Date: 19980724 Docket: C.A. 143934

NOVA SCOTIA COURT OF APPEAL
Cite as: Black v. ABN Amro Bank Canada, 1998 NSCA 114
Chipman, Hallett and Cromwell, JJ.A.

IN THE MATTER OF:

THE BANKRUPTCY OF NsC DIESEL POWER INCORPORATED

BETWEEN:

FREDERICK W.L. BLACK	)	Appellant in person
	)	
Appellant	)	David G. Coles
	)	for the Respondent
	)	
- and -	)	Thomas M. Macdonald
	)	for GmbH & Krupp MaK
ABN AMRO BANK CANADA,	)	Diesel Inc. (Watching Only)
as petitioning creditor	)	
	)	
Respondent	)	Intervenors in Person
	)	
	)	
- and -	)	
	)	Appeal Heard:
	)	June 8, 1998
THE INSPECTORS OF THE ESTATE	)	
	)	
Intervenors	)	Judgment Delivered:
	)	July 24, 1998
	)	

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Chipman, J.A. concurring; Cromwell, J.A. dissenting

HALLETT, J.A.:

This is an application for leave to appeal and an appeal from Justice Hood's order refusing to reverse a prior decision she rendered refusing to order that Terrance Russell, a former employee of the respondent, be examined by the appellant pursuant to s. 163(2) of the **Bankruptcy & Insolvency Act**, R.S.C. 1985, c. B-3. The appellant did not appeal the first order of Justice Hood.

Terry Russell is a former assistant vice-president of the respondent Bank with primary responsibility for the loan to NsC Diesel during the period from 1989 to July 1992. In late 1991 the respondent Bank petitioned NSC Diesel into bankruptcy. On December 3rd, 1991, the Supreme Court of Nova Scotia in Bankruptcy appointed Ernst & Young as Trustee.

Terrance Russell was appointed an Inspector under the provisions of the **Act**. He left the respondent Bank in late 1992 and is no longer an Inspector of NsC Diesel in bankruptcy. Both NsC Diesel and NsC Corp. are controlled by the appellant.

Section 163(2) of the **Act** authorizes the examination of a number of persons for the purpose of investigating the administration of the estate. The applicant must show sufficient cause before the court will order the examination sought.

Section 163(2) states:

> 163(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

It must be remembered that this appeal is from a decision of Justice Hood on a motion brought by the appellant for her to reconsider her initial decision.

Section 187(5) of the **Act** provides:

> 187. (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

To succeed the appellant must satisfy this Court that on the reconsideration motion Justice Hood applied wrong principles of law or that the order she made has resulted in a patent injustice. It is an error in law if Justice Hood misapprehended or failed to consider relevant evidence (**Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143).

On the motion to reconsider the appellant asserted that Justice Hood did not have before her on the original application heard on August 20th, 1997, certain materials

he was relying on in support of his motion to examine Terrance Russell. In particular, Exhibit "C" to the Inspector's affidavit of July 9th, 1996, which was initially filed in support of a 1996 application under s. 163(2) to examine a Mr. Tony Purchase who was employed by ACOA, a government agency. ACOA was involved in the financing of NsC Diesel and in discussions with the respondent Bank and others after NsC Diesel got into financial difficulties in 1989.

The appellant's notice of motion for the first application expressly stated that the appellant would be relying on two affidavits of the Inspectors; one dated July, 1994, and the other July 9th, 1996. There is no reference to Terrance Russell in the body of either of these affidavits.

In February, 1992, at the first meeting of the Inspectors, they authorized the Trustee to examine the Benn brothers of Corporation House. They had been advising the appellant in developing his project at Sheet Harbour. The project involved the construction of premises and related works to test ships' engines manufactured by Krupp MaK for installation in vessels operated by the Canadian Navy.

A May 25th, 1992, meeting with the Benn brothers and the Trustee was arranged by Terrance Russell as a result of the resolution. The Inspectors wished to ascertain if there was fraud in relation to the payment by NsC Diesel of an insurance premium on a performance bond arranged through Corporation House. The meeting took place as scheduled and certain information was obtained from Corporation House.

The July 1994 affidavit of the Inspectors asserts that the Trustee refused to redo the examinations of the Benn brothers but acknowledged that the Trustee's refusal was due to the fact that, by this time, the Trustee was not being funded; the respondent Bank having ceased to fund the Trustee in late 1992.

The affidavit concludes with paragraph 15 which states:

> 15. **THAT** it is the belief of the Inspectors that further examination under **s. 163** of the **BIA** respecting the conduct of the June, 1992 examinations by the Officer of the Bankrupt or any other interested person would potentially be beneficial to the Estate, assist in proper administration and not be harmful and the information obtained will be without cost to the Estate.

