Federal Court of Appeal (Evans, Layden‑Stevenson and Stratas JJ.A.), 2011 FCA 321, 425 N.R. 261, 2012 D.T.C. 5055, 94 B.L.R. (4th) 14, [2012] 3 C.T.C. 66, [2011] F.C.J. No. 1857 (QL), 2011 CarswellNat 5740, affirming a decision of Webb J., 2010 TCC 576, 2010 D.T.C. 1399, [2011] 2 C.T.C. 2229, 79 B.L.R. (4th) 38, [2010] T.C.J. No. 469 (QL), 2010 CarswellNat 4303. Appeal dismissed.

 *Joel A. Nitikman* and *Jessica Fabbro*, for the appellant.

 *Daniel Bourgeois* and *Eric Noble*, for the respondent.

 The judgment of McLachlin C.J. and LeBel, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

 Rothstein J. —

I. Introduction

1. Every taxpayer is entitled to order his or her affairs so that the tax payable is less than it otherwise would be. Taxpayers often engage in tax planning to achieve that result. Of course, if that tax planning is to achieve the desired result, it must be consistent with the relevant provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), and other statutes. If the planning runs afoul of such provisions, the sought after tax minimization is not achieved. That is the result in this appeal.
2. In this case, two credit unions amalgamated into Envision Credit Union (“Envision”). In doing so, they sought to avoid the application of s. 87 of the *ITA*, which requires that certain tax attributes of amalgamating corporations “flow through” to the amalgamated corporation if specific criteria are met. By avoiding the flow-through of certain tax attributes, the credit union attempted to double claim capital cost allowance and would have an enhanced capacity for a lower tax rate on a portion of its income.
3. Envision contends that it successfully avoided the flow-through requirement. In particular, Envision observes that the flow-through requirement applies only where “all of the property” of the amalgamating corporations becomes property of the amalgamated corporation. Envision argues that because certain properties were sold at the exact moment of the amalgamation, this precondition to flow-through was not met.
4. Amalgamations are creatures of statute. For the reasons that follow, I conclude that Envision was not able to avoid the application of the *ITA* rules by selling property at the time of amalgamation, because the provincial statute that permitted the amalgamation caused the *ITA* conditions to be automatically fulfilled. The amalgamation therefore met the requirements for flow-through of tax attributes under the *ITA*. I would dismiss the appeal.

II. Facts

1. On January 1, 2001, two British Columbia credit unions, Delta Credit Union (“Delta”) and First Heritage Savings Credit Union (“First Heritage”) (together the “predecessors”) amalgamated to form Envision. The merger was undertaken for non-tax reasons, but the transaction was structured to obtain the best possible tax outcome.
2. The amalgamation was carried out under the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82 (“*CUIA*”). Under that Act, an amalgamated credit union is a continuation of the predecessor credit unions: ss. 20(1) and 23(a). The amalgamated credit union is “seized of” all the property and liabilities of its predecessors: s. 23(b). The relevant provisions of the *CUIA* and the *ITA* are in the attached Appendix.
3. Under the *ITA*, there are two types of amalgamations. “Qualifying amalgamations” are those that meet the requirements in s. 87 of the *ITA*. Once the s. 87 requirements are met, the *ITA* provides for the flow-through of various tax attributes while deeming a new taxation year and prohibiting the flow-through of other tax attributes. All other amalgamations, which are sometimes called “statutory amalgamations” or “non-qualifying amalgamations”, are outside the scope of s. 87. The tax consequences of non-qualifying amalgamations are not specified in the *ITA* and therefore must be determined using the other provisions of the *ITA*, where relevant, other relevant statutes and the common law.
4. A qualifying amalgamation under s. 87 of the *ITA* has three basic requirements:

(a) all of the property of the predecessor corporations immediately before the merger must become property of the amalgamated corporation (sometimes called “Amalco”) by virtue of the merger;

(b) all of the liabilities of the predecessor corporations immediately before the merger must become liabilities of Amalco by virtue of the merger; and

(c) all of the shareholders, who owned shares of the capital stock of any predecessor corporation immediately before the merger, must receive shares of the capital stock of Amalco because of the merger.

