1964

*May 27, 28, 29 Oct. 6

NORCAN OILS LTD. and GRIDOIL FREEHOLD LEASES LTD. ..... APPELLANTS;

AND

HENRY FOGLER, a dissentient shareholder ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Amalgamation—Order approving amalgamation agreement—Amalgamation certificate issued by Registrar of Companies—Approval order set aside on appeal—Order on appeal of no effect—The Companies Act, R.S.A. 1955, c. 53, s. 140a (enacted 1959, c. 10).

Pursuant to the provisions of s. 140a of *The Companies Act,* R.S.A. 1955, c. 53, as amended, an order was granted approving the amalgamation of the appellant companies G and N. At the hearing of the application for approval of the amalgamation agreement, only one person appeared to oppose the application, this being the respondent F. The position which he took was that the ratio between the participation of G and N shareholders in the amalgamated company was unfair to the G shareholders. On appeal, the Appellate Division of the Supreme Court of Alberta allowed the appeal and set aside the approving order; two members of the Court held that the material submitted to the shareholders of G was insufficient to enable them to judge of the fairness and propriety of the scheme and a third member of the Court held that the material furnished by the companies was insufficient to enable either the shareholders or the Court to determine whether or not the transaction was provident. An appeal from the judgment of the Appellate Division was brought to this Court.

Held (Judson and Spence JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie and Hall JJ.: The vital elements in relation to this appeal were: 1. The Registrar of Companies, acting upon the strength of an order which the judge who made it had jurisdiction to make and which was, therefore, valid until set aside, issued, as he was required to do by the statute, a certificate that G and N had been amalgamated into one company. 2. Upon such certificate being issued, G and N then became one company, which company thereafter possessed all the property rights, privileges and franchises and became subject to all the liabilities, contracts and debts of each of the amalgamating companies. 3. Thereafter the amalgamated company had existed and done business on its own account.

Under s. 140a of *The Companies Act,* G and N, in the absence of any valid stay of proceedings, were required to file the amalgamation agreement and the approving order with the Registrar, who, in turn, was obliged to act upon it. The filing of a notice of appeal did not stay such proceedings, nor invalidate them. The result was that the whole purpose for which the order was made was fulfilled, a certificate of amalgamation was issued, and rights and interests had been

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

acquired by other persons against and in the amalgamated company, upon the strength of that certificate.

The Act contained no provision for the revocation of such a certificate. The Appellate Division had no power to revoke it, nor did it, by its order, purport to do so. The setting aside of the approving order did not have and could not have the effect of dissolving the amalgamated company, or of restoring the separate corporate existence of G and N. Accordingly, the order of the Appellate Division could have no effect and ought not to have been made.

Per Judson and Spence JJ., *dissenting*: The Appellate Division was correct in its view as to the effectiveness of the material put before the G shareholders; these shareholders had far less accurate information or explanation than they were entitled to in order to permit them to come to an intelligent judgment as to whether or not they should vote in favour of the proposed amalgamation and for that reason the judgment of the Appellate Division should be affirmed..

The allegation that F, because of his purchase of shares of the amalgamated company on the open market, had lost any right to appeal to the Appellate Division failed; he had simply invested in those shares for whatever they were worth and had not in any way elected to approve the transaction which he was now attacking.

An application for an order approving an amalgamation, pursuant to s. 140a of *The Companies Act,* was an application to the *court* exercising ordinary jurisdiction as such and was not an application to any person in the position of a *persona designata;* therefore the provisions of *The Extra-curial Orders Act,* R.S.A. 1955, c. 105, did not apply and an appeal lay as of right under the provisions of s. 26 of *The Judicature Act,* R.S.A. 1955, c. 164. *Esso Standard (Inter-America) Inc. v. J. W. Enterprises Inc.,* [1963] S.C.R. 144, followed.

Finally, the appellants had taken the position that when the respondent did not apply for any stay of proceedings and since the circumstances had so altered that the decision of the Appellate Division was vain, it was now impossible to return to the position prior to the argument of the appeal. However, to allow this appeal would involve the restoration of the order approving the amalgamation and that would be a gross injustice to minority shareholders who might well have proceedings in contemplation or even under way. Their rights should not be foreclosed or even in any way affected by any judgment of this Court allowing an appeal from the decision of the Appellate Division which was a correct decision.

The order approving the amalgamation agreement did not order the proponents of the scheme to do anything. They took the responsibility of filing the amalgamation agreement and order with the Registrar after their solicitor had been served with a notice of appeal and after that notice of appeal had been filed. There was a right of appeal to the Appellate Division. It was no answer to say when that appeal was successful that nothing could be done and that the dissenting shareholder must accept an accomplished fact even when he did not apply for a stay. Therefore, the appeal should be dismissed; the respondent would have to take such proceedings as he deemed fit to effect the remedy he desired, such proceedings to be in the Courts of Alberta.

Commissioner of Provincial Police v. R. ex rel. Dumont, [1941] S.C.R. 317; *R. ex rel. Tolfree v. Clark,* [1944] S.C.R. 69, distinguished.

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Cairns J. Appeal allowed, Judson and Spence JJ. dissenting.