There are ten exhibits attached to this affidavit. One of the exhibits is an affidavit of Joseph Brown dated September 3rd, 1993. With the exception of a paragraph in Joseph Brown's affidavit that Terrance Russell had been involved in arranging and administering the Bank's loan to NsC Diesel until July, 1992, there is no mention of Terrance Russell. Mr. Brown, at the time his affidavit was signed, was a vice-president of the respondent Bank and had primary responsibility for handling the NsC Diesel file since July of 1992. His affidavit was filed in an Ontario action brought by the respondent Bank against Krupp MaK and Collins Barrow.

Attached as Exhibit "H" to the Inspectors July, 1994, affidavit is a memorandum from the Inspectors to the Trustee dated October 23rd, 1993, in which the Inspectors outline their criticisms of the manner in which the Trustee performed its

duties. The purpose of the memorandum was to advise the Trustee that they did not agree with the Trustee's opinion that the appellant's representation of NsC Diesel in legal proceedings had a negative effect. The memorandum also deals with the Inspectors' views concerning the role of Krupp MaK in the financial collapse of NsC Diesel in 1989. The Inspectors seem to support the appellant's theory that Krupp MaK wanted to regain control of the so-called technology agreement it had made with NsC Diesel and in order to do so did not honour its alleged commitment to invest approximately $4 million dollars in NsC Diesel and this precipitated the financial collapse of the company.

In his affidavit filed in the Ontario proceeding, Joseph Brown makes assertions which are at odds with the appellant's theory that Krupp MaK and the Bank conspired against NsC Diesel to cause its financial collapse. At paragraphs 8 and 13 Mr. Brown states:

> 8. Based on the information and documents referenced in the following paragraphs, it would appear that Black and Krupp Mak entered into arrangements, the effect of which was to create the appearance that a technology licencing agreement between Krupp Mak and NsC Diesel had a value of $4 million and that Black had made an equity injection of $5 million, neither of which were true. This appearance was created through a series of transactions which are summarized in the diagram attached as Exhibit "F" hereto, whereby Krupp MaK provided indirectly or directly the funds necessary to create on paper the appearance of the equity injection by Black in NsC Diesel when in fact such funds came from Krupp MaK, flowed through NsC Diesel and were sent immediately back to Krupp MaK.
>
> 13. Attached hereto and marked as Exhibit "M" is a letter dated December 2, 1988 from Black to NsC Diesel's representative Corporation House, which document I am advised by Gordon

McGee and verily believe was obtained by him from Corporation House shortly before the commencement of this litigation. In that letter, Mr. Black states the following:

> "As you fully understand, the $4 million value for technology is a paper value, which we use to inflate the overall project costs. MaK will forward this money, by way of a loan to F.W.L. Black, who will then invest it in the corporation and pay it back to Mak for the purchase of the technology."

Other than the references to Terrance Russell to which I have referred, the July, 1994, affidavit contains nothing relevant to Terrance Russell's involvement with NsC Diesel's loan or the meeting between the Trustee, its solicitors and the Benn brothers on May 26th, 1992. The evidence does disclose that he attended that meeting.

The appellant, with the support of the Inspectors, alleges that the Trustee acted improperly in (i) the examination of the Benn brothers; and (ii) providing information obtained at that meeting to the respondent Bank and not to the Inspectors. The appellant asserts that the Trustee did not protect the interests of the creditors in the technology agreement. I would also infer from the record that the only possible asset of NsC Diesel is its potential recovery in the lawsuits commenced by the appellant in his own name or in the name of NsC Diesel alleging conspiracies between the respondent Bank, Krupp as well as claims against the Trustee, etc. It would not appear from the record that the technology agreement has any value to the Estate of NsC Diesel in bankruptcy.

The July 9th, 1996, affidavit of the Inspectors focuses on a desire to examine Mr. Tony Purchase respecting discussions in 1989 between representatives of a few creditors, ACOA, the respondent Bank, Krupp MaK, the Benn brothers and Ernst & Young. The apparent purpose of these discussions was to see if the Sheet Harbour facility could be completed following NsC Diesel's defaults to its building contractor and other creditors.

It is alleged by the Inspectors that the parties to these 1989 discussions, and in particular Krupp and the respondent Bank, had an objective of securing the operating control of the bankrupt's project at Sheet Harbour to "the exclusion of the estate of the bankrupt". I would note that NsC Diesel was not in bankruptcy until December, 1991.

Exhibit "C" to the Inspector's affidavit of July, 1996, is a large binder containing documents estimated to be some 500 pages in length.

On the reconsideration hearing, the appellant only referred Justice Hood to certain documents in Exhibit "C". It would appear that he referred her to a document entitled "Issues for Meeting with Superintendent/Official Receiver". This document was prepared by the Inspectors and is dated May 30th, 1994. It is contained at Tab B4 of Exhibit "C". Essentially the document complains of the failure of the Trustee to do certain things, including examinations under s. 163 of the **Act** of persons authorized by the Inspectors to be examined. The Inspectors wanted the Trustee to redo the examination of the Benn brothers with respect to the bonding issue and the Inspectors

wanted information from the Benn brothers on the “transaction outline”. This is a reference to a document created in 1989 for discussion at the meeting to which I have referred, of certain creditors, including the respondent Bank, to explore courses of action to enable the NsC Diesel project at Sheet Harbour to be completed. The appellant takes a different view as to the purpose of the meeting. In any event, the meeting pre-dated the bankruptcy by two years.

