

NOVA SCOTIA COURT OF APPEAL

Cite as: Black v. Ernst & Young Inc., 1997 NSCA 67

Freeman, Matthews and Flinn, JJ.A.

IN THE MATTER OF THE BANKRUPTCY
OF NsC DIESEL POWER INCORPORATED

BETWEEN:

FREDERICK W.L. BLACK et al.)	Frederick W.L. Black for the Appellants
)	
- and -)	Tim Hill for the Respondent Ernst & Young Inc. (Trustee)
)	
ERNST & YOUNG INC., et al)	Robert W. Wright, Q.C. for the Respondent Ernst & Young Inc. in its personal capacity
)	
)	David G. Coles for the Respondent ABN Amro Bank Canada
)	
)	D. Bruce Clarke for the Respondent the Superintendent in Bankruptcy
)	
)	Appeal Heard: April 10, 1997
)	
)	Judgment Delivered: May 6th, 1997

THE COURT: Appeal, from the refusal of a Chambers judge to permit examinations under s. 163(2) of the **Bankruptcy Act**, allowed. Appeal, from the refusal of a Chambers judge to rescind a prior order of the Court, dismissed per reasons for judgment of Flinn, J.A.; Matthews and Freeman, JJ.A. concurring.

FLINN, J.A.:

The matter of the bankruptcy of NsC Diesel Power Incorporated has been rife with litigation, and it is not advancing in a normal manner towards conclusion. Over the past two years, at least, it has been mired down in the litigation of procedural issues.

Mr. Frederick W.L. Black was the principal operating officer, a director and the driving force of the bankrupt company. He is also a creditor, having filed a proof of claim. In October 1996, following a lengthy two-day Chambers hearing before Chief Justice Clarke, Mr. Black was granted leave to appeal two matters to this Court. He was denied leave in several other matters, which are not in issue here.

At issue in this appeal is whether Mr. Black was wrongly denied an order to conduct examinations under s. 163 of the **Bankruptcy and Insolvency Act** (the **Bankruptcy Act**), R.S.C. 1985, c. B-3 as amended, and whether he was wrongly denied the right to have an order of the Court, respecting legal representation, reviewed and rescinded pursuant to s. 187(5) of the **Bankruptcy Act**.

It is not necessary to review the lengthy history associated with this bankruptcy matter. To provide a factual basis for considering the issues which give rise to this appeal, a useful starting point would be the appointment of Palmeto A.C.J., as this bankruptcy matter's Case Management Judge, in December, 1993 (the Case Management Judge).

On February 9th, 1994, the Case Management Judge wrote a letter to counsel for all of the parties. Mr. Black was included as an addressee. In that letter he said the following:

"From my observations the whole situation has gotten completely out of hand and the various actions must be brought to a conclusion as soon as possible. Accordingly, the matter will no longer be litigated by correspondence between the various parties and this Court. In future all matters to be determined will be by application in Chambers, before me, on specific dates set by application to our Chamber scheduler, Ms. Barbara Grant, or at a case management meeting if I decide to call one.

This Court will no longer accept applications from Mr. Black, either on his own behalf or on behalf of his companies, and in particular NsC Corporation Limited. In future these companies must be represented by a solicitor authorized to practice in our Courts. I have also determined that Mr. Black and the solicitor for the Inspectors of the Estate have no status at any case management meeting and will not attend....."

This was all reiterated in letters written by the Case Management Judge on March 2, 1994 and March 31, 1994. Prior to a scheduled case management meeting, Mr. Black wrote to the Case Management Judge, requesting permission to attend the meeting. The Registrar in Bankruptcy responded to Mr. Black and advised that he was not permitted to be in attendance.

This case management meeting was held, with the Case Management Judge, on May 31, 1994. It was transcribed. Shortly after the meeting began, the Case Management Judge said the following:

"...I should again, for the record of this meeting, which incidentally is being taped, that I do not intend to hear NsC Corporation or Mr. Black except through counsel. That was an order of our Court and that order is going to be continued and that will be my decision, rightly or wrongly, throughout this whole piece."

And further:

"....I want to bring this to a conclusion and I don't want to get off on any other track."