A. S. Pattillo, Q.C., and *E. D. Arnold, Q.C.*, for the appellants.

H. Fogler, respondent, in person.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], setting aside an order which had been made approving, pursuant to s. 140a of *The Companies Act*, R.S.A. 1955, c. 53, as amended, the amalgamation, as one company, of Gridoil Freehold Leases Ltd. (hereinafter referred to as "Gridoil") and Norcan Oils Ltd. (hereinafter referred to as "Norcan") under the name of Gridoil Freehold Leases Ltd. (hereinafter referred to as "the amalgamated company").

Gridoil was incorporated as a public company under the laws of the Province of Alberta on September 21, 1950, and was engaged in the business of the development and production of and exploration for oil and natural gas in Western Canada. Norcan was incorporated, under a different name, as a private company under the laws of the Province of Alberta on August 2, 1957. It was inactive until 1962. In April of that year it became a public company and shortly prior thereto had commenced operations, its business being the development, production of and exploration for oil and natural gas in Western Canada.

At the time the two companies entered into an amalgamation agreement Gridoil had authorized capital consisting of $270,000 divided into 3,000,000 shares, each with a par value of nine cents, of which 2,234,871 were issued and outstanding. At that time Norcan had an authorized capital of $3,000,000 divided into 3,000,000 shares, each with a par value of one dollar, of which 1,141,248 were issued and outstanding.

The boards of directors of both companies consisted of exactly the same persons and each company had the same

[1] (1964), 47 W.W.R. 257, 43 D.L.R. (2d) 508.

president and vice-president as the other. The four persons who constituted the two boards of directors controlled 58.6 per cent of the shares of Gridoil issued and outstanding and 61.6 per cent of the shares of Norcan issued and outstanding.

Excluding the shares controlled by the directors, over 90 per cent of the Gridoil shares were owned by residents of the United States and approximately 60 per cent of the Norcan shares were similarly owned. Gridoil shares were listed on the American Stock Exchange, but Norcan shares were not.

Both companies held reservations and crown and freehold leases in Western Canada and in the Northwest Territories. They shared the same office premises, the same management and the same staff. The directors of the two companies decided that an amalgamation was desirable and that the method which should be adopted to determine the relative participation in the shares of the amalgamated company of the respective shareholders of the two companies should be upon the basis of an independent valuation of the properties of the two companies. Such a valuation was made by an independent firm of geological and engineering consultants in Calgary. On the basis of the valuation it was proposed by the directors that the shareholders of Gridoil should receive one share of the amalgamated company for each share of Gridoil and that the shareholders of Norcan should receive nine shares of the amalgamated company for each share of Norcan.

An amalgamation agreement, dated December 3, 1962, was entered into between the two companies which, *inter alia,* provided for the share interests in the amalgamated company on that basis.

Authority for the amalgamation of two or more Alberta companies into one company is contained in s. 140a of *The Companies Act.* This section was first enacted in c. 10, Alberta Statutes 1959. The relevant portions of it are as follows:

> 140a. (1) Any two or more companies, including holding and subsidiary companies, may amalgamate and continue as one company.
>
> (2) The companies proposing to amalgamate may enter into an amalgamation agreement, which shall prescribe the terms and conditions of the amalgamation and the mode of carrying the amalgamation into effect.
>
> (3) The amalgamation agreement shall further set out
>
> (*a*) the name of the amalgamated company,

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Martland J.

(*b*) the place within the Province at which the registered office of the amalgamated company is to be situated,

(*c*) the amount of the authorized capital of the amalgamated company and the division thereof into shares,

(*d*) the objects for which the amalgamated company is to be established,

(*e*) the names, occupations and places of residence of the first directors of the amalgamated company,

(*f*) the date when subsequent directors are to be elected,

(*g*) the manner of converting the authorized and issued capital of each of the companies into that of the amalgamated company, and

(*h*) such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the amalgamated company.

(4) The amalgamation agreement shall be submitted to the shareholders of each of the amalgamating companies at general meetings thereof called for the purpose of considering the agreement, and if three-fourths of the votes cast at each meeting are in favour of the amalgamation agreement,

(*a*) the secretary of each of the amalgamating companies shall certify that fact under the corporate seal thereof, and

(*b*) the amalgamation agreement shall be deemed to have been adopted by each of the amalgamating companies.

(5) Where the amalgamation agreement is deemed to have been adopted the amalgamating companies may, if a copy of the agreement has been submitted to the Registrar and approved in writing by him, apply to the court for an order approving the amalgamation.

(6) Unless the court otherwise directs, each amalgamating company shall notify each of its dissentient shareholders, in such manner as the court may direct, of the time and place when the application for the approving order will be made.

(7) Unless the court otherwise directs, notice of the time and place of the application for the approving order shall be given to the creditors of an amalgamating company in such manner as the court may direct.

(8) Upon the application, the court shall hear and determine the matter and may approve the amalgamation agreement as presented or may approve it subject to compliance with such terms and conditions as it thinks fit, having regard to the rights and interests of all parties including the dissentient shareholders and creditors.

(9) The amalgamation agreement and the approving order shall be filed with the Registrar, together with proof of compliance with any terms and conditions that may have been imposed by the court in the approving order.

(10) On receipt of the amalgamation agreement, approving order and such other documents as may be required pursuant to subsection (9), the Registrar shall issue a certificate of amalgamation under his seal of office and certifying that the amalgamating companies have amalgamated.

(11) On and from the date of the certificate of amalgamation, the amalgamating companies are amalgamated and are continued as one company hereinafter called the "amalgamated company", under the name and having the authorized capital and objects specified in the amalgamation agreement.