Tab B4 of Exhibit “C” also contains Minutes of the Inspector’s first meeting in February, 1992, and certain correspondence between the Trustee and the Benn brothers or their corporation and correspondence between law firms, etc. Much of what is in Exhibit “C” is irrelevant to the motions requesting an order to examine Terrance Russell.

An exhibit attached to Exhibit “C” of the July, 1996, affidavit of the Inspectors is an affidavit of S. Gordon McGee, a partner of Blake, Cassels & Graydon, sworn on May 18th, 1994, and filed in Ontario proceeding 92-CQ-29496A in connection with an application by the appellant to have Blake, Cassels & Graydon removed as solicitors for the respondent Bank.

The record shows that the respondent Bank had initially funded the Trustee but withdrew funding in late 1992. None of the creditors, including those substantial creditors whose principal shareholders or employees are inspectors of NsC Diesel in bankruptcy have since been prepared to fund the Trustee.

A review of the material in Exhibit “C” would indicate that, in the Trustee’s opinion, there were no tangible assets of NsC Diesel upon which anything could be realized. A review of the documentation would indicate that the Inspectors apparently pinned their hopes for some recovery on the possible success of any of the appellant’s many law suits, including those against the Trustee, its solicitors, the respondent Bank and Krupp MaK. The record also shows that the respondent Bank has sued the appellant for fraudulent misrepresentation that induced the Bank to advance several million dollars to NsC Diesel. I would infer from the documents in Exhibit “C” that the office of the Superintendent in bankruptcy has apparently not seen fit to carry out the sort of investigation of the Trustee that the Inspectors desire.

The extent of the proceedings commenced by the appellant arising out of the collapse of his companies, NsC Corp. and NsC Diesel is illustrated in paragraphs 47, 64 and 65 of the McGee affidavit of May 14, 1994, which I quote:

> 47. In virtually all of the various proceedings described in Exhibit “O” hereto, Black has represented himself and NsC Corp. The following are some of the more salient highlights of the events in Nova Scotia as they relate to Black’s conduct:
>
> a) Black has, on five separate occasions, sought *ex parte* relief from the Nova Scotia Courts in circumstances where notice ought to have been given to the respondents, including ABN. On each occasion the requested relief was either refused or, if granted, subsequently set aside when it came to the notice of the effected party.
>
> b) Black has, unsuccessfully, attempted through three separate claims or counterclaims and numerous motions in the bankruptcy proceedings to attack the petitioning into bankruptcy of NsC Diesel or sought damages from the trustee, ABN or ABN’s counsel in respect thereto. On each

occasion the proceedings have been stayed or dismissed, save for certain of his claims as against ABN which are ongoing.

c) Black has appealed virtually every decision made by the Nova Scotia Supreme Court or the Nova Scotia Bankruptcy Court. A total of eight appeals have been brought by him to the Nova Scotia Court of Appeal and five applications for leave to appeal to the Supreme Court of Canada. Each appeal or leave to appeal application has been unsuccessful.

64. In addition to those matters set out above relating to Black's role and conduct in the Nova Scotia Court, Black, NsC Corp. and/or NsC Diesel have commenced the following actions in the province of Ontario:

a) NsC Corp. issued a statement of claim against Krupp MaK and others in the Federal Court in Ottawa on June 4, 1990. A motion was brought in that action for an injunction, which was resolved on the basis of the delivery of an undertaking by one or more of the defendants. I have been advised by Krupp MaK's Ontario solicitors and believe that NsC Corp. is continuing to pursue that action.

b) Black, NsC Corp. and others commenced an action against Krupp MaK, Corporation House, Bruce Benn, Ron Benn, Steelwood Consulting Corporation, Gary Wiseman and others in the Supreme Court of Ontario at Ottawa on June 15, 1990 claiming damages in excess of $100 million. On December 13, 1990 the plaintiffs were ordered to add NsC Diesel (the corporate party who dealt with the defendants in that action) as a plaintiff in the action. That action has not proceeded further because NsC Diesel is a bankrupt and cannot be added as a party without leave of the Court, which leave has not been obtained. In May 1992 Krupp MaK brought a motion for security for costs in that action, which motion was dismissed by the Honourable Mr. Justice Cosgrove on May 22, 1992 on the basis that Black and NsC Corp. had demonstrated that they were impecunious.

c) NsC Corp. and Black commenced an action against Ernst & Young Inc. and Peter Cleveland (the partner at Ernst & Young Inc. responsible for the custodianship and receivership of NsC Diesel in the CCAA proceedings) on June 30, 1992 claiming damages in excess of $580 million. I

> have been advised by Michael Thompson, general counsel at Ernst & Young Inc., and believe that this action has been stayed on the basis that Ontario is not the convenient forum.
>
> 65. In addition to the within proceedings ABN also commenced a separate action in late 1991 against the solicitors who represented it in making the loan and in early 1992 a further action was commenced with respect to the loan insurance which was to be provided to it by ACOA. Examinations for discovery of all parties in these actions have been held (in excess of ten full days). These actions have been ordered tried together and are expected to be pre-tried within the next few months. A motion for summary judgment has been scheduled for September of this year in the action against ACOA.

