Toronto Law Journal

Qualifying Amalgamation Defined

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Under the *Income Tax Act* (the "ITA"), there are two types of amalgamations: Qualifying Amalgamations and Non-Qualifying (or Statutory) Amalgamations. Qualifying Amalgamations are those that meet the requirements of section 87 of the ITA. All other amalgamations are outside the scope of section 87. The three basic requirements of a 'qualifying amalgamation', according to the ITA, are as follows:

- all of the property of the predecessor corporations immediately before the merger must become property of the amalgamated corporation by virtue of the merger;

- all of the liabilities of the predecessor corporations immediately before the merger must become liabilities of the amalgamated corporation by virtue of the merger; and

- 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 the amalgamated corporation because of the merger.

If the requirements of section 87 of the ITA are met, then certain tax attributes of the amalgamating corporations "flow through" to the amalgamated corporation. Canada Revenue Agency (the "CRA") has always taken the position that the tax consequences of a non-qualifying amalgamation will be determined by the legal consequences under the corporate law governing the amalgamation. Most Canadian statutes provide that the predecessors amalgamate and continue as one corporation that possesses all of the property, rights and liabilities of the predecessors. It is unclear whether the tax attributes fall under "property, rights and liabilities" of a corporation.

Notwithstanding the ambiguity, the CRA was of the view that the tax attributes of the predecessors do not flow through to the amalgamated corporation if the amalgamation does not meet the requirements of section 87 of the ITA.

This ambiguity was before the courts in the case of *Envision Credit Union v. Canada*, 2013 SCC 48. In that case, two British Columbia credit unions, Delta Credit Union and First Heritage Savings Credit Union (together the "Predecessors") amalgamated to form Envision Credit Union ("Envision"). The parties structured the amalgamation in such a way to avoid coming under the purview of section 87 of the ITA. The Courts attempted to give clarity to what constitutes a qualifying amalgamation. The balance of this paper examines the facts of the case and sets out the decisions of various levels of the court very briefly.

The predecessors formed a subsidiary ("619"). They intended to avoid the implications of section 87 by having the beneficial interest in certain real properties ("Surplus Properties") to

pass on to Envision at the exact moment of amalgamation. In exchange for the Surplus Properties, 619 issued shares to the predecessors, which flowed through to Envision as a result of the amalgamation. The amalgamation was carried out under the *Credit Union Incorporation Act*, 1996, ("CUIA"). According to section 20(1) and section 23(a) of the CUIA, an amalgamated credit union is a continuation of the predecessor credit unions.

Envision contended that the provisions of Section 87 did not apply to this amalgamation and it was not a qualifying amalgamation as not all of the property of the predecessors had passed on to Envision. Envision also contended that credit unions can contract out of section 23 of the CUIA. Envision argued that it is possible for predecessor credit unions to specify that certain property will not be subject to the rule in section 23(b) of the CUIA and will instead pass to a third party, at the exact moment of amalgamation. Envision took the position that section 23(b) of the CUIA is only operative on property that the amalgamation agreement has not otherwise provided for. In this case, because the predecessor credit unions had agreed that the surplus properties would pass to the subsidiary, 619, section 23(b) could not cause Envision to be seized of those surplus properties.

Tax Court of Canada:

The Tax Court dismissed the appeal. The Court held that the amalgamation was a qualifying amalgamation. It was held by the Court that the amalgamated credit union, Envision was a continuation of its predecessors. As a result of this continuation, the result of the non-qualifying amalgamation was the same as that of a qualifying amalgamation. The tax accounts of the predecessors still flowed through to Envision but they could choose to contract out of it.

Federal Court of Appeal:

The Federal Court of Appeal also dismissed the appeal but held that section 87 did apply to the amalgamation because the surplus properties owned by the predecessors could be traced back to the property owned by Envision in the form of shares of the subsidiary 619. The amalgamation merely changed the form in which Envision held ownership of the surplus properties as these surplus properties were converted into shares of the subsidiary 619.

The Supreme Court:

The Supreme Court dismissed the appeal and took a simpler reasoning. It rejected the Federal Court of Appeal's tracing approach. It said that contrary to the decision of the Tax Court, there was nothing in section 20 or section 23 of the CUIA that permits credit unions to amalgamate in a manner that contradicts the CUIA. Amalgamations cannot be structured so as to separate the liabilities and assets. It was held that the amalgamated corporation was seized of all of its predecessors' properties at the exact moment of amalgamation. Therefore, this was a qualifying amalgamation.

Conclusion:

The decision of the Supreme Court may suggest that it will be very difficult to fall outside of the scope of section 87 of the ITA without any amendments to the current general corporate legislation. In addition, the question of the exact consequences of a non-qualifying amalgamation on tax attributes of the amalgamated corporation remained unanswered by SCC, as they declined to make a finding on that matter.

