Docket No.: CA 162887
Date: 20001011

NOVA SCOTIA COURT OF APPEAL

[Cite as: Lipsett Holdings Ltd. (Re), 2000 NSCA 112]

Hallett, Cromwell and Oland, JJ.A.

IN THE MATTER OF: The Application of **Lipsett Holdings Limited** and **Bridgewater Insurance Agency Limited**

- and -

IN THE MATTER OF: The Amalgamation of **Lipsett Holdings Limited** and **Bridgewater Insurance Agency Limited** pursuant to Section 134 of the Companies Act, Revised Statutes of Nova Scotia, 1989, c. 81

REASONS FOR JUDGMENT

Counsel: Michael K. Power for the appellants Lipsett Holdings Ltd. and Bridgewater Insurance Agency Ltd.
Edward A. Gores for the Attorney General of Nova Scotia

Appeal Heard: September 20, 2000

Judgment Delivered: October 11, 2000

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Oland, J.A.; Hallett and Cromwell, JJ.A., concurring.

<u>OLAND, J.A.:</u>

Overview:

[1] This is an appeal of a decision of Justice Felix A. Cacchione, sitting as a judge in Chambers, given March 16, 2000.

[2] The Registrar of Joint Stock Companies issued a certificate of amalgamation to the appellants, Lipsett Holdings Limited and Bridgewater Insurance Agency. Months later, the appellants obtained an order in Supreme Court Chambers declaring that their amalgamation was deemed effective on a date earlier than that on the certificate. The Registrar refused to amend the date of the certificate.

[3] The appellants then applied in Chambers for an order amending the certificate to conform with the earlier order. Justice Cacchione concluded that the court did not have the jurisdiction to order the Registrar to backdate the certificate and dismissed their application. The appellants have appealed that decision to this court.

Issue:

[4] In essence, the appeal is of the conclusion reached by the Chambers judge as to jurisdiction. The main issue in this case then is whether he erred in law in deciding that the Supreme Court of Nova Scotia did not have the jurisdiction to amend the date

of amalgamation on a certificate of amalgamation to a date earlier than the date of the original issuance of that certificate.

Facts:

[5] It is necessary to set out the particular circumstances under which this issue arose, before turning to a consideration of the issue itself.

[6] The appellants, both companies incorporated in Nova Scotia, sought to be amalgamated pursuant to s. 134 of the **Companies Act**. They entered into an amalgamation agreement dated June 30, 1998. They then compiled financial statements, letters of consent, and other documents in support of a court application under s. 134(5) of the **Act**. Their application in Supreme Court Chambers for an order approving the amalgamation was successful.

[7] Justice Jamie W. S. Saunders (now a member of this court) granted the appellants an order dated October 30, 1998 (the "approving order") which provided, *inter alia*, as follows:

> IT IS HEREBY ORDERED that the Amalgamation Agreement be and the same is hereby approved to be effective Saturday, October 31, 1998;
>
> ...
>
> IT IS FURTHER ORDERED that the filing with the Registrar of Joint Stock Companies of a copy of this Order certified under the hand of the Prothonotary be sufficient compliance with the provisions of subsection (9) of Section 134 of the Companies Act;

[8] The appellants filed documents pertaining to the amalgamation, including a certified copy of the approving order, at the Registry of Joint Stock Companies. The Deputy Registrar issued a Certificate of Amalgamation (the "Certificate") which certified *inter alia* that the appellants had amalgamated and that the amalgamation had been approved by the Registrar effective October 31, 1998. The date of amalgamation appeared on that Certificate as October 31, 1998.

[9] In the spring of 1999, Revenue Canada rejected the tax return filed by the amalgamated company. It requested individual returns from each of the two appellants for the period extending from June 30, 1998, the date of the amalgamation agreement, to October 31, 1998, the date of the Certificate.