I have already referred to Mr. Brown's affidavit filed in the respondent Bank's action in Ontario alleging conspiracy between Krupp MaK and NsC Diesel to misrepresent to the respondent Bank that Krupp MaK was investing $4 million in NsC Diesel when the transaction was, in the Bank's view, a sham.

There was no reference in the notice of motion on the original application to the July 14th, 1994, affidavit of the appellant in which affidavit Terrance Russell was mentioned as a person that ought to be ordered to be examined by the appellant.

On the first application Justice Hood refused to consider the Inspector's Resolution dated August 19th, 1997, supporting the appellant's motion for an order to examine Terrance Russell. She refused to do so as the Resolution was not properly put before the court having been presented to the Court during the appellant's oral argument; and secondly, was not verified by an affidavit as being a resolution of the

Inspectors.

In her decision on the original motion, Justice Hood made express reference to the two affidavits of the inspectors.

As noted by Justice Hood in her decision on the first application, the Supreme Court of Nova Scotia in Bankruptcy has, since 1991, dealt with a “myriad of applications” arising out of the bankruptcy of NsC Diesel and NsC Corporation.

It was within Justice Hood’s discretion on the first application not to consider the Inspector’s resolution of August 19th, 1997.

The essence of Justice Hood’s decision on the first application is contained in the following paragraphs:

> Examinations under Section 163(2) are only ordered when sufficient cause is shown and that sufficient cause must be directly related to the person sought to be examined. To say there is cause for questions to be asked and, as Mr. Black repeated in his oral submissions, “I must start somewhere” is not what Section 163(2) requires. There must be some demonstrated connection between the evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the Estate.
>
> Mr. Black says that there may be assets of the bankrupt estate which were not recovered. There is no evidence of this and nothing whatsoever to cause me to believe that even if it is true, Mr. Russell knows anything about it.
>
> I therefore refuse to exercise my discretion to order the examination of Terry Russell.

In her decision on the reconsideration motion, Justice Hood stated, with respect to material that may not have been available to her on the first application:

> Material dated July of 1996 could have been available. If Mr. Black was concerned that it had material in it that was vital to the application before me in August of 1997, the onus was upon him to ensure that not only was it available, but the specific parts of it to which I need, according to him, direct my attention were in fact brought to my attention. . . . .
>
> I should also note that the only way for Mr. Black to ensure that on each court application the court has whatever material he wishes to have the court's attention drawn to is to take the responsibility himself of making that information available. If he wants the court to read an affidavit or if wants the court to read material then that material needs to be produced for the court.

I would infer that Justice Hood was referring to the possible absence, from the Inspector's July, 1996 affidavit, of Exhibit "C" to that affidavit.

I agree with Justice Hood's remarks that the appellant must alert the court to the evidence he relies on in support of his applications. There was no mention in the notices of motion filed with respect to the applications that the appellant was relying upon his July 1994 affidavit which had been filed in connection with another application. There was nothing in the body of the Inspector's affidavits of July, 1994 and July, 1996, that contained any reference to Terrance Russell let alone why he would have evidence that warranted an order for his examination. There is, however, the information in Exhibit "C" to the July, 1996 affidavit of the Inspectors that Terrance Russell was involved in a meeting between the Trustee and the Benn brothers on May 25th, 1992.

This information is also in Joseph Brown's affidavit attached to the July, 1994, affidavit of the Inspectors. Whether Exhibit "C" was or was not before Justice Hood cannot be conclusively determined but it would appear from the record that it may not have been before her.

On the first application it is clear from the record that Justice Hood was aware that Terrance Russell attended the meeting on May 25th, 1992, at which meeting the Trustee obtained certain information from the Benn brothers and made that information available to the Bank. Justice MacPherson of the Ontario Supreme Court dealt with allegations made by the appellant in one of the proceedings in Ontario that the Trustee acted improperly in turning over this information to the bank. Justice MacPherson apparently found no fault with the Trustee having done so. As Justice Hood in her decision on the first application quoted from Justice MacPherson's decision as follows:

> The information was obtained, with no objection from Corporation House, pursuant to various provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, especially ss. 26 and 163. The entire scheme of this Act is to permit the trustee to investigate the events surrounding a bankruptcy and to make the fruits of the trustee's investigation available to the creditors and their representatives, the inspectors. The information and documentation received from Corporation House comes squarely within this statutory scheme. The trustee was entitled to obtain it and all of the creditors, including ABN, are entitled to know about it.