1. In this case, Delta and First Heritage attempted to avoid the application of s. 87 and engage in a non-qualifying amalgamation by having the beneficial interest in certain real properties that were surplus to their business needs (the “surplus properties”) pass at the moment of amalgamation from the predecessors to a recently created subsidiary, 619547 B.C. Ltd. (“619”). In exchange for those surplus properties, 619 issued shares to the predecessors, which then flowed through to Envision as a result of the amalgamation. Upon amalgamation, Envision retained the legal title to the surplus properties as a bare trustee, but the beneficial interest was vested in 619.
2. Envision took the position that its amalgamation was not a qualifying amalgamation because not *all* of the property of the predecessors had passed to Envision. Specifically, the beneficial ownership of the surplus properties passed to 619 and did not flow through to Envision. While shares of 619 flowed to Envision, ownership of shares does not mean that Envision owned the property of 619: A.F., at para. 68, footnote 49. The provisions in s. 87 that provide for the flow-through of various tax attributes did not apply because all of the property of the predecessors did not flow through to Envision.
3. Two particular tax attributes are at issue in this appeal: capital cost allowance (“CCA”) and the preferred rate amount (“PRA”). The specific details of how the PRA functions are not important to this appeal. It is sufficient to know that the PRA is an amount used to calculate a PRA tax credit and, as a general matter, it is preferable for taxpayers to have a lower PRA. The PRA tax credit has the effect of increasing the amount of income that is taxed at what is effectively the lower small business tax rate.
4. Envision says that as a result of the non-qualifying merger, its PRA was reset to zero, which would have the effect of potentially increasing its ability to claim the PRA tax credit. Although Envision filed its tax returns in accordance with this assumption, it is undisputed that the PRA reset did not benefit it in the tax years relevant to this appeal. Nevertheless, the PRA was the reason that the decision was made to pursue a non-qualifying amalgamation. Envision also took the position that the CCA deductions taken by its predecessors were reset upon amalgamation, although it says it adopted this position only for the purpose of “consistency” with its treatment of the PRA.
5. CCA is, of course, widely known in the legal and accounting communities. However, a brief explanation may be helpful for the discussion that follows. CCA is a business deduction that reflects the fact that while the costs of acquiring certain depreciable capital assets (like buildings, equipment, vehicles etc.) are incurred in one taxation year, the assets are in fact used over a period of years. Under the CCA scheme, assets are grouped in classes according to their type.
6. Each year, a taxpayer is permitted to deduct a percentage (assigned by the *ITA* for each class) of the undepreciated capital cost (“UCC”) of each class. This amount that is deducted is what is called the CCA. The starting UCC for each class is determined based on the actual cost to the taxpayer of acquiring the assets in that class. Each year, the UCC is reduced based on the CCA that the taxpayer has claimed in that taxation year.
7. Consistent with its position that its PRA had been reset by the amalgamation, Envision argued that since any CCA claimed by the predecessor credit unions did not flow through to Envision, the opening balance of their UCC account could be reset to the actual original capital cost of the assets. This would permit Envision to claim the same CCA already claimed by the predecessor credit unions. This “reset” meant that the UCC of Envision was set at approximately $51 million, the original cost of the assets to the predecessor credit unions, rather than approximately $20 million which was the total of the UCC balances of the two predecessor credit unions at the time of amalgamation.
8. The Minister reassessed Envision for the years 2001, 2002, 2003 and 2004 on the basis that the PRA and the UCC should flow through from the predecessors to Envision. Envision appealed these reassessments.

III. Judicial History

A. *Tax Court of Canada, 2010 TCC 576, 2010 D.T.C. 1399*

1. At the Tax Court, Webb J. (as he then was) concluded that s. 87 did not apply to this amalgamation. He found that the predecessors had the legal capacity to sell the surplus properties at the same time as the amalgamation, since the predecessors’ legal personalities were continued under the relevant legislation. He considered the effect of the *CUIA* and concluded that since s. 20(2) provided that parties to an amalgamation can specify the manner of carrying the amalgamation into effect, it was open to the predecessors to agree that certain property would not become the property of Envision at the time of amalgamation. Essentially, he found that while s. 23(b) stated that all property of the predecessors becomes property of the amalgamated credit union, that was a default rule that the predecessors could (and in this case did) contract out of. As a result, he held that s. 87 did not apply to this amalgamation.
2. Webb J. then considered the tax consequences of a non-qualifying amalgamation. He found that this Court’s decision in *R. v. Black and Decker Manufacturing Co.*, [1975] 1 S.C.R. 411, applied to this amalgamation with the effect that Envision, deemed by statute to be a continuation of its predecessors, could not argue that no CCA had been claimed by the predecessors. *Black and Decker* requires that amalgamated corporations created under the continuation model of amalgamation “continue without subtraction” of the predecessors (p. 422). The *CUIA* provides for a continuation model of amalgamation and therefore it was not open to Envision to adopt only the original capital cost of the assets that it received from its predecessors and not also the CCA deducted on those assets.
3. Webb J. also rejected the argument that the provincial *CUIA* could not impact how taxes were calculated under the federal *ITA*. He concluded that simply because applying *Black and Decker* to the facts of this case would generate the same result as s. 87, this was not a reason to reach a different result. Therefore, the UCC of Envision had to be reduced based on the CCA previously claimed by the predecessors.
4. Finally, Webb J. held that the Minister’s attempt to reassess Envision’s 2001 return was statute barred. This conclusion was not appealed by the Minister.