The Case Management Judge, during the meeting, acknowledged that Mr. Black, in his personal capacity, was an interested party. He said:

"There is a question of Mr. Black. Is he an interested party and it would appear that he is a creditor of the bankrupt or at least he has filed a Proof of claim. So that he is certainly an interested party in his personal capacity, at least until I can be shown..... (inaudible)."

On June 2nd, the Case Management Judge wrote a letter to all counsel (Mr. Black was included as an addressee) in which he summarized what had taken place at the case management meeting and in that letter said, with respect to his refusal to allow Mr. Black to attend:

"Because of orders of this Court, I did not allow Mr. Black to attend...."

The only "order of the Court" which had been previously issued, following a hearing on its merits, and dealing with Mr. Black's inability to appear without counsel, was an order of Boudreau, J., of the Supreme Court of Nova Scotia dated February 12, 1993. Boudreau J. had ordered all proceedings taken by NsC Corporation Limited (the sole shareholder of the bankrupt) to be stayed until such time as the Corporation engaged counsel to act in such proceedings.

On June 14th, 1994, Mr. Black, by-passing the case management process, and the directive of the case management judge that all matters were to be heard before him in Chambers, made application (ex parte) to the Registrar of Bankruptcy for an order, pursuant to the provisions of s. 163(2) of the **Bankruptcy Act**. On Friday, July 17th, 1994, the Registrar granted an Order permitting Mr. Black to conduct examinations of certain personnel of the trustee, and former and present solicitors, all with respect to the administration of the estate of the bankrupt. Over the weekend, the trustee complained to the Case

Management Judge concerning this ex parte order of the Registrar.

On Monday, June 20th, 1994, the Case Management Judge issued an Order, ex parte, which provided that the Order of the Registrar of Bankruptcy, dated June 17th, 1994, "be stayed pending further determination by This Honourable Court". The Case Management Judge also wrote to Mr. Black on June 20th, 1994, advising him that he had issued the stay order, and that he was prepared to hear Mr. Black on an application for an order for examinations under s. 163 of the **Bankruptcy Act**.

A hearing was held before the Case Management Judge on July 13th, 1994. The Inspectors of the estate had filed an affidavit in support of Mr. Black's application for an order for s. 163 examinations.

With respect to Mr. Black's status, the Case Management Judge decided that Mr. Black had status to make the application for an order for examinations under s. 163 of the **Bankruptcy Act**. In fact, during the course of submissions on the question of Mr. Black's status, by counsel for ABN Amro Bank, the Case Management Judge noted:

"There has been no application to refuse Mr. Black to act either for the bankrupt or on his own behalf."

Following a hearing of the application, the Case Management Judge dismissed Mr. Black's application. He refused to consider the affidavit of the Inspectors which was filed in support of Mr. Black's application. The Case Management Judge said, with respect to the affidavit of the Inspectors:

"But I don't think it has any bearing today and I do not intend to complicate matters."

On the merits of Mr. Black's application, he said the following:

"THE COURT: All right. Well quite frankly, I had no hesitation in bringing this matter before me before and issuing the stay. I was quite amazed that an order (a) had been applied for in view of my previous correspondence and (b) on the basis of the affidavit which has been submitted which, in my view, does not establish one little bit the necessary requirements under Section 163. Section 163 should almost be automatic but there's no question that it is "may." There is a discretion completely in the Court. And the Court has to look at this. I've looked at the affidavit of Mr. Black and the affidavit of Mr. Black, quite frankly, is in my opinion a fishing expedition involving other documents."

On August 3rd, 1994, the Case Management Judge issued three orders which were sent by him to all counsel (Mr. Black was included) with a covering letter. The first order dismissed Mr. Black's application for examinations under s. 163 of the **Bankruptcy Act**. The second order dismissed a further application which Mr. Black had made to remove the solicitors for the creditor ABN Bank. This Order is not relevant to this appeal.

A third order, which did not arise out of any application which had been made and heard on its merits, was described by the Case Management Judge in his letter which accompanied the order as follows:

"The third Order deals with the practice and procedure in this Court as it relates to the above-noted matter. It directs that all applications by the Bankrupt, or by NsC Corporation Limited, or by Nova Scotia Commonwealth (NsC) Consultants Limited, or by Frederick W.L. Black as an officer of any of these companies, be stayed pending legal representation. In addition, it provides that all future applications etc., dealing with the Bankruptcy shall be made to the Case Management Justice of this Court and not to the Registrar.