The appellant persists in putting forward his argument that the Trustee or its solicitor acted improperly in turning over to the respondent Bank information obtained

from Corporation House (the Benn brothers). The propriety of the Trustee's action has been resolved by Justice MacPherson's decision even though the appellant does not accept his finding.

A review of Exhibit "C" shows that on April 23rd, 1993, the Trustee sent to Mr. Jerry Dill, one of the Inspectors, the report of the Trustee's representative who had conducted the interview of the Benn brothers. In paragraphs 67 and 68 of S. Gordon McGee's affidavit of May 14, 1994, he stated:

> 67. As set out above, neither ABN nor Blake, Cassels & Graydon have any objections to producing to the parties in this litigation the documents which were obtained during the various interviews conducted in May and June of 1992 which they have in their possession and which they obtained from R. Benn, B. Benn, G. Wiseman and M. Panciuk. No prior request for the production of these documents has ever been made of Blake, Cassels & Graydon or ABN.
>
> 68. In paragraph 8 of Black's "Supplementary Factum" filed herein Black suggests:
>
> > *These solicitors Blake, Cassels and Boyne Clarke, moved to protect the section 163 material obtained by the trustee and the solicitors of the Estate from Corporation House Limited (B. Benn and R. Benn) and to keep this information confidential for sole use of their client the ABN Amro Bank in a Ontario Civil proceeding (this proceeding) and in direct contravention of the Bankruptcy and Insolvency Act and the Ontario Rules of Civil Procedure.*
>
> To the extent that these unsworn allegations require a response, I categorically deny them. At no time have I or, to my knowledge, any member of Blake, Cassels & Graydon, or Boyne Clarke, whether in our former capacity as solicitors for the trustee in bankruptcy, or in our capacity as solicitors for ABN, attempted to

prevent any party from having access to the subject documents.

These allegations made by the appellant were rejected by Justice MacPherson and fly in the face of the documents in Exhibit “C” which show that the material information obtained by the Trustee from the interview of the Benn brothers was sent to Inspector Dill albeit not until several months after the information was given to the respondent Bank.

The conspiracy that the appellant alleges between the respondent bank and Krupp MaK allegedly occurred in 1989, long before NsC Diesel was petitioned into bankruptcy. Therefore, questions that might be asked of Terrance Russell relevant to the alleged 1989 conspiracy have nothing to do with the administration of the estate of NsC Diesel in bankruptcy. The **Civil Procedure Rules** of Ontario relating to discovery are available to the appellant with respect to the actions he has commenced in Ontario. Section 163(2) of the **Act** and the **Rules** made thereunder are available to the appellant in the actions he has commenced in either or both his own name and that of NsC Diesel within the bankruptcy proceedings in Nova Scotia with respect to the administration of the estate. However, to obtain an order under s. 163(2) to examine Terrance Russell the appellant must show cause why such an order ought to be made.

The wording of s. 163(2) of the **Act** that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth

factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition. The scheme of the **Act** and its proper functioning requires that trustees act with integrity and, in effect, assumes they will so act. Otherwise the purposes and objectives of the **Act** would be frustrated. If a trustee's actions are being questioned, as in this case, the **Act** properly requires that sufficient cause be shown to warrant an order for examination. This requires that evidence be put forward on the application that would indicate a problem existed with respect to the trustee's administration of the estate and that the person sought to be examined would likely have evidence relevant to the issue. The unwillingness of a Trustee, who is not being paid, to carry out tasks the Inspectors authorize is not a breach of the Trustee's duties under the **Act**.

Justice Hood did not fail to consider the evidence that was <u>properly</u> put forward by the appellant in support of his first motion to examine Terrance Russell. The appellant did not satisfy Justice Hood that there was sufficient cause shown to warrant issuing an order for the examination of Terrance Russell under s. 163(2) of the **Act**. Justice Hood found as a fact that there was no evidence before her of anything amiss in the administration of the estate of NsC Diesel in bankruptcy and no evidence that the bankrupt had assets that were not recovered by the Trustee or that if there were there is no evidence from which it could be inferred that Terrance Russell would likely have relevant evidence on the issue. A review of the record indicates that Justice Hood did not err in coming to this conclusion and, therefore, did not err in dismissing the original

application.

The legal principles that would apply to a reconsideration motion under s. 187(5) of the **Act** are set out in Houlden & Morowetz text **Bankruptcy & Insolvency Law of Canada**, 3rd edition, vol. 2, at pp. 7-20 to 7-25 as follows:

> (a) The jurisdiction given by Section 187(5) should be sparingly exercised; it is a matter of indulgence and must be carefully guarded.
>
> (b) The discretion given by Section 187(5) must be exercised judicially ... different considerations apply to the exercise of the discretion according to the character of the Order sought to be varied or rescinded.
>
> (c) The sub-section permits a judge to deal with continuing matters in the bankruptcy so as not to be bound by an earlier decision, <u>if circumstances have changed</u> ... there must be a fundamental change in circumstances between the original hearing and the time when a review is sought, or evidence must have been discovered which was not known at the time of the original hearing and which would have led to a different result.
>
> (d) The question on a Section 187(5) application is not, as in an appeal, whether the original Order ought to have been made, but whether an Order ought to remain in force in the light of either of changed circumstances or in the light of fresh evidence.
>
> (e) The onus is on the applicant to satisfy the Court that the Order should be varied or rescinded.
>
> (f) Section 187(5) is not an alternative remedy to an appeal, nor is it designed merely to give a disgruntled party an opportunity to relitigate questions and issues already decided. There must be new material or material indicating a change in circumstances for the Court to make an Order under Section 187(5).