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The Availability of Trial Bifurcation in Ontario

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Courts in Ontario have traditionally been reluctant to depart from the basic right for a litigant to have all issues in dispute decided in one trial notwithstanding the clear benefits that trial bifurcation often provides. Despite the recommendation by the Honourable Justice Osborne in the Civil Justice Reform Project to provide a mechanism to allow for the Courts to bifurcate trials, this recommendation was not incorporated into the *Rules of Civil Procedure* when revised in 2010. Given this, the Ontario Courts have typically only considered motions for bifurcated trials where the parties agree that this is preferred and where there is a clear demarcation line between discrete liability issues and complex damages issues and where significant cost savings can be achieved.

Notwithstanding this, many litigators agree that bifurcation is a valuable tool in complex proceedings as a means to save time and costs and to provide quantifiable returns for all parties. This is particularly so in civil trials where liability is questionable as bifurcation could result in significant potential cost savings. While trial bifurcation is available in only the "clearest of cases", it appears that Ontario courts have recently enhanced their appreciation of this controversial trial management device for civil trial.

Rule 6.1.01 of the *Rules of Civil Procedure*

The enactment of Rule 6.1.01 of the *Rules of Civil Procedure* spurred divided authority on whether the courts had jurisdiction to grant bifurcated trials absent consent of the parties. The Rule, on its face appeared to remove the courts' inherent power:

> With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.[1]

Notwithstanding the wording of Rule 6.1.01, the Court in *Soulliere v. The Estate of Isabelle Robitaille* established that it is within the courts' inherent jurisdiction to order bifurcated trials in non-jury trials.[2]

[1] *Rules of Civil Procedure* RRO 1990, Reg 194, r 6.1.01.
[2] 2013 ONSC 5073 [*Soulliere*].

Considerations for Trial Bifurcation

In evaluating the merits of a motion for bifurcation, Ontario courts rely upon the following factors when deciding whether to allow for bifurcation:

i) are the issues to be tried simple;

ii) are the issues of liability clearly separate from the issues of damages;

iii) is the factual structure upon which the action is based so extraordinary and exceptional that there is good reason to depart from normal practice requiring that liability and damages be tried together;

iv) does the issue of causation touch equally upon the issues of liability and damages;

v) will the trial judge be better able to deal with the issues of the injuries of the plaintiff and his financial losses by reason of having first assessed the credibility of the plaintiff during the trial of the issue of damages.

vi) can a better appreciation of the nature and extent of injuries and consequential damage to the plaintiff be more easily reached by trying the issues together;

vii) are the issues of liability and damages so inextricably bound together that they ought not to be severed;

viii) if the issues of liability and damages are severed, are facilities in place which will permit these two separate issues to be tried expeditiously before one court or before two separate courts, as the case may be;

ix) is there a clear advantage to all parties to have liability tried first;

x) will there be a substantial saving of costs;

xi) is it certain that the splitting of the case will save time, or will it lead to unnecessary delay;

xii) has there been an agreement by the parties to the action on the quantum of damages;

xiii) if a split be ordered, will the result of the trial on liability cause other plaintiffs in companion actions, based on the same facts, to withdraw or settle;

xiv) is it likely that the trial on liability will put an end to the action.[3]

Trial bifurcation has been addressed in the following cases:

- In *Bourne*, the plaintiff's motor vehicle collided with a train, rendering the plaintiff a paraplegic. The Court dismissed the motion for trial bifurcation, as the circumstances did not warrant a departure from a standard single trial of all issues as cost-savings were not evident, settlement of the actions contingent on the outcome of the trial of

[3] *Bourne v. Saunby* [1993] OJ No 2606 at para 30 (Ont Ct J (Gen Div) [*Bourne*].

liability was not realistic, and as the moving party failed to distinguish the issues of liability and damages to justify severance, amongst other factors.[4]

- The Court in *Woodbury v. Woodbury* endorsed the use of trial bifurcation as the unique circumstances necessitated a just, expeditious, and cost-saving solution. In this action, the plaintiff was being towed on a tube attached to a boat operated by his father. In an effort to avoid colliding with an oncoming boat, his father made a sharp turn causing the tube containing the plaintiff to collide with the oncoming boat.[5] The Court considered the various factors set out in *Bourne* in determining that it would be in the interests of justice to pursue trial bifurcation. Of significance, the Court noted the following reasons:

    a) The liability issues were relatively narrow in comparison to the complexity of the plaintiff's $20,000,000 damages claim;[6]

    b) The liability issues could proceed to trial within a short period of time; and

    c) Scarce judicial resources, time and costs would be conserved[7] and a vast amount of medical evidence necessary to assess damages would be eliminated.[8]