B. *Federal Court of Appeal, 2011 FCA 321, 425 N.R. 261*

1. The Court of Appeal found that s. 87 applied to this amalgamation because the property owned by the predecessors (the surplus properties) could be traced into property owned by Envision (the shares of 619). The amalgamation merely changed the form in which Envision held ownership of the surplus properties since the surplus properties were in effect converted into shares of 619.
2. The Court of Appeal also found that the Tax Court was correct that *Black and Decker* had the effect of requiring Envision to adopt the combined UCC balances of its two predecessors even if the amalgamation was not a qualifying one.

IV. Issues

1. This appeal raises three questions:

(1) Was the Envision amalgamation a qualifying amalgamation under s. 87 of the *ITA*?

(2) If the Envision amalgamation was not a qualifying amalgamation, how should Envision’s UCC and PRA be calculated?

(3) If the Envision amalgamation was not a qualifying amalgamation and the *ITA* otherwise permits Envision to reset its UCC and PRA without reference to its predecessors, is the general anti-avoidance rule applicable to deny Envision the tax benefit flowing from that conclusion?

1. In view of my conclusion described below, that this was a qualifying amalgamation, it is not necessary for the Court to answer questions 2 and 3. As a result, it is not necessary to address whether the flow-through of tax attributes following a non-qualifying amalgamation is governed by *Black and Decker*, as held by the courts below. I leave this question for another day.

V. Analysis

1. In my view, the requirements of s. 87 are satisfied by this amalgamation because Envision was seized of the surplus properties at the moment of amalgamation. Therefore, the amalgamation was a qualifying amalgamation. In reaching this conclusion, I am guided by the provisions of the *CUIA*, the terms of the amalgamation agreement and the terms of the agreements for the sale of the surplus properties. I conclude that it was not open to the parties, by virtue of the *CUIA*, to have some property that belonged to the predecessors not become property of Envision by virtue of the amalgamation.

A. *Section 23 of the CUIA*

1. Section 23 of the *CUIA* has not previously been interpreted by this Court. Indeed, to my knowledge, prior to these proceedings, this section had never been interpreted by a court. In terms of authority, this Court has only the benefit of the reasons of the courts below. Although no doubt assisted by those reasons, this Court is not bound by the decisions of the Tax Court on questions of statutory interpretation. While I am mindful of the reasons of Webb J., I reach the opposite conclusion as to the meaning and effect of s. 23(b) of the *CUIA*.
2. Section 23(b) of the *CUIA* states:

**23** On and after the date of the amalgamation . . .

. . .

 (b) the amalgamated credit union is seized of and holds and possesses all the property, rights and interests and is subject to all the debts, liabilities and obligations of each amalgamating credit union . . . .

This language provides that the result of an amalgamation under the *CUIA* is that the amalgamated credit union is the owner of all the property of its predecessors.