(g) If the applicant intends to proceed on the record that was before the Court when the original Order was made, the proper mode of proceeding is ordinarily an appeal. If there is new evidence or evidence of a change of circumstances, then an application under Section 187(5) is the appropriate remedy.

(h) Although Section 187(5) contains no time limit, an application must be made promptly and within a reasonable time of acquiring knowledge of the order sought to be varied or rescinded.

Section 187(5) of the **Act** is not an alternative remedy to an appeal of the original order of Justice Hood. Nor is it an opportunity to have an issue relitigated.

This was an interlocutory matter that required Justice Hood to exercise her discretion judicially. A review of the record discloses that Justice Hood did not appear to give consideration to the support of the Inspectors of the appellant's motion to examine Terrance Russell. She said their support was irrelevant but did so in the context of stating that the discretion to make the order was hers, not the Inspectors. She was correct.

I would note that in the Minutes of the Inspectors' meeting of May 21st, 1996, at which the Inspectors approved of an application for an order to examine Tony Purchase of ACOA, it is stated that one of the purposes of examining him was to assist one of the Inspectors "in a potential action against ACOA". That is not a proper reason to authorize examination under s. 163(2) of the **Act**. The Inspectors' resolution of

August, 1997, supporting the appellant's application to examine Terrance Russell contains nothing of that sort. However, the appellant's law suits are the only straw the Inspectors have to grasp at if they hope to be paid anything on their outstanding accounts. Their support must be looked at in this light.

A review of Justice Hood's decision on the reconsideration motion shows that she applied the correct legal test in deciding that she would not reverse her original order as there was no change of circumstance since the original application nor was any new material put before her on the reconsideration motion that could not have been properly put before her on the original application. Therefore, it was not a legal error for Justice Hood to refuse to consider the evidence in Exhibit "C" put forward on the reconsideration motion.

I have reviewed the evidence in Exhibit "C" simply to show that it did not contain facts that could have resulted in a different decision on the first application, assuming that Justice Hood failed to consider Exhibit "C" on that application.

At first blush it may appear that an order for the examination of Terrance Russell might have been made either on the first application or on the motion for reconsideration. However, on analysis of the facts the appellant failed to show sufficient cause to warrant such an order. The application lacked facts to support the granting of the order sought. The support of the Inspectors does not change this deficiency in the application. If the Inspectors have evidence to put before the court that would warrant

an order for the examination of Terrance Russell it is open to the Inspectors to make such an application. Therefore, Justice Hood's decision on the reconsideration motion has not resulted in a patent injustice. I would not interfere with the exercise by Justice Hood of her discretion on the reconsideration motion.

In her reconsideration decision Hood, J. stated:

> With respect to costs, my decision from August indicated that costs were to be paid forthwith. If costs have not been paid forthwith I understand that in the Ontario Courts, the courts made a ruling that the costs have to be paid before further proceedings are taken. I think it is time that such an order be made in this court. If the costs with respect to the proceedings under S.H. No. 80055 are not paid, then no further proceedings are to be taken until those costs are paid. That may affect the hearing which I understand is scheduled for about two weeks from now. If the costs are not paid, then that hearing should not proceed.
>
> Because of my decision today with respect to the necessity of the s. 187(5) application, I am going to order that the costs of the ABN AMRO Bank be paid forthwith. I order costs to be paid forthwith in the amount of $500.00.

The essence of this ruling was incorporated into the order issued on December 19th, 1997.

The appellant asserts Justice Hood erred in ordering that he could not proceed further without paying the outstanding cost awards.

In S. Gordon McGee's affidavit of May 18th, 1994, which forms part of Exhibit "C", the deponent states in paragraph 48:

> 48. I am advised by David Coles and believe that as a result of Black's and NsC Corp.'s unsuccessful efforts to attack the bankruptcy of NsC Diesel or to pursue the trustee in bankruptcy, ABN , or ABN's counsel, it has been ordered to pay ABN (or its counsel) costs on at least 17 separate occasions. I am advised by David Coles and believe that these cost Orders total in excess of $14,000.00. Six of the cost Orders which were granted were payable forthwith and are in the total amount of more than $10,000.00. I am advised by David Coles and believe that none of these latter cost Orders have been satisfied.
>
> > *Attached hereto and marked as Exhibit "P" to this my affidavit are true copies of the six cost Orders, or reasons for decision on which Orders were subsequently granted, which were payable forthwith and which were granted by the Nova Scotia courts*.