(12) The amalgamated company thereafter possesses all the property, rights, privileges and franchises and is subject to all the liabilities, contracts and debts of each of the amalgamating companies, and all the provisions of the amalgamation agreement respecting the name of the amalgamated company, its registered office, capital and objects shall be deemed to constitute the memorandum of association of the amalgamated company.

* * *

(19) An amalgamated company shall, for the purposes of the other provisions of this Act, be deemed to be a company incorporated under this Act within the meaning of clause (g) of section 2, so far as the nature of an amalgamated company will permit.

Section 2(*g*), which is referred to in subs. (19) above, provides as follows:

(*g*) "company" includes any company incorporated under this Act and an existing company;

"Existing company" is defined in s. 2(*p*):

(*p*) "existing company" means a company lawfully incorporated or registered under any Act or Ordinance respecting companies at any time in force in the Province prior to the first day of October, 1929, and subject to the legislative authority of the Province;

The amalgamation agreement was submitted to the Registrar of Joint Stock Companies and received his approval on January 9, 1963.

The amalgamation agreement was submitted to the shareholders of each company at meetings held on January 15, 1963.

At the Gridoil meeting 96.3 per cent of the votes cast were in favour of the agreement. Of the shares voted, excluding those controlled by the four directors, 78.5 per cent were in favour of it.

At the Norcan meeting 99.8 per cent of the votes cast were in favour of the agreement. Of the shares voted, excluding those controlled by the four directors, 99.2 per cent were in favour of it.

Application was then made for approval of the agreement. Notice was given to the dissentient shareholders in the manner directed by the learned judge before whom the application was to be made. He dispensed with notice to creditors.

At the hearing on February 12, 1963, only one person appeared to oppose the application, this being the respondent Fogler. The position which he took was that the ratio between the participation of Gridoil and Norcan share-

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Martland J.

holders in the amalgamated company was unfair to the Gridoil shareholders.

The learned judge granted an order approving the amalgamation agreement, which was entered on February 13. No application was made for any stay of proceedings under the order, nor was any intimation given by the respondent of his intention to make such an application.

On February 15 the respondent filed a notice of appeal. Rule 610 of the Rules of Court of the Supreme Court of Alberta provides as follows:

> 610. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the Court or judge or master appealed from, or any judge of the Supreme Court, may order; and no intermediate act or proceedings shall be invalidated except so far as the court appealed from may direct.

The solicitor representing Gridoil and Norcan, upon being served with the notice of appeal, notified the Registrar of Joint Stock Companies of this fact. Thereafter he proceeded to file with the Registrar the amalgamation agreement and the approving order pursuant to the requirements of subs. (9) of s. 140a. The Registrar issued a certificate of amalgamation, pursuant to subs. (10), on February 18, certifying that Gridoil and Norcan were that day amalgamated as one company under the name of Gridoil Freehold Leases Ltd.

The respondent's appeal came on for hearing on October 17, 1963, and judgment was delivered on February 24, 1964, allowing the appeal and setting aside the approving order.

The learned Chief Justice, whose reasons were concurred in by Johnson J.A., held that the material submitted to the shareholders of Gridoil was insufficient to enable them to judge of the fairness and propriety of the scheme because (1) it did not disclose the figure as to the revaluation of the oil and gas properties of that company and (2) it did not disclose that Gridoil had accumulated tax credits of $2,000,000, resulting from drilling and exploration expenses incurred by it in previous years, which might, under certain circumstances, be used by the amalgamated company against future taxable income.

The explanation given before us with respect to both of these items was that the material in question could not be furnished if Gridoil were to comply with the requirements

of the American Securities Exchange Commission and that, in view of the fact that of the issued shares of Gridoil not controlled by its directors over 90 per cent were owned in the United States and the fact that Gridoil shares were listed on the American Stock Exchange, such compliance was highly desirable.

Porter J.A., who delivered separate reasons for allowing the appeal, held that the material furnished by the companies was insufficient to enable either the shareholders or the Court to determine whether or not the transaction was provident.

In view of the conclusions which I have reached with respect to this appeal, I express no opinion as to the nature of the material which should be submitted to shareholders when they are summoned to a meeting to consider the approval of an amalgamation agreement. Section 140a itself contains no statutory requirement in this regard.

To me the vital elements in relation to this appeal are:

1. that the Registrar, acting upon the strength of an order which the learned judge who made it had jurisdiction to make and which was, therefore, valid until set aside, issued, as he was required to do by the statute, a certificate that Gridoil and Norcan had been amalgamated into one company;

2. that, upon such certificate being issued, Gridoil and Norcan then became one company, which company thereafter possessed all the property rights, privileges and franchises and became subject to all the liabilities, contracts and debts of each of the amalgamating companies;

3. that thereafter the amalgamated company has existed and done business on its own account, including:

(1) the acquisition, either alone or in participation with other companies, of 14,701 net acres of petroleum and natural gas rights in Alberta and Saskatchewan, at a total cost to the amalgamated company of over $500,000;

(2) the acquisition, by way of participation in farmout agreements and joint ventures with 56 other companies, of over 200,000 net acres of petroleum and natural gas rights in those two provinces and in the Arctic Islands at a cost to the amalgamated company of over $50,000;

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Martland J.

(3) the expenditure of over $1,500,000 for drilling and development of the petroleum and natural gas rights acquired since the amalgamation;

(4) the obtaining of a production loan from the bank, of which $775,000 remains outstanding;

(5) the incurring of trade obligations of which approximately $250,000 remains outstanding.