[10] For the purposes of responding to Revenue Canada's concerns, the appellants returned to Chambers seeking an order amending the approving order and deeming that order effective June 30, 1998.

[11] The materials in support of that application included an affidavit by the solicitor for the appellants which recounted Revenue Canada's request for separate returns. He also stated that it was the honest intent of the amalgamating companies to be amalgamated effective June 30, 1998, that he had been advised by the Registrar that she was aware of at least one other instance where the court had amended an approving order and directed the issuance of an amended certificate of amalgamation,

and that, except as noted in that affidavit, it was not injurious, adverse or harmful to any third party to have the approving order amended.

[12] The appellants brought their application by way of interlocutory notice (ex parte application) dated June 1, 1999. Although the supporting affidavit referred to a telephone conversation between their solicitor and the Registrar, no mention was made of a subsequent letter from the Registrar to that solicitor dated May 25, 1999 which advised that staff had not been able to locate the file containing an order amending a certificate of amalgamation to an earlier date and which indicated that the Registrar did not think a court could make such an order. No notice of the application was given to the Registrar.

[13] The application was heard and granted by Justice Saunders. His order of June 3, 1999 (the "amending order") provided as follows:

> IT IS ORDERED AND DECLARED that the Order of the Court dated October 30, 1998 in the within proceeding is hereby amended by declaring it to be effective the June 30, 1998 [sic] and that the amalgamation herein is deemed to be effective June 30, 1998 for all purposes.

[14] The appellants sent a copy of the amending order to Revenue Canada, believing that it would suffice to satisfy Revenue Canada. They were mistaken. Revenue Canada responded that it required a certificate of amalgamation showing June 30, 1998, rather than October 31, 1998, as the date of amalgamation.

[15] To this end, on June 25, 1999, the solicitor for the appellants forwarded a certified copy of the amending order to the Registrar and requested an amended Certificate showing June 30, 1998 as the effective amalgamation date. The Registrar refused.

[16] The appellants made a third application in Chambers. They sought an order ordering the amendment of the Certificate to conform with the amending order. Their application was brought by way of interlocutory notice. This time, notice was given to the Registrar.

[17] The application was heard on March 16, 2000 before Justice Cacchione. His oral decision which is the subject of this appeal provided in part as follows:

> ... after reviewing the briefs, reading the cases that have been filed, I come to the conclusion that this Court's jurisdiction is in fact circumscribed by the provisions of the **Company's** [sic] **Act**, in particular s. 134(10). Effectively the Court does not have jurisdiction to allow for a predating of a Certificate of Amalgamation which in fact predates the approving order.

Analysis:

[18] The appellants sought and obtained their amalgamation pursuant to s. 134 of the **Companies Act** which reads in part as follows:

> **Amalgamation**
>
> **134 (1)** Any two or more companies, including holding and subsidiary companies, may amalgamate and continue as one company.

Amalgamation agreements

(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.

. . .

Adoption of agreement

(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.

Approval orders

(5) Where the amalgamation agreement is deemed to have been adopted, the amalgamating companies may apply to the court for an order approving the amalgamation.

Notice of application

(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.

Manner of notice to creditors

(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.

Terms and conditions

(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.

Filing of agreement

(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.

Certificate of amalgamation

(10) On receipt of the amalgamation agreement, the 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.

Name, capital and restrictions

(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 restrictions, if any, on its objects and powers specified in the amalgamation agreement.

Powers, rights and liabilities

(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 restrictions, if any, on its objects and powers, shall be deemed to constitute the memorandum of association of the amalgamated company.

[19] Section 2 of the **Act** defines “court” as the Supreme Court or a judge of that court.

[20] Section 134 sets out the procedure to be followed for amalgamations. Amalgamating companies, such as the appellants in this case, initiate the process by entering into an amalgamation agreement and obtaining shareholder approval: s. 134(2) and (4). They then make application to the Supreme Court for court approval: s. 134(5).

