THE CANADIAN BAR ASSOCIATION
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CPA CHARTERED PROFESSIONAL ACCOUNTANTS CANADA
COMPTABLES PROFESSIONNELS AGRÉÉS CANADA

The Joint Committee on Taxation of
The Canadian Bar Association
and
Chartered Professional Accountants of Canada

Chartered Professional Accountants of Canada, 277 Wellington St. W., Toronto Ontario, M5V3H2
The Canadian Bar Association, 500-865 Carling Avenue Ottawa, Ontario K1S 5S8

March 4, 2019

Brian Ernewein
General Director, Legislation
Tax Policy Branch, Department of Finance
90 Elgin Street
Ottawa, ON K1A 0G5

Dear Mr. Ernewein:

**Subject: Definition of "Public Corporation"**

As discussed with you last fall, members of the Joint Committee on Taxation of the Canadian Bar Association and Chartered Professional Accountants of Canada (the "Joint Committee") have identified concerns with the definition of "Public Corporation" in subsection 89(1) of the *Income Tax Act* (Canada) (the "**Act**"). The status of a corporation as a public corporation has many significant Canadian tax consequences, including the ability of the corporation to effect a return of capital to its shareholders. As a follow up to that discussion and given the importance of this issue, we have enclosed our submission.

Members of the Joint Committee and others in the tax community participated in the discussion concerning this submission and contributed to its preparation, including:

- Carrie Smit, Goodmans LLP
- Mitchell Sherman, Goodmans LLP
- Ian Crosbie – Davies Ward Phillips & Vineberg
- Ken Griffin – PwC LLP

We trust that you will find our submission helpful and we would be pleased to discuss it further at your convenience.

Yours very truly,

Ken Griffin
Chair, Taxation Committee
Chartered Professional Accountants of Canada

Jeffrey Trossman
Chair, Taxation Section
Canadian Bar Association

## Definition of "Public Corporation"

A corporation is considered to be a public corporation for Canadian tax purposes if it satisfies the definition of "public corporation" in subsection 89(1) of the *Income Tax Act* (Canada) (the "**Act**"). The status of a corporation as a public corporation has many significant Canadian tax consequences, including the ability of the corporation to effect a return of capital to its shareholders.

Given the importance of a corporation's status as a "public corporation" for tax purposes, the Joint Committee on Taxation of The Canadian Bar Association and Chartered Professional Accountants of Canada (the "**Joint Committee**") wishes to make the following submission to the Department of Finance.

### *Current Definition*

The definition of "public corporation" in subsection 89(1) of the Act is attached hereto as Schedule A. In particular, pursuant to paragraph 89(1)(a) of the definition, a Canadian resident corporation will be a public corporation at a particular time if, at that time, a class of shares of the capital stock of the corporation is listed on a designated stock exchange in Canada. In addition, pursuant to paragraph 89(1)(c), a Canadian resident corporation will be a public corporation at a particular time if, at any time after June 18, 1971 and before the particular time, it was a public corporation, unless after the time it last became a public corporation it elected not to be a public corporation or was designated by the Minister of National Revenue not to be a public corporation. In order for a corporation to elect not to be a public corporation, the prescribed conditions in Regulation 4800(2) must be satisfied. These conditions are attached hereto as Schedule B.

### *The Issue*

An issue commonly arises in public M&A "going private" transactions, where all of the issued shares of a public corporation are acquired by a purchaser and a valid election is filed shortly after the acquisition pursuant to paragraph 89(1)(c) and Regulation 4800(2) for the corporation not to be a public corporation for tax purposes. Under the current definition of "public corporation" and based on our understanding of the Canada Revenue Agency's ("CRA's") interpretation of this provision, it appears that the corporation may nevertheless continue for several days to be a public corporation for Canadian tax purposes. In our view, this result is anomalous and inappropriate once all of the corporation's shares have been acquired.