As I read s. 140a, Gridoil and Norcan, in the absence of any valid stay of proceedings, were required to file the amalgamation agreement and the approving order with the Registrar, who, in turn, was obliged to act upon it. The filing of a notice of appeal did not stay such proceedings, nor invalidate the same.

The result is that the whole purpose for which the order was made was fulfilled, a certificate of amalgamation was issued, and rights and interests have been acquired by other persons against and in the amalgamated company, upon the strength of that certificate.

That being so, it is necessary to consider what is the effect of the order on appeal setting aside the order which approved the amalgamation agreement.

The approving order was not one which affected only the position of the parties to the proceedings which led up to it. It was an order from which, when filed with the Registrar, by the terms of the statute, legal consequences must flow, which inevitably affected the rights of other persons. Under the specific provisions of s. 140a, upon receipt of the amalgamation agreement and the order approving it, the Registrar was not only empowered, but legally obligated, to issue a certificate of amalgamation, and, thereafter, the two companies were amalgamated into one amalgamated company, which was authorized to carry on business, including the making of contracts with other persons. Any such person was entitled to rely upon the certificate as sufficient basis for the capacity of the amalgamated company so to do.

The Companies Act contains no provision for the revocation of such a certificate. In my opinion the Appellate Division had no power to revoke it, nor did it, by its order, purport to do so. The setting aside of the approving order did not have and could not have the effect of dissolving the amalgamated company, or of restoring the separate corporate existence of Gridoil and Norcan. Accordingly, the

order of the Appellate Division could have no effect and ought not to have been made.

For these reasons, in my opinion, the appeal should be allowed. In the light of all the circumstances of this case I do not think that either party should be entitled to receive costs in this Court, or in the Court below.

The judgment of Judson and Spence JJ. was delivered by

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] made on March 23, 1964. By that order the Court allowed an appeal from the judgment of Mr. Justice Cairns dated February 12, 1963, in which Mr. Justice Cairns approved the amalgamation agreement between the two appellant companies. I propose to deal with the merits of the appeal and then to discuss certain preliminary objections put forward by counsel for the appellants.

The order of Cairns J. was made without written reasons. I think the Court below assumed, and I am ready to assume, that the amalgamation agreement was approved upon the argument advanced to this Court. In the Court of Appeal reasons were delivered by the Chief Justice of Alberta and by Mr. Justice Porter. Mr. Justice Johnson concurred with the Chief Justice. All agreed in allowing the appeal and quashing the order approving the amalgamation agreement. Porter J.A., citing s. 140a of *The Companies Act* of Alberta, stated that under that section a shareholder who dissents from the views of only three-quarters of the members whose votes were cast at a meeting may be forced to exchange his shares for shares in the amalgamated company and continued:

> He may thus be coerced into taking the shares in the new company by a relatively small percentage of shares and shareholders of the old company. This is not, however, to be done without the approval of the court in terms as follows:

Porter J.A. then quoted s. 140a(8), and continued:

> It will be observed that the statute itself gives no guidance and imposes no limits as regards the grounds on which this judicial discretion is to be exercised. The approval of the transaction is left entirely to the discretion of the court: *Hayes v. Mayhood*, 18 D.L.R. (2d) at 505. Unlike the requirements of section 138, the requisite majority cannot by itself compel the amalgamation. It must have the approval of the court whereas under section 138 the compulsory purchase is complete unless the dissentient shareholder moves to the court to order otherwise.

[1] (1964), 47 W.W.R. 257, 43 D.L.R. (2d) 508.

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Spence J.

It is clear that section 140a(8) requires the judge to review the facts and circumstances and approve of the transaction if, in his opinion, it is fair and provident. *To exercise that discretion he must decide whether a prudent man properly informed would regard the transaction as provident.*

(The italicizing is my own.)

Porter J.A. cites *In re Bugle Press Ltd.*[1], at p. 276, for the proposition that business people are much better able to judge their own affairs than the Court is able to do and therefore the Court is accustomed to pay the greatest attention to what commercial people who are concerned with a transaction in fact decide, but pointed out that in the same case it was emphasized that those who proposed the amalgamation controlled 90 per cent of the holding and that under such circumstances their views could not serve as a guide to the propriety of the transaction as would the opinion of a majority of shareholders interested in only one of the amalgamated companies. That is the situation in the present case where those proposing the amalgamation hold 61 per cent of the capital stock of Norcan and 58.6 per cent in the capital stock of Gridoil.

Porter J.A. continued by showing that in the case of Norcan, and leaving aside the shares held by the promoters, only 18 per cent of the shareholders in fact voted for the amalgamation, and in the case of Gridoil, leaving aside the promoters' shares, only 12 per cent voted for the amalgamation, and then stated:

With so small a percentage of the disinterested shareholders voting the first inquiry for a court should be to determine whether the information which was given to the shareholders prior to the meeting was such as to enable them to form a judgment as to whether they should or should not attend the meeting. "Did the circular issued to the shareholders disclose sufficient information to enable them to judge of the fairness and propriety of the scheme?" (*Carruth v. Imperial Chemical Industries Ltd.*, [1937] 2 All E.R. 422.)