1. The *CUIA* provides no deeming rule for determining at what time on the date of the amalgamation that amalgamation takes place, unlike the B.C. *Business Corporations Act*, S.B.C. 2002, c. 57, s. 279(b)(ii), which provides that if no *time* is specified for the amalgamation, it occurs at the beginning of the specified date. However, an amalgamation must take place at a particular time and not just on a particular date. In this case, the parties are in agreement that the moment of amalgamation was set in the amalgamation agreement as the commencement of January 1, 2001.
2. Envision argues that credit unions can contract around the effect of s. 23(b) with respect to particular properties. To reach this conclusion, Envision relies on s. 20 of the *CUIA* which permits amalgamating credit unions to specify “the terms and conditions of the amalgamation” and “the manner of carrying the amalgamation into effect”. Envision argues that it is possible for predecessor credit unions to specify that certain property will not be subject to the rule in s. 23(b) and will instead pass to a third party, at the exact moment of amalgamation. Envision takes the position that s. 23(b) is only operative on property that the amalgamation agreement has not otherwise provided for. In this case, Envision argues, because the predecessor credit unions had agreed that the surplus properties would pass to 619, s. 23(b) could not cause Envision to be seized of those surplus properties.
3. In my view, s. 23(b) is not a provision out of which amalgamating credit unions are permitted to contract. Instead, it is a mandatory provision that prescribes the consequences of an amalgamation under the *CUIA*.
4. Credit unions in B.C. are not permitted to amalgamate except in accordance with the requirements of s. 20 of the *CUIA*. Section 20(2)(a)(ii) permits predecessors to set the terms and conditions of amalgamation. However, s. 23 describes the effects of a s. 20 amalgamation. While s. 20 empowers predecessor credit unions to set terms and conditions of amalgamation, those terms and conditions cannot contradict or override the automatic consequences of amalgamation specified in s. 23 of the *CUIA*. Nothing in s. 20 expressly provides authority for amalgamating credit unions to set their own effects or consequences of amalgamation with respect to assets or liabilities. These effects of amalgamation are provided for in s. 23.
5. In this respect, I am in agreement with Cromwell J. Section 20 describes the conditions for an amalgamation. Section 23 describes the effects. I also agree that this is the structure that the *CUIA* adopts with respect to acquisitions in ss. 16-18. However, I cannot see how this distinction between effects and conditions of amalgamation raises doubts for my colleague about the conclusion that parties cannot contract out of the effects of s. 23(b).
6. To permit amalgamating credit unions to contract out of s. 23 of the *CUIA* would undermine the statutory scheme constructed by the legislature. Nothing in s. 20 or s. 23 of the *CUIA* permits amalgamating credit unions to contract out of any of the express statutory consequences of an amalgamation, and there is no independent common law power that permits credit unions to amalgamate in a manner that would contradict the terms of the *CUIA*.
7. Cromwell J. relies on the fact that the other paragraphs in s. 23 contain explicit references to the amalgamation agreement: “. . . the amalgamating credit unions are amalgamated and are continued as one credit union under the name and with the constitution and rules provided in the amalgamation agreement” (s. 23(a)); “every member and auxiliary member of each amalgamating credit union is bound by the amalgamation agreement” (s. 23(c)). He suggests that because these paragraphs adopt the terms of the amalgamation agreement, somehow the same thing should hold true for s. 23(b) where there is no reference to the terms of the amalgamation agreement. With respect, I cannot see how the explicit adoption of the amalgamation agreement in s. 23(a) can assist in reaching the same conclusion for s. 23(b) where there is no such language. If anything, it suggests the opposite conclusion: that the consequences prescribed by s. 23(b) cannot be altered by the terms of the amalgamation agreement. Nor does s. 23(c), which simply makes the amalgamation agreement binding on the members of the credit unions, suggest that the terms of the amalgamation agreement may be inconsistent with s. 23(b).
8. The policy reasons of the legislature for not permitting contracting out of the effects of s. 23 can easily be understood. Protection for creditors is a key issue in an amalgamation. If Envision’s reading of the statute were correct, there would be no reason that predecessor credit unions could not also opt out of the effect of s. 23(b) in respect of liabilities, by specifying that liabilities or obligations should not pass to the amalgamated credit union. This would be an untenable result. Amalgamations are not intended to permit corporations to split liabilities from assets. The role of s. 23(b) as a protection for creditors is even more important because the *CUIA* does not contain specific provisions that protect the interests of creditors as does the B.C. *Business Corporations Act*.
9. I agree with Cromwell J. that regulatory approval is required for credit unions to amalgamate and that credit unions operate in a highly regulated environment. However, the statutory obligation of the regulator in approving an amalgamation agreement is to determine whether the amalgamation agreement is “contrary to the interests of one or more of the amalgamating credit unions or its or their members”: *CUIA*, s. 20(3)(b). While the regulator may be interested in the protection of creditors, this is not the focus of the regulatory approval process. Section 23(b), then, remains as an important element of creditor protection.
10. By virtue of s. 23(b), therefore, Envision was seized of the surplus properties at the exact moment of amalgamation. This caused the condition in s. 87(1)(*a*) of the *ITA* to be fulfilled. All of the property of the predecessors was property of Envision by virtue of the merger.
11. Envision argues that this interpretation would render the requirements with respect to property and liabilities in s. 87 of the *ITA* redundant because it would be impossible to fail to meet them, as effectively all corporate amalgamation statutes in Canada provide for continuity in respect of assets and liabilities. While this may be the case now, at any time, corporate law statutes could be amended to alter those provisions. The fact that the two conditions in the *ITA* will always be fulfilled because of current corporate law provisions does not require a different interpretation to be given to those corporate law statutes. The *ITA* exists to impose tax consequences based on corporate law; it does not exist to cause those corporate laws to be interpreted differently.
12. The Envision amalgamation was a qualifying amalgamation. Subsections 87(2)(*d*) and 137(4.3)(*b*), the provisions of the *ITA* that provide for the flow-through of CCA and PRA, apply and Envision’s tax attributes must be adjusted accordingly.
13. Cromwell J. argues that the s. 23(b) analysis is unnecessary. However, it was the basis on which this appeal was argued both in this Court and in the courts below. The parties made submissions on the meaning and effect of these sections of the *CUIA*. While my colleague suggests that this result will create significant practical problems in other cases, I cannot see any advantage to declining to decide an issue after a full appeal process and complete submissions of the parties. Indeed, to the extent that practical problems should guide judicial decision making, I think those factors suggest that this Court decide this matter now rather than leaving the matter unresolved and therefore uncertain.