It is not necessary for me to set forth the reasons for this Order other than I accept completely the reasoning of Boudreau J. of this Court in his decision of February 12th, 1993, which culminated in his order of February 24th, 1993, and also the reasoning of the decision of the Nova Scotia Court of Appeal delivered June 22, 1993 (C.A. No. 028919)."

For simplicity, I will refer to this Order as "the Order requiring counsel dated August 3rd, 1994".

Mr. Black filed a notice of appeal with respect to this Order requiring counsel dated August 3rd, 1994. In that notice of appeal, Mr. Black also gave notice that, subject to a decision on that appeal, he would appeal other orders of the Case Management Judge, including his Order refusing the s. 163 examinations.

On November 24th, 1994, on an application made to Chief Justice Clarke in Chambers by the trustee, the Chief Justice ordered that Mr. Black's appeal, with respect to the Order requiring counsel dated August 3rd, 1994, be dismissed. Mr. Black had failed to comply with an order respecting the posting of security for costs.

I will not review, here, the myriad of other applications which Mr. Black brought between August, 1994, and April, 1996, in this bankruptcy matter. They are all outlined in the decision of Chief Justice Clarke granting Mr. Black leave to bring this appeal (See (1997), 155 N.S.R. (2d) 90).

On April 11th, 1996, Mr. Black brought an ex parte application before Justice Goodfellow of the Supreme Court of Nova Scotia pursuant to s. 187(5) of the **Bankruptcy Act**.

Mr. Black applied for an order to "review and rescind" the Order requiring counsel dated August 3rd, 1994. Justice Goodfellow dismissed the application on the grounds that he had "no discretion or authority to overrule and rescind an order that was granted almost two years ago by a fellow justice".

Mr. Black filed a notice of appeal from Justice Goodfellow's decision.

On October 10th and 11th, 1996, Chief Justice Clarke, in Chambers

heard a series of applications arising out of this bankruptcy. His decision on these applications is reported in (1997) 155 N.S.R. (2d) 90. The only matters, in that decision, which are relevant to this appeal are the denial of Mr. Black's application for s. 163 examinations; and the Order requiring counsel dated August 3rd, 1994. With respect to the first matter, Chief Justice Clarke said the following at pp. 103-104:

" As a judge sitting in Chambers of the Court of Appeal, I am satisfied that I have the discretion to extend the time to file and serve a notice of appeal from the Order of Associate Chief Justice Palmeto dated June 20, 1994. In the circumstances, Mr. Black has satisfied the requirements to justify the exercise of such a discretion. The material indicates that he had a bona fide intention to file an appeal of the June 20, 1994, Order which he in fact did but after appearing in the Chambers of this court, elected to proceed with an appeal of the August 3, 1994, Order. There is an arguable ground of appeal based on the circumstances which gave rise to the June 20, 1994, Order. Finally, given Mr. Black's inability to obtain an Order for Examination of certain of the Trustee's personnel, it is in the interest of justice that time should be extended for filing and serving a notice of appeal.

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By reason of the decisions/Orders of Associate Chief Justice Palmeto on June 20, 1994 and July 13, 1994, coupled with that of August 3, 1994, Mr. Black has not been able to apply to the court for an Order for Examination of the individuals listed in the Registrar's Order of June 17, 1994. This is especially disturbing given the fact that other interested parties have been able to obtain such Orders in the Supreme Court without difficulty."

With respect to the Order requiring counsel dated August 3rd, 1994, Chief Justice Clarke said at pp. 105-106:

"The effect of the Order of August 3, 1994, has impaired Mr. Black's ability to advance his case in the matters relating to the bankruptcy of NsC Diesel Power Inc. Since the stay was issued Mr. Black, as an interested party in the bankruptcy proceedings, has been prevented from participating in the

proceedings. This has both directly and indirectly affected his rights as an officer of the bankrupt companies. The difficulties with which he has been confronted are well illustrated by the ongoing problems he faces in being precluded from seeking an Order for Examination unless he retains counsel.