In particular, it is often the case in a public acquisition transaction that a Canadian corporation ("**Acquisitionco**") will acquire all of the issued and outstanding shares of a taxable Canadian corporation ("**Targetco**") which is a public corporation under section 89, because its shares are listed on a designated stock exchange in Canada such as the Toronto Stock Exchange (the "**TSX**"). Following the acquisition of Targetco (the "**Acquisition**"), it is common for Acquisitionco and Targetco to immediately amalgamate (the "**Amalgamation**") and form one corporation ("**Amalco**"). This Amalgamation may be implemented as part of the transaction for a number of legitimate commercial and tax planning reasons (for example, providing the lenders to Acquisitionco with direct security against the property of Targetco, permitting a tax cost "bump" transaction, or effecting a direct consolidation of the Targetco income and the interest expense on the acquisition debt). Amalco will often want to distribute certain property previously held by Targetco to its shareholders - this can be undertaken for a variety of valid commercial reasons (including business and foreign tax consolidation or moving the assets closer to the acquisition debt for security purposes), or to remove foreign subsidiaries from under Canada in order to rationalize the

corporate group structure and/or address potential future issues under the "foreign affiliate dumping" rules. In order to manage foreign exchange or capital appreciation risks, it is prudent to distribute the property to Amalco's shareholders as a return of capital as soon as possible after the Acquisition and Amalgamation. It is critical that this distribution be treated as a return of capital and not as a dividend for tax purposes; uncertainty in this regard may exist with respect to the possible application of subsections 84(4.1) and 84(2). As a result, conventional practice is to ensure that Amalco is not a public corporation for Canadian tax purposes at the time of the distribution.

Amalco will itself be deemed to be a public corporation pursuant to paragraph 87(2)(ii) of the Act, if one of its predecessor corporations was a public corporation immediately before the Amalgamation. Following the Acquisition, but prior to the Amalgamation, Targetco will satisfy all of the requirements of Regulation 4800(2) to make an election in prescribed manner (the "**Election**") not to be a public corporation for tax purposes. In particular, an insider (being Acquisitionco) will own 100% of the issued and outstanding shares of each class of shares of Targetco that were previously listed on a designated stock exchange, no other person will hold any shares of Targetco, and there will be no class of shares of Targetco that is qualified for distribution to the public and which complies with the conditions in Regulation 4800(1)(b) and (c).

However, Targetco will still be a public corporation immediately before the Amalgamation if its shares are considered to be listed on a designated stock exchange in Canada at that time, notwithstanding that Targetco has made a valid Election prior to that time. If Targetco makes an Election after the Acquisition but prior to the Amalgamation, the Election will only ensure that Targetco is not considered to be a public corporation under paragraph (c) of the definition; however, if the shares of Targetco are still listed at the time of the Amalgamation, Targetco will continue to be a public corporation under paragraph (a) of the definition. A timing issue arises because Canadian stock exchanges (including the TSX) generally take several days after an acquisition to formally delist the target corporation's shares; in particular, shares listed on the TSX normally remain listed for up to 3 days after an acquisition has closed. In fact, shares of a target corporation often remain listed even after the corporation has amalgamated with its sole shareholder and the shares no longer exist.

***Response of the CRA***

The CRA has acknowledged the timing issue discussed above, and has an administrative position allowing Amalco to make an Election after the Amalgamation.[1]

At the 2017 CRA Roundtable at the Canadian Tax Foundation Annual Conference, the CRA again addressed this issue. The question, and the CRA response, are as follows:

> ***Question 12: Election not to be a public corporation***
>
> *Under paragraph (c) of the definition of "public corporation" in subsection 89(1) of the Income Tax Act (Act), a Canadian resident corporation that was considered to be a public corporation because its shares were previously listed on a designated stock exchange in Canada is considered to continue to be a "public corporation" unless, after the time it last became a public corporation, either it elects not to be a public corporation (under subparagraph (c)(i) of the public corporation definition) or the Minister designates it not to be a public corporation (under subparagraph (c)(ii) of the public corporation definition).*

[1] See, for example, 2015-0577141R3 and 2008-0268961R3.