[21] The statutory scheme in s. 134 also establishes when a certificate of amalgamation can issue and when the amalgamation is effective. Not until an approving order and other documents are filed with the Registrar can the Registrar issue a certificate of amalgamation. This is clear from the opening words of s.134(10) which provide that “on receipt” of those documents, “the Registrar shall issue a Certificate of Amalgamation ....”

[22] The use of the word “shall” in s.134(10) indicates that the Registrar has a mandatory obligation to issue a certificate of amalgamation following receipt of the specified documents. In addition to the clear wording of that subsection, this interpretation is supported by **Norcan Oils Ltd. et al. v. Fogler** (1964), 46 D.L.R. (2d) 630 (S.C.C.), in which the Supreme Court of Canada considered similar provisions contained in the **Alberta Companies Act**.

[23] Section 134(11) and (12) of our **Companies Act** establish the effective date of an amalgamation. Amalgamating companies have amalgamated and continue as one company “on and from the date of the Certificate of Amalgamation.” These subsections read in conjunction with s. 134(10) lead to the conclusion that, under the statutory scheme in s. 134, an amalgamation cannot be effective on a date earlier than the date the Registrar received the approving order and other specified documents.

[24] In this case, the appellants sought to have a date earlier than the Registrar’s receipt of the specified amalgamation documents attach to their Certificate. The date sought is one some four months earlier than the approving order and the Certificate itself. Any authority for such an amendment must be found in the legislation itself or in the court’s inherent jurisdiction.

[25] The **Companies Act** contains no provision authorizing the Registrar to either issue a certificate of amalgamation with a date earlier than the Registrar's receipt of an approving order and the other documents specified in s. 134(10) or to amend an issued certificate in that manner. Moreover, the **Act** is silent as to the court having any right to order or to effect such an amendment.

[26] Case authorities support the position that unless the legislation contains provisions authorizing the amendment or revocation of a certificate of amalgamation, a court does not have jurisdiction to do so.

[27] In **Boutique Pénélope Inc. c. Québec (Inspecteur général des institutions financières)**, [1993] A.Q. No. 1698, the Quebec Superior Court refused an application for annulment of one certificate of amalgamation and the issuance of another dated two days after the original issuance date of the first, on the grounds that the Inspector General of Financial Institutions did not have the authority to issue a retroactive certificate of amalgamation. The order would have been equivalent to a retroactive order of the court. While the **Quebec Companies Act** expressly provided for certain amendments that could be given retroactive effect with the sanction of the court, for example, corrections to irregularities in a company's articles, there was nothing in that legislation which, in the court's view, permitted the cancellation of a previously issued certificate of amalgamation and the issuance of a new post-dated certificate.

[28] In **Re Yokohama Enterprises Inc. and Mascot Enterprises Inc.** (1984), 56 B.C.L.R. 132 (Commercial Appeals Commission), after the amalgamating companies had obtained an approving order in chambers and received a certificate of amalgamation, application was made for an order setting aside the approving order and returning the companies to their state prior to the approving order. The setting aside order was granted, purportedly by consent. The Registry of Companies refused to give it effect.

[29] The Commission dismissed the appeal taken from the Registrar's refusal. The **British Columbia Company Act** required the Registrar to issue a certificate of amalgamation showing *inter alia* the date of amalgamation following the filing of specified documents and further provided that from the date of the amalgamation, the amalgamating companies were amalgamated. The Commission held that amalgamation arose from the effect of a statute and was something which could not be reversed or set aside by a court without specific statutory authority, which did not exist in their legislation.

[30] In **Norcan, supra**, the Registrar had issued a certificate of amalgamation upon receipt of certain documents, including an approval order, in accordance with the **Alberta Companies Act**. The approving order was then under appeal but no application for any stay of proceedings had been made. The Supreme Court of Canada

held that as the legislation contained no provision for the revocation of a certificate of amalgamation, the Appellate Division had had no power to revoke it.