After a detailed analysis of the material, Porter J.A. concludes:

No court can determine whether this merging transaction is fair and no shareholder can make a decision without having knowledge of all the facts which a prudent man disposing of one stock and acquiring another would require to weigh and consider before coming to a decision. The necessary facts will vary with the characteristics of the companies involved but in companies of the kind being dealt with here they may well include, for example, the following: book value for historical purposes, demonstrated earnings capacity, liabilities current and long term,

[1] [1961] 1 Ch. 270.

cash flow, provisions for depreciation and depletion, market activities, the speculative potential of the acreage of an exploratory company, proper estimates of reserves, and their marketability, as well as the benefits that might accrue to the shareholders in the future operations of the merged company that would not be available if the companies were not merged.

In my view the material before the learned judge was so lacking in essential facts that it could not form the basis for the exercise of discretion.

Smith C.J.A. said in his reasons:

I have had the advantage of reading the reasons for judgment of Porter J.A. which sufficiently outline the facts, I am in agreement with the result which he has reached but I might base my decision upon somewhat narrower ground.

Having then examined the material and authorities upon the subject, he concludes:

My view is that the proxy statement sent to the shareholders of Gridoil was insufficient because of the omission (1) of the figure as to the revaluation of the oil and gas properties of that company, and (2) of a reference to the tax credits of $2,000,000.00 referred to by Porter J.A. Under these circumstances, my view is that the shareholders were not enabled to exercise an intelligent judgment upon the merits of the proposed amalgamation. I do not consider that the directors in the proxy statement were "honestly putting forward to the best of their skill and ability a fair picture of the Company's position" (*In re Imperial Chemical Industries Ltd.* [1936] 1 Ch. 587, Clauson J. at 618) or that the proxy statement "disclosed sufficient information to enable" the shareholders to "judge of the fairness and propriety of the scheme." (*Carruth v. Imperial Industries Ltd.* [1937] 2 All E.R. 422.)

Smith C.J.A. also quoted Masten J.A. in *Re Langley's Ltd.*[1], at p. 132:

. . . and that every shareholder affected by the proposed scheme receives such fair, candid and reasonable notice of the proposed arrangement as will afford him proper and adequate opportunity for its consideration prior to the meeting.

Despite the very able argument of learned counsel for the appellants, I have not been convinced that the Court of Appeal for Alberta was not exactly correct in its view as to the effectiveness of the material put before the Gridoil shareholders to permit them to make an intelligent appraisal of the proposed amalgamation. In the 1960 directors' report to the shareholders of Gridoil under date May 5, 1961, it was said in part:

During the past two years water flooding and other engineering operations were carried out in the Company's major producing field. In

[1] [1938] O.R. 123.

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Spence J.

1960 the Company's engineer was able to evaluate the results of these operations and he estimated the recoverable oil reserves to be 4,500,000 net barrels after royalties, an increase of 2,500,000 barrels over the previous estimate of 2,000,000 barrels. This major revision in the oil reserves was discussed with appropriate officials of the Securities and Exchange Commission in Washington and they approved the upward revision of oil reserves as calculated by the Company's engineer.

The 1961 directors' report to shareholders dated April 27, 1962, was in a similarly optimistic vein. Then the proxy statement upon the proposed amalgamation, after having recited that it was proposed that one share of the old Gridoil stock should be surrendered for one share of the new stock as against the proposal that one share of Norcan should be surrendered for nine shares of the new stock, continued:

> The above ratio was determined on a basis of estimates of the value of the assets of the companies including estimates of value by independent geologists and engineers with respect to oil and gas properties of the companies and of Canadian Williston Minerals Ltd. owned 63.4% by Norcan. The net earnings of the companies were not given any weight in determining the basis of exchange. Such estimates of value of the oil and gas properties of the companies are not necessarily indicative of the fair market value thereof. On the basis of the present outstanding shares the ratio of value per share of Gridoil and Norcan was determined to be approximately 1 to 9 which became the basis for the exchange.

With the notice of special general meeting of shareholders and a proxy statement as to Gridoil there were forwarded to its shareholders under date December 21, 1962, two letters from S. C. Nickel as president. In one of those letters, it was said in part:

> Although the Company's cash flow from operations for the nine months ended September 30, 1962 was $245,846, your management has found it necessary to restrict normal drilling and exploration activities because of insufficient working capital. Also sinking fund requirements in respect of the 5½% Notes beginning in 1964 are likely further to restrict the amount of funds available for future exploration. Norcan on the other hand has substantial working capital and holds $710,000 principal amount of 5½% Notes of the Company which would be acquired by the Company and cancelled prior to the effective date of the amalgamation, resulting in the sinking fund requirements being satisfied until 1968. The amalgamation of Gridoil and Norcan would result in a much greater and more diversified spread of oil and gas properties.

The second letter under the same date is very short and simply advises that the statement in the 1960 annual report that "this major revision in the oil reserves was discussed with appropriate officials of the Securities and Exchange Commission in Washington and they approved the upward revision of oil reserves as calculated by the company

engineer" was an incorrect statement. Also included amongst the material forwarded to shareholders in the proxy statement were statements of book value which purported to show that the shares in Gridoil Freehold Leases Ltd. were of a minus 15 cents book value. A shareholder seeing this dire picture might well have determined to take the 1 for 9 distribution proposed in the amalgamation without any further investigation and have refrained from attending the meeting or exercising his vote. Only a small percentage of shareholders did attend the meeting apart from the shares controlled by the promoters. I am in agreement with the Chief Justice of Alberta when he said:

> If the valuation of the oil and gas properties of Gridoil was accurate, that company had a surplus instead of a substantial deficit.

