

Date: 19980313

Docket: C.A. 143934

NOVA SCOTIA COURT OF APPEAL

(in Bankruptcy)

Cite as: Black v. ABN Amro Bank of Canada, 1998NSCA2

IN THE MATTER OF:

THE BANKRUPTCY OF NSC DIESEL POWER INCORPORATED

BETWEEN:

FREDERICK W.L. BLACK

Appellant

- and -

ABN AMRO BANK OF CANADA,
Inc.
as petitioning creditor

Respondent

) Heather Cruickshanks,
) Inspector, in person
)
) David G. Coles
) for the Respondent
)
) Thomas M. Macdonald
) for Krupp MaK Maschinenbau
) GmbH & Krupp MaK Diesel
)
)
)
) D. Bruce Clarke
) for the Superintendent in
) Bankruptcy
)
)
) Frederick W.L. Black
) (Written submissions only)
)
)
) Application Heard:
) February 19, 1998
)
)
) Decision Delivered:
) March 13, 1998
)

BEFORE THE HONOURABLE JUSTICE CROMWELL IN CHAMBERS

CROMWELL, J.A.: (in Chambers)

Frederick W.L. Black has filed a notice of appeal (and, if necessary, an application for leave to appeal) from a decision of Hood, J. in the Supreme Court in Bankruptcy delivered December 16, 1997. In that decision, Hood, J. refused to revisit and rescind her decision of August 22 dismissing an application for an order to examine Mr. Terry Russell pursuant to **s. 163(2)** of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3. Mr. Black's appeal has been set down to be heard on June 8th, 1998. The appeal book is to be filed on April 17th, the appellant's factum on April 24th and the respondent's factum by May 15th.

The inspectors of the Estate of NsC Diesel Power Incorporated now apply to intervene in the appeal. Their application is opposed by counsel by the ABN Amro Bank but supported by the appellant in his written submission and by counsel on behalf of the Superintendent of Bankruptcy. Counsel for Krupp MaK Maschinenbau GmbH & Krupp MaK Diesel Inc. takes no position on the application.

I am satisfied that I have jurisdiction to make the order sought. **Rule 51** of the **Bankruptcy and Insolvency Rules** provides that, subject to the **Bankruptcy and Insolvency Act** and the rules made thereunder, appeals to the Court of Appeal are to be regulated by the ordinary rules of court relating to appeals in civil actions. I have not been referred to any provisions of the **Bankruptcy and Insolvency Act** or **Rules** which deal specifically with the question of intervention on appeal. The **Civil Procedure Rules**, which are incorporated to the extent just set out by **Rule 51** of the **Bankruptcy**

and Insolvency Rules, specifically provide that a judge of the Court of Appeal in Chambers may make an order granting leave to intervene upon terms and conditions as the judge may determine: see **Rule 62.35**. There is an issue between the parties in this matter as to whether the appeal presently before the Court is one requiring leave or not. In either case, I have jurisdiction to grant leave to intervene because the definition of “appeal” for the purposes of **Rule 62** includes an application for leave to appeal: see **Rule 62.01(a)**.

The inspectors wish to intervene for the purpose of supporting Mr. Black’s position on the appeal. In short, their position is that Mr. Russell ought to be examined. The inspectors passed a resolution to this effect in August of 1997 and seek to argue on the appeal that their views on this subject, given their statutory responsibilities, ought to have been given more weight by Hood, J. As counsel for the Superintendent of Bankruptcy observed, one of the issues on the appeal is of the legal effect, if any, of the inspectors’ resolution. Considering that the inspectors could not have appealed Hood, J.’s order and given that there is no reason to believe that the intervention by the inspectors will cause delay or unduly widen the issues before the Court, counsel for the Superintendent submits that it is appropriate that they be allowed to intervene.

Mr. Coles made submissions on behalf of the Bank in opposition to the intervention. He noted that if the inspectors wish to have individuals examined under **s.**

163, it is open to them to bring the appropriate application to the Court. Moreover, the appeal before this Court is from a dismissal an application for reconsideration. Accordingly, in Mr. Coles' submission, the issue is not so much whether or not Mr. Russell ought to be examined, but whether Hood, J. erred in refusing to reconsider her earlier decision, which was not appealed, that he should not be. Mr. Coles submits that the inspectors have nothing to contribute to the resolution of the appeal and that their participation risks widening the issues on the appeal.

The pertinent considerations are set out in **Rule 62.35**. These include the proposed intervener's interest in the appeal, the nature of the position to be taken by the proposed intervener and why the intervener's submissions are relevant and useful to the Court and different from those of other parties. Justice Hallett in **1874000 Nova Scotia Ltd. v. Adams** (1996), 156 N.S.R. (2d) 208 at 217 summarized the factors normally considered on an intervention application. These include whether the intervention will unduly delay the proceedings, the possible prejudice to the parties if intervention is granted, whether the intervention will widen the *lis* between the parties, the extent to which the position of the intervener is already represented and protected by one of the parties and whether the intervention will transform the court into a political arena.

Having considered the factors enumerated in **Rule 62.35** and those summarized by Hallett, J.A., I conclude that leave to intervene should be granted.

Inspectors have special and important duties and responsibilities under the **Bankruptcy and Insolvency Act**. One of the issues raised on this appeal is the weight that should be attached by a judge dealing with a **s. 163(2)** application to a resolution of the inspectors in support of a proposed examination. It seems to me that the inspectors have a unique interest in that issue in the sense that the resolution of it may affect other proposed examinations. Beyond their immediate interest in the examination of Mr. Russell, it seems to me to be at least possible that the decision of this Court on the appeal will affect the availability of other examinations which I understand the inspectors support.

I am satisfied that the participation of the inspectors will not delay the proceedings. They do not seek to supplement the record and I will require their written argument to be filed according to the timetable set for the parties to the appeal. I can see no prejudice to the parties if the intervention is granted and I do not think that the intervention will significantly widen the scope of the appeal. Given their special and important role under the **Bankruptcy and Insolvency Act**, and that one of the issues on the appeal specifically addresses the weight, if any, to be given to the inspectors' views on the merits of a proposed examination, I am of the view that they do have a particular interest and perspective which will contribute usefully to the Court's consideration of the appeal.

I therefore grant leave to the inspectors to intervene in this appeal on the

following terms:

- i. the inspectors will file one factum not to exceed 25 pages on or before April 30th, 1998;
- ii. the inspectors will be bound by the appeal book and may not add to it;
and
- iii. the ability of the inspectors to make oral submissions to the panel hearing the appeal will be within the discretion of the panel.

The inspectors are not, at present, represented by counsel. I, therefore, require the inspectors to file with their factum proof by affidavit that all inspectors have been given the opportunity to review the contents of the factum filed on their behalf prior to its filing and that at least a majority of the inspectors adopt the position taken in the factum.

The costs of this application are reserved to the panel hearing the appeal.

Cromwell, J.A.