*A corporation that intends to elect not to be a public corporation must meet the prescribed conditions in subsection 4800(2) of the Income Tax Regulations (Regulations). One of these conditions is that insiders of the corporation must hold more than 90% of the issued shares of each class of shares that were previously listed (under subparagraph 4800(2)(a)(i) of the Regulations) or designated (under subparagraph 4800(2)(a)(ii) of the Regulations) (Insider Requirement).*

*In a situation where a private corporation (Acquisitionco) acquires all of the shares of a publicly-listed Targetco corporation (Targetco), the designated stock exchange often takes several days to formally delist the purchased shares.*

*Prior to the formal delisting of its shares, can Targetcoco make a valid election (Election) not to be a public corporation under subparagraph (c)(i) of the public corporation definition at a time when Acquisitionco owns 100% of Targetcoco so that when Acquisitionco and Targetcoco vertically amalgamate (Amalgamation) to form a new corporation (Amalco), Amalco would not be considered to be a public corporation?*

***CRA Response***

*If Targetcoco is still a public corporation immediately before the Amalgamation, by virtue of paragraph 87(2)(ii), Amalco will be deemed to be a public corporation.*

*Assuming that Targetcoco met the prescribed conditions in subparagraph (c)(i) of the public corporation definition by making an Election before the Amalgamation and, therefore, would be excluded from being a public corporation under subparagraph (c)(i) of the public corporation definition, Targetcoco would still be a public corporation, by virtue of paragraph (a) of the public corporation definition, as long as a class of Targetcoco shares were still listed on a designated stock exchange in Canada.*

*The reason for Targetcoco making an Election before the Amalgamation is to meet the Insider Requirement before its shares are cancelled.*

*However, the CRA has taken the position in the past in certain situations involving vertical amalgamations (see for example document nos. 2015-0577141R3 and 2008-0268961R3) that the fact that shares of a public corporation no longer exist at the time of making an Election would not preclude the Insider Requirement from being met. Accordingly, in those types of situations, where Amalco makes an election after the time that Targetco shares are delisted, Amalco will not be considered to be a public corporation.*

*The CRA will continue to rule, on a case by case basis, whether the prescribed conditions in subparagraph (c)(i) of the public corporation definition and in subsection 4800(2) of the Regulations will be met, in a situation where shares of a public corporation no longer exist, after a review of all the relevant facts and circumstances.*

This response from the CRA is problematic in an M&A context; although it effectively permits the amalgamation of Acquisitionco and Targetco immediately after the Acquisition, it requires Amalco to wait until the Targetco shares are delisted before it can elect not to be a public corporation. As noted above, this can take several days to occur, which can cause both commercial and tax issues. In addition, it is costly and impractical from a timing perspective to require taxpayers to obtain an advance income tax ruling in order to confirm whether an Election can be made by Amalco.

A submission was made to the CRA in 2018 (a copy of which is attached hereto), requesting that the CRA issue a technical interpretation respecting the meaning of the word “listed” for the purposes of the

definition of "public corporation". In support of the request, the TSX provided a letter addressing the legal nature of the listing of a share after an acquisition and amalgamation (a copy of which is also attached hereto). In particular, it was requested that the CRA confirm that, at such time as (i) Acquisitionco owns all of the issued and outstanding shares of Targetco, (ii) the stock exchange has been notified to delist the shares of Targetco, and where (iii) the Acquisitionco and Targetco amalgamate shortly after the Acquisition, the shares of Targetco would not be considered to be "listed" at that time for purposes of paragraph (a) of the definition of public corporation. This would ensure that Targetco would not be considered to be a public corporation under paragraph (a) of the definition of public corporation immediately before the Amalgamation and, assuming that Targetco makes a valid Election prior to the Amalgamation, Amalco would not be deemed to be a public corporation for tax purposes. Unfortunately, the CRA declined to issue this technical interpretation, on the basis that it was bound by the words of the Act.

***Request***

We are requesting that the definition of "public corporation" be amended to ensure that a Canadian resident corporation will not be considered to be a public corporation for Canadian tax purposes where it has filed a valid election not to be a public corporation. In particular, paragraph (a) of the definition could be amended to provide that a corporation will be considered to be a public corporation where its shares are listed, unless, after the last time a class of shares was listed, the corporation ceased to be a public corporation under paragraph 89(1)(c) because of a valid election or designation. **[Paragraph 89(1)(a) could be amended as follows:**

> ***(a) a corporation that is resident in Canada at the particular time, if at that time there is a class of shares of the capital stock of the corporation that is listed on a designated stock exchange in Canada, unless, after the last time a class of shares of the capital stock of the corporation became listed on a designated stock exchange and before the particular time, it would have ceased to be a public corporation under paragraph (c) because of an election or designation under that paragraph if this paragraph did not apply.***

## SCHEDULE A

### Definition of "Public Corporation"

*"public corporation" at any particular time means*

*(a) a corporation that is resident in Canada at the particular time if at that time a class of shares of the capital stock of the corporation is listed on a designated stock exchange in Canada,*