Porter J.A. remarks:

> Downgraded as Gridoil was by the contents of the circular, many shareholders may well have elected to stay away from the meeting and take their loss.

A further and in my opinion a very important consideration is the fact that in the Gridoil proxy statement there was no mention of a $2,000,000 allowance under the *Income Tax Act* which could be deducted from income before the imposition of tax. But, in the statement which went to the Norcan shareholders, this item is not overlooked but rather is emphasized in the following terms:

> Tax credits of some $2,000,000 resulting from drilling and exploration expenditure incurred by Gridoil in prior years may be used by the amalgamated company under certain circumstances against future taxable income as it is expected that no income tax would be payable by the amalgamated company for a number of years.

This omission from the Gridoil proxy statement was explained by William L. James in his affidavit sworn on April 17, 1964:

> 28. The above mentioned second sentence concerning the tax credit was not included in the President's letter to the shareholders of Gridoil for the following reasons:
>
> On the basis of their discussion with the S.E.C. officials Gridoil's representatives were satisfied that the S.E.C. would not permit the inclusion of the said sentence in the President's letter to the shareholders. Furthermore the unclaimed drilling and exploration expenditures were not considered to be a significant factor in the valuations, as it was anticipated that the amalgamated company in the normal course of its operations would create large tax deductions in its own right, and it was questionable whether the tax credits of Gridoil would ever have any value

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Spence J.

to the amalagamated company. In the result, these Gridoil tax credits have to date had no value to the amalgamated company. In its first fiscal period (February 19, 1963 to December 31, 1963), the amalgamated company incurred drilling and exploration expenditures of some $860,000 in excess of its taxable income without using any of Gridoil's unclaimed expenditures. The directors have approved a drilling and exploration budget of $1,700,000 for 1964 which is considerably more than the credits which can be used in that year. The prevailing general practice in dealing with the acquisition of this type of tax credits is to value them on the basis of 5 cents to 10 cents on the dollar provided that they will be required as a deduction from taxable income in the near future. Because the Gridoil tax credits may never be required by the amalgamated company their value is considerably less than five cents on the dollar. Therefore they were not considered a significant factor in valuing the assets of Gridoil.

I am not convinced by that explanation. It would seem to me that the tax credit was thought sufficiently attractive to emphasize in the proxy statement to the Norcan shareholders and it is rather a sad admission if Mr. James is now permitted to come along and swear that it really wasn't of any importance at all. Secondly, I share a view which I understand was expressed by Porter J.A. during the appeal that no S.E.C. requirements or regulation should prevent shareholders in Canada having proper notice of such an important matter when considering the proposed amalgamation.

It is not my intention to go through all of the material in great detail. I may summarize by saying that I am convinced that the shareholders of Gridoil had far less accurate information or explanation than they were entitled to in order to permit them to come to an intelligent judgment as to whether or not they should vote in favour of the proposed amalgamation and for that reason I am ready to affirm the judgment of the Court of Appeal of Alberta.

I turn now to three preliminary matters brought up by counsel for the appellants. Firstly, the appellant alleges that the respondent lost any right to prosecute his appeal to the Appellate Division of Alberta because he had in September of 1963 purchased 3,000 shares of stock in the amalgamated company. These shares were purchased on the market and were not the purchase of treasury shares from the amalgamated company. Counsel cites in support of that view, *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*[1]; *Honey Dew Ltd. v. Ryan et al.*[2], and *Banque*

[1] [1921] 2 K.B. 608. [2] [1935] O.R. 56.

des Marchands de Moscou (Koupetschesky) v. Kindersley et al.[1] and seeks to distinguish *Lissenden v. Bosch Ltd.*[2]. Having considered those cases and others, I am of the opinion that the present situation does not exhibit an example of a person who had an election between two different courses and who could therefore choose either but who could not choose both. When Fogler purchased shares of the amalgamated company on the open market, he was simply investing in those shares for whatever they were worth and wasn't in any way electing to approve the transaction which he now attacks.

The second matter urged by way of preliminary objection, is that the Appellate Division erred in allowing the appeal from the Honourable Mr. Justice Cairns on the basis that that order was made by the learned judge as a *persona designata* and that under the provisions of the Alberta *Extra-curial Orders Act,* R.S.A. 1955, c. 105, s. 7, no appeal lies from the judgment, order, or decision of a judge under s. 2 of the Act unless an appeal is expressly authorized by the Act giving the jurisdiction or special leave to appeal is granted by the said judge or judge of the Supreme Court. Section 140a of the Alberta *Companies Act* gives no such right of appeal and no leave was obtained from a judge of the Supreme Court of Alberta.

Section 140a(5) of the Alberta *Companies Act* provides:

> Where the amalgamation agreement is deemed to have been adopted the amalgamating companies may, if a copy of the agreement has been submitted to the Registrar and approved in writing by him, apply to *the court* for an order approving the amalgamation. (The italicizing is my own.)

Subsections (6), (7) and (8) continue to deal with the jurisdiction of the *court*.

The *Judicature Act,* R.S.A. 1955, c. 164, in s. 26(*b*)(iv) provides that the Appellate Division has jurisdiction and power subject to the provisions of the rules of the court to hear and determine

> (iv) all appeals or motions in the nature of appeals respecting a judgment, order, or decision of
> (A) a judge of the Supreme Court.