B. *Effect of the Amalgamation and Purchase and Sale Agreements*

1. The above analysis is sufficient to resolve the tax issue in this case, because s. 23(b) of the *CUIA* caused the conditions in s. 87 of the *ITA* to be fulfilled. Nonetheless, Envision raises the issue of the effectiveness of the amalgamation agreement which Envision argues was the mechanism by which s. 23(b) was circumvented. Envision argues that if it was not possible for Envision to structure its affairs so that the surplus properties did not become property of Envision, the amalgamation agreement between the predecessor credit unions might be invalid (appellant’s reply factum, at para. 18).
2. To the extent that Envision is arguing that the Court’s interpretation of s. 23(b) of the *CUIA* and s. 87 of the *ITA* should turn on the effect it would have on these parties’ private transaction, I would not give effect to that argument. Tax consequences which flow from the application of tax law cannot be tailored to avoid negative corporate law consequences.
3. I agree that the practical problems posed by potentially invalidating an amalgamation that has been operational for over 10 years could be significant. However, I am not convinced that such practical problems arise in this case. Despite the fact that Envision was seized of the surplus properties at the time of amalgamation, an outcome that the predecessors were trying to avoid, the sale agreements and the amalgamation agreement were still effective. As I explain below, the effect of those agreements was identical to the effect that the predecessors had planned for, with the sole exception of the tax consequences which could not have been achieved because of s. 23(b) of the *CUIA*.