Section 187(5) BIA provides that an application can be made to the court of original jurisdiction to review and rescind an Order of that court. In this instance, Mr. Black availed himself of that provision and applied to Justice Goodfellow to exercise his discretion under s. 187(5) to rescind the August 3, 1994, Order of Associate Chief Justice Palmeter. As noted above, the application was dismissed and Mr. Black filed a notice of appeal from that decision. In the ordinary course an appeal from the decision of Justice Goodfellow, already set in motion, will enable Mr. Black to challenge the August 3, 1994, Order of Associate Chief Justice Palmeter. In my opinion, Mr. Black should be permitted to set down his appeal to a panel of this court from the decision and Order of Justice Goodfellow."

Disposition

I will deal with the issues raised in this appeal under two general headings:

- (1) Was Mr. Black wrongly denied the right to an order for examination of witnesses under s. 163(2) of the **Bankruptcy Act?**; and
- (2) Does Mr. Black have a valid appeal from the decision of Goodfellow J. rejecting Mr. Black's application to "review and rescind" the Order requiring counsel dated August 3rd, 1994?

Section 163 Examinations

In considering this issue, I will take into account the Order of the Registrar permitting these examinations; the Order of the Case Management

Judge which stayed the Registrar's Order ("pending further determination by This Honourable Court"); the decision of the Case Management Judge dated July 13th, 1994, refusing Mr. Black's application for s. 163 examinations; and the Order issued pursuant to that decision (one of the three orders of the Case Management Judge dated August 3rd, 1994).

On January 20th, 1994, when the Case Management Judge stayed the Order of the Registrar, he agreed, at the same time, to hear Mr. Black's application for the s. 163 examinations, on its merits.

Clearly, the Case Management Judge had the jurisdiction to grant the stay of the Order of the Registrar. Section 192(2) of the **Bankruptcy Act** expressly authorizes a judge of the Supreme Court to exercise the powers and jurisdiction of a Registrar. It was known by both Mr. Black, and the Registrar, that a Case Management Judge had been appointed with respect to this bankruptcy matter. Both Mr. Black and the Registrar were aware of the directions of the Case Management Judge that all applications with respect to the file were to be brought before him. Therefore, the decision by the Case Management Judge to stay the Order of the Registrar, and have the s. 163 application brought before him, on its merits, was clearly part of the general supervisory jurisdiction of the Supreme Court to control its own process.

Mr. Black's application was made pursuant to s. 163(2) of the **Bankruptcy Act** which provides as follows:

"163(2) On the application of any creditor or other interested person to the court, 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 his 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."

Any order which the judge makes on such an application, is an interlocutory discretionary order. This Court has repeatedly said that it will not interfere with such a discretionary order unless wrong principles are applied or a patent injustice will result (See **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 and **Exco Corp. v. Nova Scotia Savings & Loan Co. et al.** (1983), 59 N.S.R. (2d) 331). The discretion, in a word, must be exercised judicially.

There were two affidavits which supported Mr. Black's application under s. 163(2).

The affidavit of Mr. Black deposed:

- (a) That the trustee had conducted informal interviews of witnesses rather than formal s. 163 examinations as were authorized by the Inspectors;
- (b) That the trustee may have misrepresented the nature of the interviews to the persons who were being interviewed;
- (c) That the solicitors for the Estate were in a conflict of interest;
- (d) That the trustee and S. Gordon McKee (one of its solicitors) examined the files of Corporation House (a former consultant of NsC Diesel);
- (e) That information obtained by the trustee from the "interviews" was given by the solicitors for the Estate to ABN Bank, which information was used by the Bank for its private benefit in

litigation in Ontario;

- (f) That the trustee Ernst & Young, in assisting in this process was in a conflict of interest and violated its fiduciary duties; and
- (g) That the trustee Ernst & Young did not file the examination material that they received so that it would have been available to the Court, the Inspectors and the general body of creditors.