I accept the judgment of the Court of Appeal of Ontario in *Re Hynes and Schwartz*[3], that when a judge is given juris-

[1] [1951] Ch. 112. [2] [1940] A.C. 412.
[3] [1937] O.R. 924.

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Spence J.

diction to make a decision, in that case on an appeal from the architects' board, and no right of appeal is given in the statute then the only appeal therefrom to the Court of Appeal may be by virtue of *The Judges' Orders Enforcement Act* (the counterpart in Ontario of *The Extra-curial Orders Act* of Alberta), and *Cook v. Westgate*[1], that it is elementary law that there no right of appeal exists unless it is given by statute. I am, however, of the opinion that the matter was settled by the decision of this Court in *Esso Standard (Inter-America) Inc. v. J. W. Enterprises Inc.*[2], where the Court by dismissing the appeal from a judgment of the Court of Appeal of Ontario, reported as *Re International Petroleum Ltd.*[3], approved the jurisdiction of that Court. There, the Court was considering the provisions of s. 128 of the *Companies Act* of Canada, R.S.C. 1952, c. 23. That section in subs. (1) provided for giving notice "in such manner as may be prescribed *by the Court* in the province in which the head office of the transferor company is situate . . ." and further provided for the jurisdiction of *the Court*. Nothing in the section gave a right of appeal to the Court of Appeal from the decision in first instance. Laidlaw J.A., giving judgment for the majority, said at p. 711:

> Mr. Robinette submitted "that where jurisdiction is conferred by a Dominion statute on the Supreme Court of Ontario the effect is to confer jurisdiction on both branches of the Supreme Court of Ontario with the result that the Court of Appeal has the jurisdiction conferred upon it for this purpose by the *Judicature Act,* and that Act in s. 26(2) provides that the Court of Appeal has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature". I accept that submission. *I think that the words "the Court" as used in s. 128 of the Companies Act confers jurisdiction on the High Court of Justice as one branch of the Supreme Court of Ontario and also on the Court of Appeal as the other branch of that Court, and that by virtue of s. 26 of the Judicature Act an appeal lies to this Court from the orders made in Court by Wells J., a Judge of the High Court of Justice.* (The italicizing is my own.)

I am therefore of the opinion that the application to the Court provided in s. 140a of *The Companies Act* of Alberta is an application to the *court* exercising ordinary jurisdiction as such and is not an application to any person in the position of a *persona designata,* that therefore the provisions of *The Extra-curial Orders Act* of the Province of Alberta do not apply and that an appeal lay as of right under the provisions of s. 26 of *The Judicature Act,* R.S.A. 1955, c. 164.

[1] [1944] 3 W.W.R. 145 at 153. [2] [1963] S.C.R. 144.
[3] [1962] O.R. 705.

The third preliminary objection is one which presents some considerable difficulty. By r. 610 of the Alberta Rules of Court, an appeal does not operate as a stay of execution, or of proceedings under decisions appealed from, except so far as the court or judge, or master appealed from, or any judge of the Supreme Court may order, and further, no intermediate act or proceeding shall be invalidated except in so far as the court appealed from may direct. In the present case, no application was made by the appellant in the Appellate Division, here the respondent, Fogler for stay of execution. *The Companies Act* of Alberta in s. 140a(9) provides that the amalgamation agreement and the approving order shall be filed with the Registrar together with proof of compliance with any terms and conditions that may have been imposed by the court in approving the order. The Court did not impose any conditions. The order of Cairns J. approving the application for amalgamation was dated February 12, 1963, and was entered on February 13, 1963. The order was filed with the Registrar under the provisions of the said s. 140a(9) and the Registrar thereupon in pursuance of the said s. 140a issued a certificate dated February 18, 1963, under his seal of office certifying that Gridoil and Norcan were that day amalgamated as one company under the name Gridoil Freehold Leases Ltd. Subsection (11) of s. 140a of *The Companies Act* provides:

> (11) On and from the date of the certificate of amalgamation the amalgamating companies are amalgamated and are continued as one company hereinafter called the amalgamated company under the name and having the authorized capital and objects specified in the amalgamation agreement.

Subsection (19) of the said section provides:

> (19) An amalgamated company shall for the purpose of the other provisions of this Act be deemed to have been a company incorporated under this Act within the meaning of clause (g) of s. 2 so far as the nature of an amalgamated company will permit.

In pursuance of the said certificate of amalgamation, the amalgamation was immediately carried in full force and effect. Neither Gridoil nor Norcan has since the date of the said certificate operated as a continuing corporation. The amalgamated company has been in full operation. By April 1, 1964, all shares of Norcan had been exchanged for

1964

NORCAN OILS LTD. *et al.* v. FOGLER

Spence J.