 (1) The Sale Agreements for the Surplus Properties

1. While Envision has not directly raised the issue of the effectiveness of the agreements for purchase and sale, a proper understanding of the effect of these agreements is necessary to understand how the amalgamation agreement operated in this case.
2. 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.
3. At the moment of amalgamation, the predecessors, Delta and First Heritage, no longer had separate legal personalities capable of fulfilling the terms of the sale agreements. While they were continued under the *CUIA*, they were continued inside Envision: *Black and Decker*, at p. 422. Any legal obligations that the predecessors had entered into that needed to be fulfilled, at or after the time of the amalgamation, had to be fulfilled by Envision. This is the effect of s. 23(b) of the *CUIA*, which causes the amalgamated credit union to be seized of all of the obligations of its predecessors on and after the moment of amalgamation. So, despite the fact that the agreements listed Delta and First Heritage as the vendors, at the moment of amalgamation, the vendor was Envision.
4. This principle flows from this Court’s decision in *Black and Decker*, at p. 418, where it was noted that under a continuation model of amalgamation, “upon amalgamation each constituent company loses its ‘separate’ existence but it by no means follows that it has thereby ceased to exist”. From this understanding of amalgamation, it follows that contracts that were entered into in the names of the predecessor corporations are binding upon and must be fulfilled by the amalgamated entity, barring restrictions in those contracts to the contrary: *British Columbia Company Law Practice Manual* (2nd ed. 2007), vol. 1, at p. 11-7.
5. Nothing in the agreements for the sale of the surplus properties prohibited them from being fulfilled upon an amalgamation. Indeed, the agreements specifically state that they are binding on Delta and First Heritage’s successors. A corporation’s successor is generally understood to include those corporations formed as a result of an amalgamation: *Black’s Law Dictionary* (9th ed. 2009). Therefore, since at the moment of amalgamation, Delta and First Heritage had no separate existence and because the contracts for sale of the surplus properties were binding on Envision, those agreements were properly carried out by Envision at that time.
6. The parties have characterized this case as being one of simultaneous transactions. While it is no doubt true that two things were happening at the same time (Envision being seized of all property by virtue of s. 23(b) and the surplus properties being sold by virtue of the sale agreements), the parties did not acknowledge the different nature of these two events. The distinction is between a transaction *with respect to* the properties (the sale) and a larger transaction that *had an effect on* the properties (the amalgamation).
7. When Envision was seized of the property, it was not by virtue of an agreement for purchase and sale. Envision’s seizure of the property cannot be equated to a conveyance: *Black and Decker*,at p. 417. Instead, it is more appropriate to think of Envision’s being seized of the assets of its predecessors as similar to changing the name of the legal owner. Distinguishing seizure from a conveyance makes sense given the adoption of the continuation model of amalgamation. A conveyance requires that the seller and the buyer be separate legal entities at the time of the transfer of the property. At the moment Envision was created, the predecessors ceased to have any independent legal existence, so there were not two parties capable of engaging in a conveyance. In this case, there was no point in time when Delta, First Heritage *and* Envision existed as separate legal entities such that Delta and First Heritage could convey their property to Envision. At the moment of amalgamation, only Envision continued to exist as a separate legal entity.
8. No court has previously interpreted the phrase “is seized of” in the context of the *CUIA*. Similar language existed in s. 251 of the *Company Act*, R.S.B.C. 1996, c. 62, which governed corporate amalgamations. Interpretations of that section suggest that the language ought to be considered as analogous to the provisions that this Court interpreted in *Black and Decker*: *Manco Home Systems Ltd., Re*, 1989 CanLII 2819 (B.C.S.C.). As noted above, this Court in *Black and Decker* concluded that continuation model amalgamations are not transfers or conveyances of assets.
9. At the moment that Envision was created, it was seized of the property and was immediately able to transact in relation to that property. Envision was therefore immediately able to and indeed required to fulfill the obligations of the predecessors, such as the obligation to sell the surplus properties to 619. It follows that the agreements for the sale of the surplus properties were effective.

 (2) The Amalgamation Agreement

1. I now consider whether s. 23(b) renders any portion of the amalgamation agreement invalid. Part 6.1 of the amalgamation agreement between the predecessors provides:

As and from the Effective Time, Delta and First Heritage shall be amalgamated and shall continue as the Amalgamated Credit Union under the name and with the Constitution and Rules hereinbefore provided and the Amalgamated Credit Union shall, subject to Part 8 hereof, be seized of and shall hold and possess all of the property, rights and interests, and shall be subject to all debts, liabilities and obligations, of each of Delta and First Heritage . . . . [Emphasis added; A.R., at p. 116.]

This provision, with the exception of the underlined text, simply repeats the effect of s. 23 of the *CUIA*. Part 8 provides that at the Effective Time, the predecessors will transfer certain surplus assets to a subsidiary.

1. There is nothing in Part 8 that is inconsistent with the requirements of s. 23(b) of the *CUIA*. As described above in relation to the purchase and sale agreements for the surplus properties, it was open to the predecessors to make commitments that would be fulfilled at or after the time of amalgamation. However, at and after that time, the predecessors had no independent legal existence so actions undertaken to fulfil those commitments were undertaken by the amalgamated credit union, Envision.
2. The statement in Part 6, that the seizure of the assets is “subject to Part 8”, must be interpreted in light of the meaning of Part 8. The effect of Part 8 is to commit the predecessors to selling the surplus properties at the moment of amalgamation. Nothing in Part 8 prevented Envision from being seized of the surplus properties upon amalgamation. Rather, it merely committed the predecessors and therefore Envision to making the sale.
3. Although there is extrinsic evidence that the predecessors intended to prevent Envision from being seized of the surplus properties, such an arrangement would be in violation of s. 23(b) of the *CUIA*. When a contract may be construed in two ways, a lawful interpretation ought to be preferred over an unlawful one: G. McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (2nd ed. 2011), at para. 7.31. Accordingly, the words of the contract (as opposed to the intention of the parties with respect to tax consequences) are best interpreted as merely ensuring that the surplus properties were sold at the time of the amalgamation. This interpretation is consistent with s. 23(b) of the *CUIA*. As a result, the amalgamation agreement is not invalid.