- In *Rilling v. Stewart,* the Prince Edward Island Supreme Court exercised its inherent jurisdiction and granted a bifurcated trial. The matter revolved around a motor vehicle accident. Although the equivalent P.E.I. Rule differs from Rule 6.1.01 in Ontario in that a party may move for bifurcation on its own initiative[9], the Court cited the Ontario cases of *Bourne and Woodbury* in finding the merits of severing the issues of liability and damages.[10] Specifically, the Court placed emphasis on the following *Bourne* factors when ordering for a severance of the issues:

    a) The discrete and separable liability and damages issues;

    b) The significant advantage that the defendants would incur and the minimal disadvantage the other parties would incur by having the issues of liability and damages tried separately; and

    c) The greatly increased potential for settlement from a determination of liability and the minimal delay that would incur if liability issues were disposed first.[11]

On the other end of the scale are jury trials. Courts remain hesitant when it comes to bifurcating a jury trial, as the Court of Appeal in *Kovach (Litigation Guardian of) v. Linn* held

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[4] *Ibid*.
[5] 2013 ONSC 7736 [*Woodbury*].
[6] *Ibid* at para 17.
[7] *Ibid* at para 18.
[8] *Ibid* at para 17.
[9] *Prince Edward Island Rules of Civil Procedure,* r 6.03.
[10] 2014 PESC 29 (PEI SC) [*Rilling*].
[11] *Ibid* at para 84.

that the courts' power to bifurcate jury trials is contingent upon the consent of the parties.[12] When a jury notice has been served, the courts consider factors which could cause prejudice to the plaintiff, such as a jury holding a divergent opinion of a matter on appeal from a verdict of liability.

Alternative Avenue to Trial Bifurcation

If all parties do not agree to trial bifurcation, an alternate mechanism to separately address issues of liability and damages is to bring a summary judgment motion for an order granting a trial of individual issues. The Supreme Court of Canada in *Hryniak v. Mauldin* reinforced a similar proposition that full trials canvassing every issue can compromise fairness and are not always in the best interests of justice.[13]

Future Considerations

In the United States, courts view bifurcation with a vastly different lens where a liability verdict may not be appealed in advance of the final judgment unless novel issues are introduced. Thus, American judges associate the use of trial bifurcation with judicial efficiency, enhanced jury comprehension and higher settlement rates. As such, we believe that a variation in the *Rules* to align with the recommendations of the Honourable Justice Osborne would allow for lawyers (and their clients) to benefit from the merits of trial bifurcation in instances where there may be opposition by one or more opposing parties.

[12] 2010 ONCA 126 [*Kovach*].
[13] 2014 SCC 7 (CanLII).

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The Walking Dead:
Limitation Period for Motor Vehicle Accidents That Never Die

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It is common knowledge that a claimant generally has two years from the date of loss to issue a lawsuit before the limitation period expires, but there are caveats. One such caveat is what is known as the discoverability rule; a claimant can only sue once he "discovers" that he has something to sue for. The date of that discovery does not always coincide with the date of loss. The recent decision of Justice Perell in *Farhat v. Monteanu* deals with the discoverability of a claim in the context of motor vehicle litigation and the governing statutes of the *Insurance Act*.

Mr. Farhat was injured when his vehicle was rear-ended on May 18, 2006. Within a few weeks of the accident, Mr. Farhat's lawyer put the Defendant on notice of a potential claim. Nearly a year later, Mr. Farhat was diagnosed with a sensory deficit in his left upper and lower extremities. On June 19, 2008, two years and 32 days after the accident, Mr. Farhat issued his claim, for non-pecuniary damages only.

The Plaintiff brought a partial summary judgment motion to defeat the Defendant's limitation period defence. In turn the Defendant brought a cross-motion for a summary judgment dismissing Mr. Farhat's action as statute-barred. The basis of Mr. Farhat's argument was that he discovered that his injuries met the statutory threshold of "serious and permanent", as found in section 267 of the *Insurance Act*, only when he was diagnosed with the sensory deficit, and that his two year clock to commence a claim began only with that diagnosis.

In ruling for the Plaintiff, Perell J., held that all a Plaintiff needs to do is show that he or she could not have discovered his or her threshold injury during the time by which the 2 year anniversary is missed. In this case the claim was issued 2 years and 32 days after the accident, so all the Plaintiff had to show was that the threshold injury didn't crystallize in the first 32 days following the accident.

Perell J. goes on to write about the interplay between section 267 of the *Insurance Act* and the limitation period. He notes that "perhaps ironically, because s. 267.5 (5) of the *Insurance Act* was introduced to eliminate minor personal injury claims, its effect has also been to protect such claims from the running of a limitation period for a period of time commensurate with how long it would take a reasonable person with the abilities and in the circumstances of the Plaintiff to have discovered that the threshold for a claim has been surpassed".