the shares of the amalgamated company except 49,964 shares registered in the name of 322 shareholders. Since the amalgamation on February 18, 1963, many shares of stock of the amalgamated company have changed hands on the stock exchange and otherwise. Since that date, the amalgamated company acting in the normal course of business has acquired either alone or in participation with other companies 14,701 net acres of petroleum and natural gas rights in the provinces of Alberta and Saskatchewan at a total cost to the amalgamated company of $503,674; has acquired 201,721 net acres of petroleum and natural gas rights in the said provinces and in the Arctic Islands by way of farm-out agreements at a cost of $54,134 and have expended the sum of $1,556,535 for drilling and development of petroleum and natural gas rights. The amalgamated companies have obtained a production loan of $800,000 from the Bank of Montreal in December 1963 of which amount the sum of $775,000 remained outstanding. It has cancelled $710,000 of Gridoil's 5½ per cent convertible sinking fund redeemable notes formerly owned by Norcan, has incurred trade obligations and liabilities in the normal course of business and the sum of $250,000 presently remains outstanding and unpaid in respect of such trade obligations and liabilities. 1,309,435 shares of Gridoil which were owned by Norcan have been cancelled in accordance with the terms of the amalgamation agreement. In view of these circumstances and under the provisions of the Alberta *Companies Act* hereinbefore recited, counsel for the appellant takes the position that when the respondent did not apply for any stay of proceedings and since the circumstances have so altered that the decision of the Appellate Division is vain, it is now impossible to return to the position prior to the argument of the appeal. Counsel points out that the Appellate Division did not set aside the certificate of amalgamation granted by the Registrar. It is true that Mr. Justice Porter's reasons for judgment conclude with the sentence "the order approving the merger should therefore be set aside".

The formal order of the Appellate Division simply provided:

> It is adjudged that the appeal from the said order of the Honourable Mr. Justice J. M. Cairns be allowed and the said order be set aside.

Of course the question arises whether this Court should be concerned with this problem. Rule 601 of the Rules of Court of Alberta provides in part:

> The Court shall have power to draw inferences of fact and give any judgment and make any order which ought to have been made and to make such further order or other order as the case may require.

Counsel for the appellant in urging this objection relied, *inter alia,* upon *Commissioner of Provincial Police v. The King ex rel. Dumont*[1], where Duff C.J. said at p. 320:

> After the judgment of the Court of Appeal allowing the appeal the Commissioner of Police very properly complied with the order and delivered up the licences and number plates. The argument on behalf of the appellant in support of the Commissioner's authority being as I have said quite without substance I think a reasonable interpretation of what occurred is that the Commissioner acquiesced in the judgment of the Court that the suspension was invalid and that he was not entitled to retain the licence and number plates. From that point of view, the appeal has no practical object. Even if the appellant's technical objection to the proceedings by way of *mandamus* had been well founded, the licences and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the only question for discussion on appeal would be the academic technical question with regard to the propriety of proceedings by *mandamus* and the question of costs.

I am of the opinion that this decision is not in *pari materia.* At the time the Appellate Division heard the appeal of the present respondent, the amalgamation order was in effect and was being complied with. The appeal was therefore not academic and the Appellate Division, in my view, had the right to make the order which it did make.

In *The King ex rel. Tolfree v. Clark*[2], this Court refused leave to appeal from the judgment of the Court of Appeal of Ontario affirming the dismissal by Hope J. of an application in the nature of *quo warranto* for an order that the respondents show cause why they did unlawfully exercise or usurp the office and liberties of a member of the legislature of Ontario. After the judgment of the Court of Appeal, the then present legislative assembly had been dissolved. Duff C.J. said at p. 72:

> Admittedly the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of the statute of 1942 extending the life of the Legislative Assembly, as well as section 3 of the *Legislative Assembly Act.* Nevertheless, the direct and immediate object of the proceeding was to obtain a judgment fore-

[1] [1941] S.C.R. 317.

[2] [1944] S.C.R. 69.

1964

NORCAN OILS LTD. *et al.* *v.* FOGLER

Spence J.

judging and excluding the respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment could not now be executed and could have no direct and immediate practical effect as between the parties except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared.

Again, the situation in that case was not as in the present case; the amalgamation was approved by Cairns J. and at the time of the decision in the Appellate Division and now is in full effect. In *Coca-Cola Company of Canada v. Mathews*[1], this Court refused to entertain an appeal where the amount of the judgment was $350 plus costs of the trial, and the parties had agreed that the appellant would pay to the respondent the amount of the judgment and costs in any event of the result of the appeal to this Court.

In my view, there is no reason for allowing the appeal and affirming the order of Cairns J. All that is involved in this appeal is the question of whether that order was properly made. I agree with the Appellate Division that it was not so made. What the consequences of this may be is a matter which perhaps should be determined by the Supreme Court of Alberta and that Court would appear to have such power under r. 601 *supra*. For this Court to allow the appeal would involve the restoration of the order of Cairns J. and that would be a gross injustice to minority shareholders who might well have proceedings in contemplation or even under way. Their rights should not be foreclosed or even in any way affected by any judgment of this Court allowing an appeal from the decision of the Appellate Division which I believe was a correct decision.

The order of Cairns J. approving the amalgamation agreement did not order the proponents of the scheme to do anything. They took the responsibility of filing the amalgamation agreement and order with the Registrar after their solicitor had been served with a notice of appeal and after that notice of appeal had been filed. There was a right of appeal to the Appellate Division. It is no answer to say when that appeal was successful that nothing could be done and that the dissenting shareholder must accept an accomplished fact even when he did not apply for a stay.

[1] [1944] S.C.R. 385.

I therefore am of the opinion that this Court should dismiss the appeal and then the respondent will have to take such proceedings as he deems fit to effect the remedy he desires, such proceedings being in the Courts of Alberta.

For these reasons, I would dismiss the appeal with costs.

Appeal allowed, no order as to costs, JUDSON *and* SPENCE JJ. *dissenting.*

Solicitors for the appellants: Arnold & Crawford, Calgary.

Solicitors for the respondent: Prothroe, Gibbs, McCruden & Hilland, Calgary.