C. *Tracing Must Be Rejected*

1. In view of my conclusions above, it is unnecessary to consider the Court of Appeal’s approach of tracing the surplus properties through the shares of 619. However, I am of the view that if it had been necessary to consider it, the tracing approach would have to be rejected. It is a basic rule of company law that shareholders do not own the assets of the company: see, e.g., *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 1033. While the *ITA* provides for “look-through” rules in certain circumstances which permit this basic rule to be ignored for tax purposes, those provisions are explicit: see, e.g., the s. 256(1.2) look-through rules that deem shares (property) owned by a corporation to be controlled by the shareholders of the corporation.
2. The Minister argues that the broad definition of property and the language in s. 87 of “in such a manner that” is sufficient to create such a look-through or tracing rule. In my view, that cannot succeed. That legislative language is not as explicit as those provisions of the *ITA* that permit shareholders to be deemed to be the owners of corporate property. The tracing approach cannot be used to cause an amalgamation to meet the requirements of s. 87.

VI. Disposition

1. As a result of s. 23(b) of the *CUIA*, it was not possible for the predecessors to structure an amalgamation that did not meet the condition in s. 87(1)(*a*) of the *ITA*. Therefore, the Envision amalgamation was a qualifying amalgamation under the *ITA* and Envision’s UCC balance and PRA must be determined in accordance with s. 87 of the *ITA*.
2. I would dismiss the appeal with costs.

 The following are the reasons delivered by

1. 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. That is sufficient to fully answer the appellant’s appeal and I would stop the analysis there.
2. My colleague also relies on s. 23 of the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82 (“*CUIA*”), to resolve the appeal by holding that s. 23(b) is a provision out of which amalgamating credit unions are not permitted to contract: para. 30. However, I find it both unnecessary and undesirable to adopt this interpretation of s. 23 in this case. It is unnecessary because the line of reasoning to which I refer in the first paragraph of my reasons is sufficient to resolve the question raised on appeal. Having found that there was no inconsistency between the actual transaction and the result of an amalgamation as described in s. 23, it is not necessary to speculate on what would have happened if that were not the case. It is undesirable, in my respectful view, for a number of reasons.
3. My colleague interprets s. 23(b) of the *CUIA* as establishing a prerequisite to a lawful amalgamation. In effect, my colleague’s reasons lay down a rule that all amalgamations under the *CUIA* (and therefore under similarly worded provisions in other corporations statutes) cannot, as a matter of law, fall outside the provisions of s. 87(1)(*a*) and (*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”). This is a significant holding. But there is apparently no authority to support it (certainly none is cited) and it did not attract the approval of the learned Tax Court judge in this case: see reasons of Webb J. (as he then was), 2010 TCC 576, 2010 D.T.C. 1399, at para. 50. Moreover, there is reason to be concerned about the correctness of the proposed interpretation given the text and structure of the statute. It is also acknowledged that this interpretation has the potential to give rise to significant practical problems in future cases. All of these considerations, to my mind, call for caution and cast doubt on the wisdom of deciding this point.
4. I will not dwell on the absence of authority — Rothstein J. cites none on this point — other than to observe that the Court is generally assisted by reasons of other courts on points that it decides. We have no such assistance here. I will not expand further on the fact that the learned Tax Court judge did not accept the interpretation now advanced other than to note that his conclusion suggests that the interpretative point before us is at least one on which reasonable and highly experienced tax lawyers may reasonably differ. I will address in somewhat more detail the aspects of the text and structure of the statute that raise doubts in my mind as to the correctness of my colleague’s interpretation.
5. Turning first to the text, Rothstein J. reads s. 23 as setting out legal requirements for an amalgamation out of which the parties cannot contract. However, when one contrasts the language used in s. 23 with that in s. 20, that construction seems at least doubtful.
6. When the legislature intended to set out legal requirements for amalgamation, it used language appropriate to achieve that goal. It did so very clearly in s. 20. Section 20 provides that two or more credit unions may amalgamate, “but must not do so except in accordance with this section”: s. 20(1). It would be hard to find clearer expression of the intent to set out legal requirements. There follows in s. 20 a detailed list of substantive and procedural requirements, including the need for regulatory approval. The important point is that s. 20 uses clear language to set out the requirements and that is clearly the purpose of the provision.
7. Contrast the language of s. 20 with that used in s. 23. Section 23 uses language that describes the effects of amalgamation; it does not use language that establishes requirements for a lawful amalgamation. Section 23 is premised on a certificate of amalgamation having been issued and it adopts the terms of the amalgamation agreement in relation to “the name . . . the constitution and rules provided in the amalgamation agreement”: s. 23(a). It further provides that every member of each amalgamating credit union is bound by the amalgamation agreement: s. 23(c). This would be an odd choice of language if the provision were meant to lay down hard and fast rules with which amalgamations must comply. It would also seem to be an odd approach to drafting to put a prohibition relating to the contents of an amalgamation agreement in s. 23(b) between two other subsections, 23(a) and 23(c), that indicate that the provisions of the amalgamation agreement govern once the certificate is issued. In short, there is reason to think that s. 23 does not set out the conditions for amalgamation; that is the role of s. 20. Rather, it may well simply describe the effects of an amalgamation, recognizing that the amalgamation agreement plays a central role in spelling out those effects.
8. Turning to the structure of the *CUIA*, it too casts some doubt on the correctness of Rothstein J.’s interpretation of s. 23. The provisions in the *CUIA* which deal with acquisitions (ss. 16 to 18) and amalgamations (ss. 20 to 24) have a similar structure. Section 16 sets out the conditions for acquisition of a credit union by asset transfer in the same way that s. 20 sets out the conditions for amalgamation. Section 17 deals with acquisitions directed by the commission in the same way that s. 20 deals with amalgamations directed by the commission. Section 18 describes the effects of the transaction based on the acquisition agreement in the same way that s. 23 deals with the effects of the amalgamation based on the amalgamation agreement.
9. My colleague is concerned that the interpretation of s. 23 he proposes is essential in order to address concerns that, without such a provision, creditors of predecessor credit unions would not, or might not be protected on amalgamation. Section 20 addresses this concern, however, through the requirement for regulatory approval of the proposed amalgamation. I also note that credit unions operate in a highly regulated environment and it seems to me to be rather unlikely that creditor protection depends so heavily on s. 23(b).
10. Taking these points into account, there seems to me to be good reason to question the interpretation advanced by my colleague.
11. I am also concerned about the possible unintended consequences of my colleague’s interpretation. As he properly acknowledges in para. 43, “the practical problems posed by potentially invalidating an amalgamation that has been operational for over 10 years could be significant”. Although no such problems in fact arise here, I would not adopt an interpretation that is recognized to have the potential to give rise to significant practical problems in other cases when doing so is not necessary for the resolution of this appeal. Given that Rothstein J.’s interpretation may put in doubt the legality of previous amalgamations which received appropriate regulatory approval and, given further that the point has apparently never come up before, it seems to me that deciding this point when it is unnecessary to do so is much more likely to create problems than to solve them.
12. To conclude, Rothstein J. proposes an interpretation: (1) that has potentially far-reaching effects beyond the construction of the *CUIA*; (2) in support of which no authority is offered; (3) which encounters some difficulty having regard to the structure and text of the statute; and (4) which is acknowledged to have the potential to cause significant practical problems in other cases. With great respect, it is my view that the Court should not take this step when doing so is completely unnecessary for the proper disposition of the appeal before us.