*(b) a corporation (other than a prescribed labour-sponsored venture capital corporation) that is resident in Canada at the particular time if at any time after June 18, 1971, and*

*(i) before the particular time, it elected in prescribed manner to be a public corporation, and at the time of the election, it complied with prescribed conditions relating to the number of its shareholders, the dispersal of ownership of its shares and the public trading of its shares, or*

*(ii) before the day that is 30 days before the day that includes the particular time it was, by notice in writing to the corporation, designated by the Minister to be a public corporation and at the time it was so designated it complied with the conditions referred to in subparagraph (i),*

*unless, after the election or designation, as the case may be, was made and before the particular time, it ceased to be a public corporation because of an election or designation under paragraph (c), or*

*(c) a corporation (other than a prescribed labour-sponsored venture capital corporation) that is resident in Canada at the particular time if, at any time after June 18, 1971 and before the particular time it was a public corporation, unless after the time it last became a public corporation and*

*(i) before the particular time, it elected in prescribed manner not to be a public corporation, and at the time it so elected it complied with prescribed conditions relating to the number of its shareholders, the dispersal of ownership of its shares and the public trading of its shares, or*

(ii) *before the day that is 30 days before the day the includes the particular time, it was, by notice in writing to the corporation, designated by the Minister not to be a public corporation and at the time it was so designated it complied with the conditions referred to in subparagraph (i),*

*and* w*here a corporation has, on or before its filing due date for its first taxation year, become a public corporation, it is, if it so elects in its return of income for that year, deemed to have been a public corporation from the beginning of the year until the time when it so became a public corporation.*

## SCHEDULE B

### Public Corporation - Prescribed Conditions

*4800(2) For the purposes of subparagraph (c)(i) of the definition of "public corporation" in subsection 89(1) of the Act, the following conditions are prescribed in respect of a corporation:*

*(a) insiders of the corporation shall hold more than 90 per cent of the issued and outstanding shares of each class of shares of the capital stock of the corporation that*

*(i) was, at any time after the corporation last became a public corporation, listed on a designated stock exchange in Canada, or*

*(ii) was a class, designated as described in paragraph (1)(a), by virtue of which the corporation last became a public corporation;*

*(b) in respect of each class of shares described in subparagraph (a)(i) or (ii), there shall be fewer than*

*(i) where the shares of that class are equity shares, 50, and*

*(ii) in any other case, 100*

*persons, other than insiders of the corporation, each of whom holds*

*(iii) not less than one block of shares of that class, and*

*(iv) shares of that class having an aggregate fair market value of not less than $500; and*

*(c) there shall be no class of shares of the capital stock of the corporation that is qualified for distribution to the public and complies with the conditions described in paragraphs (1)(b) and (c).*

Goodmans LLP

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January 31, 2018

**Via Email**

Canada Revenue Agency
Rulings Directorate
11th Floor, Tower B
Place de Ville
112 Kent Street
Ottawa, Ontario
K1A 0L5

**Attention: David Palamar**

Dear David:

**Re: Public Corporation – Listed Shares**

We are writing to request that the Canada Revenue Agency (the "**CRA**") issue a technical interpretation respecting the meaning of the word "listed" for the purposes of the definition of "public corporation" in section 89 of the *Income Tax Act* (Canada) (the "**Act**"). The definition of "public corporation" is set out in Appendix A.

It is often the case in a public acquisition transaction that a Canadian corporation (the "**Acquirer**") will acquire all of the issued and outstanding shares of a taxable Canadian corporation (the "**Target**") which is a "public corporation" under section 89 because its shares are listed on a designated stock exchange in Canada such as the Toronto Stock Exchange (the "**TSX**"). Following the acquisition of the Target (the "**Acquisition**"), it is common for the Acquirer and the Target to immediately amalgamate (the "**Amalgamation**") and form one corporation ("**Amalco**"). This Amalgamation may be implemented as part of the transaction for any number of legitimate commercial and tax planning reasons (for example, providing lenders to the Acquirer with direct security against the assets of the Target and undertaking a tax cost bump transaction). The Amalco will itself be deemed to be a public corporation pursuant to paragraph 87(2)(ii) of the Act, if one of its predecessor corporations was a public corporation immediately before the Amalgamation.