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This is in contrast with the operation of the limitation period in, for example, a slip and fall claim and according to Perell J., it "rankles the insurance defence bar" because a Plaintiff, or his or her negligent lawyer, "can take comfort from this slack because the limitation period only begins to run when a sufficient body of information is available to determine whether the plaintiff has a claim that may meet the threshold".

Arguably, this decision leads to separate limitation periods within the same motor vehicle lawsuit; one for pecuniary losses, that begins from the date of loss, and one for non-pecuniary losses, that begins only when a sufficient body of evidence shows that the Plaintiff sustained a threshold injury. Furthermore, the limitation for non-pecuniary losses where the Plaintiff's injuries are minor in nature may *never* commence, as the claimant will not be able to procure a sufficient body of evidence required to give knowledge of a potential claim.

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Security in Guardianship Proceedings

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Security bonds are designed to protect property, whether the assets of an estate or the property of an incapable person being administered on his or her behalf by a court-appointed guardian, when it may otherwise risk improper depletion by the fiduciary with control of the assets.

In some circumstances, the Court will order, on the appointment of a guardian of property, that a security bond be posted. Security is intended to protect the incapable person, as well as the creditors and beneficiaries of his or her estate in the event that assets of an estate or incapable person may be improperly managed. However, the requirement to post security may sometimes deter qualified individuals from acting as a guardian of property or estate trustee and it is not uncommon for a proposed guardian of property who may otherwise be required to provide security to request that the Court exercise its discretion to waive such a requirement.

Within the context of estate administration, the relevant legislation in Ontario provides greater clarity regarding situations in which the requirement of security is likely to be waived. Further, there is case law that provides guidance regarding situations in which the Court may reduce, or dispense with altogether, the requirement to post security.

The *Substitute Decisions Act* and supporting case law that deal with the security requirements when guardians of property are appointed are, however, less informative. For instance, the *Substitute Decisions Act* directs that, when a person who does not reside in Ontario is appointed as a guardian of property, that person must provide security, as approved by the Court, for the value of the property to be administered.[1] The Court also has discretion to waive the requirement that security be provided by a non-resident guardian of property.[2] Under what circumstances the Court will exercise its discretion to waive the requirement to post security when appointing a non-resident guardian of property is unclear within the legislation and little guidance is provided by the sparse case law that deals with this issue.

In a recent paper by Dermot Moore of the Office of the Public Guardian and Trustee (the "**PGT**"), the policy of the PGT in recommending security when a non-resident guardian of property is being appointed is explained. The PGT will typically recommend that security be required in the following circumstances:

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[1] SO, 1992, c 30, s 24(3).
[2] *Ibid*, s 24(4).

- If the proposed guardian is not a parent or spouse of the incapable person and the value of property is greater than $100,000.00;

- If the proposed guardian is a parent or spouse, the incapable person does not own real property, and the value of the property is greater than $250,000.00; and

- If the proposed guardian is a parent or spouse, the incapable person owns real property, and the value of the property is greater than $500,000.00.[3]

It may be worth noting that, in a jurisdiction such as Toronto, where property values are so high, a guardianship application by a non-resident of Ontario in respect of the average person who own real property will result in a recommendation by the PGT that security be posted.

It is not uncommon for the Court to dispense with the requirement that security be provided if there is some logical argument in support of waiving the requirement. However, the absence of formal guidelines and minimal jurisprudence on this issue are suggestive of each situation simply being considered on its own facts.

One of the few decisions in which the issue of security in the appointment of non-resident guardians has been considered is *Salzman v. Salzman*.[4] In this case, a resident of Quebec was appointed as guardian of property for his mother and was not required to post security upon his appointment. In dispensing with the requirement to post security, Justice Hoy made note of the proposed guardian's close relationship with his incapable mother, his historical assistance in managing her affairs, and the consent of his siblings, the only other beneficiaries of his mother's estate, to the non-resident's appointment and the dispensing of the requirement to post security.

At present, it appears that decisions regarding whether a non-resident guardian of property will be required to post security and, if so, in what amount, are considered on a case-by-case basis. However, with projected significant increases over the next fifteen years in the prevalence of dementia and other diseases associated with mental incapacity[5], and in a world that is increasingly mobile, it will be interesting to see whether courts or the legislature will provide greater clarity on this point in the future.

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[3] Dermot Moore, "Statutory versus Court Applications for Guardianship: The PGT's Perspective" (2015) *Law Society of Upper Canada*.

[4] 2011 ONSC 3555, 2011 CarswellOnt 15786.

[5] "Dementia numbers in Canada" (2015) *Alzheimer Society of Canada*, available at: http://www.alzheimer.ca/en/About-dementia/What-is-dementia/Dementia-numbers.