[31] The appellants relied upon the Federal Court of Appeal decision in **Dale v. R.**, [1997] 2 C.T.C. 286 (F.C.A.). There, taxpayers had obtained an order of the Supreme Court of Nova Scotia which deemed certain preference shares to have been issued years earlier. In the course of a s. 85 rollover, the Dale Corporation had issued those shares when it could not validly do so. The Federal Court of Appeal held that the court order constituted proof of the fact that, as of the end of the earlier taxation year set out in that order, the preference shares had been validly issued and outstanding. It noted that the Nova Scotia court had granted its order on the basis of s. 44 of the **Nova Scotia Companies Act** which authorized the court to rectify the shareholders' register and to deem something to have occurred on a date already past. In **Dale**, the court had a statutory basis for its order. In the case at hand, there is no statutory authority for amending a certificate of amalgamation to show any earlier date as the appellants have requested.

[32] I conclude from my review of s. 134 of the **Act**, the **Act** itself, and these case authorities that the Supreme Court of Nova Scotia does not have any statutory right to amend a certificate of amalgamation in the manner requested here.

[33] The question then becomes whether the court has the inherent jurisdiction to do so. The appellants referred to I. H. Jacob, *The Inherent Jurisdiction of the Court*, Current Legal Problems 1970, which was extensively quoted in **Lundrigans Ltd. (Receivership) v. Bank of Montreal et al.** (1993), 110 Nfld. & P.E.I.R. 91 (Nfld. S.C.T.D.) However, the inherent jurisdiction of the court can be circumscribed by legislation and such legislation must be respected: **College Housing Co-operative Ltd. and College Housing Inc. v. Baxter Student Housing Ltd. and R.C. Baxter Ltd.,** [1976] 2 S.C.R. 475; 5 N.R. 575 (S.C.C.) at p. 480, quoted at p. 103 of the **Lundrigans** case.

[34] It is my view that the legislative will as expressed in Section 134 of the **Companies Act** is unambiguous. The Registrar is to issue a certificate of amalgamation after the criteria in s. 134(10) have been met. When a certificate can issue and by whom it is issued are clear. That subsection limits any inherent jurisdiction of the court to order amendment of a certificate to an earlier date.

[35] There is no jurisdiction, statutory or otherwise, to amend a certificate of amalgamation as sought by the appellants. Justice Cacchione did not err in law in deciding that the Supreme Court of Nova Scotia did not have jurisdiction to order the Registrar to backdate the Certificate issued to the appellants to June 30, 1998, a date earlier than the Registrar's receipt of the approving order and other amalgamation documents.

[36] Nor, in my view, did the decision of Justice Cacchione result in any patent injustice in the particular circumstances of this case.

[37] The approving order was issued in the form sought by the appellants. The Certificate bore the date of amalgamation they had requested.

[38] Furthermore, the amending order was granted in the form sought by the appellants. It states that the approving order of October 30, 1998 was declared effective June 30, 1998 and that the amalgamation was deemed effective June 30, 1998 for all purposes. It is to be noted that the amending order was not directed to the Registrar, nor did it order the issuance of an amended certificate of amalgamation. Indeed, when they applied for this amending order, the appellants did not anticipate having to deal with the Registrar or with the Certificate at all. They then believed that provision of the amending order in the declaratory form in which it was taken out was all that was necessary to address the request of Revenue Canada. It was only after Revenue Canada demanded an amended certificate of amalgamation that the appellants requested the Registrar to provide such a certificate.

[39] While the appellants may have encountered difficulties they did not expect after the issuance of the Certificate as they had sought, no patent injustice resulted from the decision under appeal.

Disposition:

[40] The appellants have not met the burden required for this court to intervene in the decision under appeal. Their appeal is dismissed, and as the Attorney General has not sought costs, none are awarded.

Oland, J.A.

Concurred in:

Hallett, J.A.

Cromwell, J.A.