The Target will be a public corporation immediately before the Amalgamation if its shares are considered to be "listed" on a designated stock exchange in Canada at that time for purposes of subsection (a) of the definition of public corporation. If the Target elects in prescribed manner not to be a public corporation after the Acquisition but prior to the Amalgamation (in accordance with Regulation 4800), this election (the "**Election**") will ensure that the Target is

not considered to be a public corporation under subsection (c) of the definition; however, if the shares of the Target are still listed, the Target will continue to be a public corporation under subsection (a) of the definition.

We are requesting that the CRA issue a technical interpretation confirming that, at such time as (i) the Acquirer owns all of the issued and outstanding shares of the Target, (ii) the TSX has been notified to delist the shares of the Target, and where (iii) the Acquirer and the Target amalgamate shortly after the Acquisition, the shares of the Target will not be considered to be "listed" at that time for purposes of subsection (a) of the definition of public corporation. This would ensure that the Target will not be considered to be a public corporation under subsection (a) of the definition of public corporation immediately before the Amalgamation. Assuming that the Target also makes the Election prior to the Amalgamation, the Target would not be a public corporation immediately before to the Amalgamation, and Amalco would not be deemed to be a public corporation for tax purposes.

We have consulted with senior management at the TSX to understand how the TSX treats listed shares of a corporation where all of the issued and outstanding shares have been acquired by a third party. As an administrative matter, the shares will typically continue to be listed for a short number of trading days following the completion of an acquisition (typically two to three days). However, the TSX acknowledges that what is effectively being traded or exchanged is not an ownership interest in the corporation's shares but rather the entitlement to receive the proceeds of sale. The TSX understands and acknowledges that the shares themselves cannot be traded, in that they have been purchased by one acquirer. The shares themselves are no longer capable of being traded as such; rather what is traded is an entitlement to the consideration payable by the acquirer. The continued listing provides liquidity to investors in respect of the proceeds of sale. The TSX has agreed to issue a letter to the CRA confirming this (which will be sent directly to you from the TSX).

As a result, the continued listing of the shares of the Target after the Acquisition should be treated as a listing of the right to the acquisition proceeds, and not as an actual listing of the shares themselves. Ownership interests in the shares cannot trade after the Acquisition, notwithstanding that the shares may appear to be listed. In fact, the TSX listing is often still in place after the Amalgamation, at a time when the shares and the issuer have actually ceased to exist - this clearly indicates that what is listed is not the shares.

The Act should be interpreted in a textual, contextual and purposive manner. As confirmed by the Supreme Court of Canada[1] "*the interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole.*" Where market participants are able to purchase and sell ownership interests in a corporation through a listing of the corporation's shares on a stock exchange, that

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[1] *Canada Trustco Mortgage Co. v. Canada*, 2005 DTC 5523(SCC).

corporation should be considered to be a public corporation. But where 100% of those shares have been acquired and are no longer capable of being traded, the shares should not be considered to be listed for the purposes of determining whether a corporation is a public corporation. This is consistent with the position taken by the CRA in RCT 89-144 (attached), where the CRA found that shares were not considered to be listed until they were placed on a trading board and could be traded over the exchange. The focus was on ability to trade in the shares over the stock exchange. It would be consistent to conclude that shares which are no longer able to be traded over a stock exchange should not be considered to be listed for purposes of the Act. This position is also consistent with a 1996 CRA position[2] where the CRA expressed the view that shares will only be considered to be listed on a stock exchange so long as a full unconditional listing of the shares exists. The purpose of this is clearly to ensure that the shares will only be considered to be listed at such time as they are capable of being traded on the exchange.

The CRA has taken a textual, contextual and purposive approach in issuing advance tax rulings concerning the Election. For example, in a 2010 ruling[3] a corporation was permitted to file the Election even though it did not have any issued shares of a class that was previously listed. The CRA granted a positive ruling "*since, as a matter of tax policy, a corporation in this situation should not be precluded for electing not to be a public corporation*". Similarly, a Target as described above which is 100% owned by an Acquirer, should not be precluded from losing its status as a public corporation following the Acquisition where a valid Election has been filed.