**APPENDIX**

Relevant Provisions

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

 **87.** (1) [Amalgamations] In this section, an amalgamation means a merger of two or more corporations each of which was, immediately before the merger, a taxable Canadian corporation (each of which corporations is referred to in this section as a “predecessor corporation”) to form one corporate entity (in this section referred to as the “new corporation”) in such a manner that

 (*a*) all of the property (except amounts receivable from any predecessor corporation or shares of the capital stock of any predecessor corporation) of the predecessor corporations immediately before the merger becomes property of the new corporation by virtue of the merger,

 (*b*) all of the liabilities (except amounts payable to any predecessor corporation) of the predecessor corporations immediately before the merger become liabilities of the new corporation by virtue of the merger, and

 (*c*) all of the shareholders (except any predecessor corporation), who owned shares of the capital stock of any predecessor corporation immediately before the merger, receive shares of the capital stock of the new corporation because of the merger,

 otherwise than as a result of the acquisition of property of one corporation by another corporation, pursuant to the purchase of that property by the other corporation or as a result of the distribution of that property to the other corporation on the winding-up of the corporation.

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

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

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

 (a) specifies

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

 (ii) the terms and conditions of the amalgamation,

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

. . .

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

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

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

. . .

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

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

 (b) the amalgamated credit union is seized of and holds and possesses all the property, rights and interests and is subject to all the debts, liabilities and obligations of each amalgamating credit union, including any obligations to members or auxiliary members under section 24, and

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

 *Appeal dismissed with costs*.

 Solicitors for the appellant:  Dentons Canada, Vancouver.

 Solicitor for the respondent:  Attorney General of Canada, Ottawa.