The appellant has disregarded the orders of the Nova Scotia courts. He submits that he is impecunious. He has not presented any evidence to support this submission. However, I do note that in 1992 he apparently satisfied Justice Cosgrove in Ontario that he was impecunious. Whether he still is I do not know.

Costs are in the discretion of the court. The court has an inherent jurisdiction to control its own process.

The appellant acknowledged during the hearing of this appeal that there are approximately six outstanding orders requiring him to pay costs forthwith and that he has not complied with the Orders. Under the circumstances, I would not interfere with

the exercise by Justice Hood of her discretion on this issue except to vary her Order so as to authorize a Judge of the Supreme Court to grant leave to the appellant to bring further proceedings or applications if circumstances are shown that it would be just to allow the appellant to initiate or continue any proceeding notwithstanding that costs remain outstanding.

Leave to appeal is granted but the appeal ought to be dismissed with costs to the Bank of $1,000.00 plus disbursements to be paid by the appellant and further costs to the Bank of $500.00 inclusive of disbursements payable by the Intervenors. Both cost awards ought to be paid forthwith.

Hallett, J.A.

Concurred in:

Chipman, J.A.

CROMWELL, J.A.: (Dissenting)

In my view, the Chambers judge erred in principle in refusing to reconsider her earlier order. Accordingly, and with great respect to my colleague, Hallett, J.A., whose reasons I have had the advantage of reviewing, I would grant leave to appeal and allow the appeal. I will briefly set out my reasons for reaching this conclusion.

Section 163(2) of the **Bankruptcy & Insolvency Act** permits orders to be made for the examination under oath of persons for the purpose of investigating the administration of the estate. Interested persons may apply for these orders and they may be made if "sufficient cause" is shown. These orders are often made by the Registrar in Bankruptcy without notice to other interested parties. Their purpose is to help ensure that the estate is being administered in the interests of the creditors and in accordance with the law.

Section 187(5) of the **Bankruptcy & Insolvency Act** allows all courts making orders in bankruptcy matters to "review, rescind or vary" them. While its main purpose is to provide flexibility that is needed to deal with changing circumstances in the course of the administration of the estate, the authority granted by the section is extremely broad. It is appropriate to invoke these powers of review if evidence or points of law have been overlooked, if the consideration of the matter was in some way incomplete or if it is otherwise just and expedient in the control of the Court's process: see **Re Strachan** (1980), 34 C.B.R. 136 (Ont Sup Ct in Bank) at 139 and **Re Quinn** (1989), 72

C.B.R. 80 (Ont Sup Ct in Bank) at 82.

Since 1994, Mr. Black has attempted to obtain orders for the examination of various individuals under s. 163(2). In 1994, he applied to examine 15 people including one Terry Russell. That application was dismissed but on appeal to this Court, the dismissal was set aside and Mr. Black was given leave to make a fresh application.

He did so, this time limiting the application to a request for an examination of Mr. Russell. His application was dismissed by Hood, J. in August of 1997. Mr. Black applied to the learned judge for reconsideration of her decision. That application was dismissed in December of 1997. Hood, J. also made an order requiring Mr. Black to pay all outstanding cost awards presently due and payable by him to the ABN AMRO Bank before initiating or continuing any proceedings in respect to this bankruptcy file.

Mr. Black now seeks leave to appeal, if required, and appeals the dismissal of his application for reconsideration and the imposition of this condition.

In my respectful view, the learned judge applied the wrong test under s. 187(5) and applied the test she did adopt in an unduly rigid manner. In both respects she erred in principle. In essence, the learned judge held that before she could review her earlier order, it had to be demonstrated that there was substantial new evidence that was not known or could not have been made available at the first hearing with reasonable diligence or that the circumstances had changed.

At the outset of the Chambers hearing, the learned judge referred to this principle as one that went to her jurisdiction to hear the matter. At another point, she referred to it as a "preliminary hurdle." While some of the cases assert this as the general rule, others, including **Re Strachan** to which the learned judge referred, make it clear that the approach to a s. 187(5) review should not be inflexible.

Of course, the section must not be used simply to relitigate points that have been settled. But on the other hand, the section is very broadly worded and is intended to provide a simple way to ensure that the substance of the matter before the court has been dealt with appropriately. In this way, the delay and expense of appeals are avoided. In my view, broadly framed statutory conferrals of jurisdiction to review, rescind and vary such as that found in s. 187(5) should not be circumscribed by inflexible, judicially created rules. Whether the evidence could have been placed before the court on the earlier occasion or there are changed circumstances are factors to be considered in exercising the discretion to review, vary or rescind. However, these factors are not inflexible rules of law to be applied without regard to other relevant considerations.

Even if these review applications require the applicant to show that there is new evidence that could not have been placed before the court with due diligence or that the circumstances have changed, I think , with respect, that the learned Chambers judge applied this test in an unduly restrictive way.