A fact situation very similar to the one underlying this request was addressed in a 2015 advance tax ruling.[4] In this ruling, Bidco acquired all of the shares of Pubco, followed by the amalgamation of Bidco and Pubco. Although the technical requirements of Regulation 4800 were not met, the ruling permitted the amalgamated corporation to file the Election, again on the basis of tax policy. Clearly, tax policy should also support the treatment of a corporation as no longer being a public corporation where (i) its shares are wholly owned by one shareholder and they can no longer be traded on a stock exchange; and (ii) the corporation has elected not to be a public corporation in accordance with Regulation 4800.

The administrative position that the amalgamated corporation may be able to make the Election (notwithstanding that it does not technically comply with the requirements of Regulation 4800) was addressed again at the 2017 CTF Annual Tax Conference Roundtable.[5] The CRA stated that "*the CRA will continue to rule, on a case by case basis, whether the prescribed conditions in subparagraph (c)(i) of the public corporation definition and in subsection 4800(2) of the Regulations will be met, in a situation where shares of a public corporation no longer exist, after a review of all the relevant facts and circumstances.*" Although this statement is helpful, it is not

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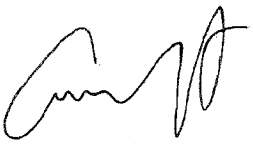
[2] 9627665 – Election to Crystallize Gains on Going Public.
[3] 2010 – 0355001R3 – Election to Cease to be a Public Corporation.
[4] 2015-0577141R3 – Election to Cease to be a Public Corporation.
[5] 2017 Canadian Tax Foundation Annual Tax Conference, CRA Roundtable, Question 12.

ideal to require taxpayers to obtain their own tax rulings, or to rely on published rulings which are fact specific and which do not follow the technical requirements of Regulation 4800. In the context of a public acquisition transaction where the acquirer purchases 100% of the target shares (and does not intent to trade them again) there is obviously no mischief with the making of the Election, and to provide that CRA will rule on a "case by case basis" creates unnecessary uncertainty. Rather, an administrative position respecting when shares are considered to be "listed" for purposes of subsection (a) of the definition of public corporation would be preferential, in that taxpayers would not be required to apply for an advance tax ruling to confirm that the amalgamated corporation may make the Election.

Thank you for your consideration of this technical interpretation.

Sincerely,

**Goodmans LLP**



Carrie Smit
CS/ss
Attch.

6779259

## APPENDIX A

*""Public Corporation" at any particular time means:*

*(a) a corporation that is resident in Canada at the particular time if at that time a class of shares of the capital stock of the corporation is listed on a designated stock exchange in Canada,*

*(b) a corporation (other than a prescribed labour-sponsored venture capital corporation) that is resident in Canada at the particular time if at any time after June 18, 1971 and*

*(i) before the particular time, it elected in prescribed manner to be a public corporation, and at the time of the election it complied with prescribed conditions relating to the number of its shareholders, the dispersal of ownership of its shares and the public trading of its shares, or*

*(ii) before the day that is 30 days before the day that includes the particular time it was, by notice in writing to the corporation, designated by the Minister to be a public corporation and at the time it was so designated it complied with the conditions referred to in subparagraph (i),*

*unless, after the election or designation, as the case may be, was made and before the particular time, it ceased to be a public corporation because of an election or designation under paragraph (c), or*

*(c) a corporation (other than a prescribed labour-sponsored venture capital corporation) that is resident in Canada at the particular time if, at any time after June 18, 1971 and before the particular time it was a public corporation, unless after the time it last became a public corporation and*

*(i) before the particular time, it elected in prescribed manner not to be a public corporation, and at the time it so elected it complied with prescribed conditions relating to the number of its shareholders, the dispersal of ownership of its shares and the pubic trading of its shares, or*

*(ii) before the day that is 30 days before the day that includes the particular time, it was, by notice in writing to the corporation, designated by the Minister not to be a public corporation and at the time it was so designated it complied with the conditions referred to in subparagraph (i),*

*and where a corporation has, on or before its filing-due date for its first taxation year, became a public corporation, it is, if it so elects in its return of income tax for the year, deemed to have been a public corporation from the beginning of the year until the time when it so became a public corporation."*

# RCT 89-144 — Meaning of the word "listed"

**Date:** September 23, 1980

**Reference:** 89(1)(g)

Dear XXX:

This is in reply to your letter of September 3 wherein you requested our opinion on the meaning of the word "listed" as used in paragraph 89(1)(g) of the Income Tax Act.

You have advised us that for all intents and purposes shares are "listed" on the Toronto Stock Exchange when the Exchange has given consent to use the TSE legend on the Company's final prospectus. At that time solicitations can be made for the purchase of the shares and buying can take place on margin. However there can be no trading in the shares of the Company through the Exchange until the name of the Company is placed on the trading board.

It is our opinion that a company is not "listed" until a class of shares of its capital stock is placed on the trading board.

It is our understanding that until the shares are placed on the trading board the shares can at best only be traded "over the counter". As is stated in paragraph 3 of Interpretation Bulletin IT-391 the trading of a class of shares "over the counter" does not qualify the company to be a public corporation.

We trust the above comments will be useful.

**Julie K. Shin**
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January 31, 2018

Canada Revenue Agency
Rulings Directorate
11th Floor, Tower B
Place de Ville
112 Kent Street
Ottawa, Ontario
K1A 0L5

Attention: Mr. David Palamar

Dear Sirs/Mesdames:

**Re: Acquisitions of Listed Issuers**

It is our understanding that Goodmans LLP is applying to the Canada Revenue Agency (the "**CRA**") for a technical interpretation concerning the issue as to whether listed shares ("**Listed Shares**") of an issuer (a "**Listed Issuer**") which are acquired by an acquirer (the "**Acquirer**") pursuant to a business combination transaction should still be considered to be "listed" for tax purposes following the acquisition. In particular, when an Acquirer acquires 100% of the issued and outstanding shares of a Listed Issuer (the "**Acquisition**"), followed shortly by the amalgamation (the "**Amalgamation**") of the Acquirer and the Listed Issuer, the question is whether the Listed Shares should be considered to be listed after the acquisition and immediately prior to the Amalgamation. In that context, we have been asked to briefly outline the policies and procedures of the Toronto Stock Exchange (the "**Exchange**") in connection with a transaction of the nature referenced.

The Exchange is providing this letter to assist in the analysis by the CRA of the request for the technical interpretation described above, and for no other purpose. The Exchange does not express any opinion or view of any nature as to the subject matter of the requested technical interpretation or as to income tax matters more generally.

When all of the Listed Shares of a Listed Issuer are to be acquired by an Acquirer, the Exchange as a matter of practice and policy provides notice (the "**Completion Notice**") to its participating organizations of the completion of the Acquisition on the date of completion of the transaction or shortly thereafter. The Completion Notice confirms the completion of the transaction, and specifies the date on which the Listed Shares will cease to trade, typically two to three trading days after dissemination of the Completion Notice.

The Exchange acknowledges that, notwithstanding that the Listed Shares will continue to be listed and posted for trading for approximately two to three trading days after delivery of the Completion Notice:

- at the time immediately following the completion of the Acquisition, ownership of the Listed Shares as such may not be acquired by anyone purchasing through the facilities of the Exchange, in that pursuant to the Acquisition, ownership of all of the Listed Shares was acquired by the Acquirer;

- the Listed Issuer itself will cease to exist as a consequence of the Amalgamation; and

- the Listed Shares themselves will cease to exist as a consequence of the Amalgamation.

More generally, the Exchange acknowledges that, in view of the foregoing, although nominal trading in the Listed Shares may continue for a short period of time post-completion of the Acquisition, what market participants are effectively trading is the entitlement to receive the consideration payable by the Acquirer for the Listed Shares.

The Exchange cannot deliver the Completion Notice earlier, i.e. prior to completion of the Acquisition, because the Completion Notice cannot be disseminated prior to the point in time at which completion of the transaction is a certainty. The fact that trading continues for a short period of time following delivery of the Completion Notice does not suggest that the Listed Shares themselves necessarily continue to exist, or that ownership in them may be traded, but rather this listing provides liquidity to market participants in respect of the proceeds of sale payable by the Acquirer.

This letter is provided solely to the benefit of the parties to whom it is addressed, in connection with the requested technical interpretation. It is not to be transmitted to any other person nor is it to be relied upon by any other person or for any other purpose or quoted or referred to in any document or filed with any government agency or other person without our prior written consent.

Please feel free to contact the undersigned should you have any questions.

Yours truly,

TORONTO STOCK EXCHANGE

Julie K. Shin