It was argued that a lengthy exhibit to an affidavit ought to have been before

the judge on the earlier hearing but apparently was not. Of course, I agree completely with the Chambers judge that it was Mr. Black's responsibility to ensure that all the material necessary for the Court was placed before it. It is not enough to refer compendiously to material on file, particularly in a voluminous and complex file such as this. However, when this material was drawn to the Court's attention, at least some consideration ought to have been given to the substance of the argument rather than dismissing it purely on the basis that it could have been placed before the court on the earlier occasion. The learned Chambers judge stated that " whether or not it [i.e. the material relied on] is substantial ... does not need to be decided, and I am not going to make a decision on that issue." Adopting that approach was an error in principle.

Further, the learned judge made no reference on the reconsideration application to a resolution of the Inspectors of the estate which she had ruled inadmissible at the first hearing because it was filed late. It is implicit in the learned judge's decision that the Inspectors' resolution was not new even though it had been presented at the earlier hearing and ruled inadmissible as a result of late filing. With great respect, this seems to me to take an unduly restrictive approach to what may constitute new evidence for the purposes of a s. 187(5) review. Of course, lack of diligence of the party advancing the material is relevant to the exercise of the discretion. However, to hold that evidence which was previously ruled inadmissible on technical grounds is not "new" when properly submitted and therefore precludes further consideration of it is an error in principle.

I also am of the view that the learned Chambers judge erred in her approach to the Inspectors' resolution. The Inspectors of the estate had expressed their support for the examination of Mr. Russell. Although not referred to in her decision, it seems from the transcript of the hearing that the judge accepted submissions made on behalf of the Bank that the position of the Inspectors was simply irrelevant to whether Mr. Black had shown sufficient cause for the examination of Mr. Russell.

Of course the decision to order, or not to order, the examination is for the Court and not the Inspectors. That does not make their views irrelevant. The examination under s. 163(2) is ultimately for the benefit of the creditors. The Inspectors are their representatives. Under s. 163(1) of the **Bankruptcy & Insolvency Act**, the Trustee, on the resolution of the creditors, may examine without order of the court a wide range of persons thought to have relevant information. In this bankruptcy, there was effectively no trustee in that the trustee by the time of this application was inactive because there were no funds to cover the trustee's fees. In addition, this bankruptcy is complex, with allegations and cross allegations of all manner of wrongdoing both before and after the petition. In these circumstances, the views of the inspectors, while not controlling the court's discretion in any way, were and are entitled to considerable respect. In the particular circumstances of this bankruptcy, I should have thought that a judge would wish to have substantial reasons for not giving the Inspectors' views very considerable weight in deciding whether sufficient cause had been shown for a s. 163(2) examination. Dismissing their views as irrelevant, as the learned Chambers judge appears to have done was, in my respectful view, an error in principle.

For these reasons, I conclude that the learned Chambers judge erred in principle in her consideration of the application under s. 187(5) and that her order dismissing the application should be set aside.

By the combined effect of **Rule** 51 of the **Bankruptcy and Insolvency Rules** and **Civil Procedure Rule** 62.23(1) (a), this Court is authorized to make"... any order which might have been made by the court appealed from..." . I therefore turn to the question of whether the Chambers judge ought to have rescinded her earlier order and ordered the examination of Mr. Russell.

I do not wish to contribute unnecessarily to the repetition of allegations and cross-allegations of wrongdoing in this bankruptcy. I will limit myself to saying that the material before the Court raises questions that are relevant to the administration of the estate and about which Mr. Russell as a former inspector of the estate and senior officer of the Bank is likely to have relevant information. The evidence supporting this conclusion is summarized by Flinn J.A. in the decision of this Court in this matter in May of 1997. The Inspectors think Mr. Russell should be examined. The Trustee, if active, could examine him without order at the request of the creditors. In my view, sufficient cause existed for the examination and I would issue an order authorizing Mr. Black to conduct it. I would therefore rescind the order of Hood, J. dated September 18, 1997, set aside her order dated December 19, 1997 and in their place issue an order authorizing the examination of Mr. Russell.

However, I would do so on conditions. As noted by the learned Chambers judge, various cost awards made against Mr. Black and payable forthwith in these proceedings remain unsatisfied. I would make my order authorizing the examination of Mr. Russell conditional on payment of all costs awards against Mr. Black which were directed to be payable forthwith and which remain unpaid in all bankruptcy proceedings involving Mr. Black in the Supreme Court of Nova Scotia in Bankruptcy or in this Court. Of course, any costs awards in his favour that have not been paid may be set off.

I would not award costs of either of the proceedings before Hood, J. or of this appeal.

Cromwell, J.A.

C.A. No.143934

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

FREDERICK W.L .BLACK	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
ABN AMRO BANK OF CANADA,	)	HALLETT, J.A.
as the petitioning creditor	)	
	)	Cromwell, J.A.
Respondent	)	(Dissenting)
	)	
	)	
	)	
	)	
	)	
	)	