The Inspectors filed an affidavit in support of Mr. Black's application which deposed:

- (a) That the Inspectors had given the authorization for the s. 163 examinations;
- (b) That in reporting to the Inspectors, the trustee did not divulge that the trustee conducted an examination of the files of Corporation House, nor did the trustee disclose the existence of the documents which the trustee received; or that those documents were given to ABN Bank;
- (c) That the documents delivered to ABN Bank were used by it in legal proceedings to which the estate was not a party;
- (d) That the Inspectors had requested the trustee to do proper s. 163 examinations but that the trustee had refused;
- (e) That the Inspectors had requested the trustee to provide a copy of a letter from one of the Estate's solicitors to the trustee and the trustee refused; and
- (f) That further s. 163 examinations were required and that if the order were granted to Mr. Black it would allow the necessary information to be made available to the Estate at no cost to the

Estate.

At the hearing of the application, the Case Management Judge refused to consider the affidavit of the Inspectors which was filed in support of Mr. Black's application. He concluded that Mr. Black's application "does not establish one little bit the necessary requirements under s. 163" without indicating those requirements, and in what manner the application was deficient. He further concluded that Mr. Black's application was a "fishing expedition"; and he dismissed the application.

The Superintendent of Bankruptcy appeared as a statutory intervener at the hearing of this appeal. In his factum, counsel for the Superintendent says the following:

"....There were two affidavits before the Court which were consistent in their information. The affidavits had Exhibits attached which seem to support the statements in the affidavits. It appears that the Trustee may have conducted informal examinations when they were authorized to conduct formal examinations, may have received information and documents that it did not disclose to the Inspectors or the creditors of the Estate and may have participated in the delivery of those documents and that information to ABN Bank through their mutual solicitors.

At this time all of the facts are not known and there may be good explanations for the conduct of the Trustee. The purpose of a s. 163 examination would be to make available the information relating to these issues. One effect of the order preventing the s. 163 examinations has been to prolong the atmosphere of uncertainty and innuendo that has clouded this matter far too long."

I agree with those submissions. Further, as counsel for the Superintendent told the Panel at the hearing of this appeal, orders for s. 163 examinations issue almost as a matter of course. They are often issued ex parte. If the Case Management Judge had reviewed the affidavit of the

Inspectors (which he refused to do) he would have found corroboration for the depositions of Mr. Black (that there were questions yet to be answered, and documents yet to be produced) and, as a result, he would, in all probability, not have considered that Mr. Black was on a "fishing expedition".

By refusing to consider all of the evidence which was before him, in support of the application, the Case Management Judge did not exercise his discretion judicially, in dismissing Mr. Black's application. I would, therefore, allow the appeal with respect to this issue. I would set aside the Order of the Case Management Judge dated August 3rd, 1994, which dismissed Mr. Black's application for s. 163 examinations. I would further order that Mr. Black be at liberty to make a fresh application, pursuant to s. 163(2) of the **Bankruptcy Act**, on notice, to a judge in Chambers of the Supreme Court of Nova Scotia.

Mr. Black's status to make such an application is not hampered by any existing order of the Supreme Court. As the Case Management Judge indicated, Mr. Black is an interested party in his personal capacity as a creditor. He is, therefore, a "creditor or other interested person" within the meaning of s. 163(2) of the **Bankruptcy Act**. The Order of Boudreau J. dated February 13th, 1993, which stays proceedings taken by NsC Corporation until such time as counsel is retained, does not inhibit Mr. Black from making an application under s. 163(2) of the **Bankruptcy Act**. Likewise, the Order requiring counsel, dated August 3rd, 1994, does not affect his status to make such an application.

If I was satisfied that Mr. Black was entitled to an order to conduct s. 163 examinations on all fifteen (15) of the persons identified in the original Order of the Registrar, dated June 17th, 1994, this Court could make such an order. I am reluctant to do that. In my view it is preferable that the matter be dealt with

by way of a fresh application to a judge of the Supreme Court of Nova Scotia in Chambers because :

- (1) I am not satisfied, on the basis of the material which was before the Case Management Judge, that Mr. Black is entitled to an order to examine all fifteen (15) of the persons identified. The precise nature of each person's involvement is not clearly disclosed in the documentation which supports the application;
- (2) New facts may have come to light, since the original application in 1994, and, if so, those facts should be before the Court; and
- (3) In view of the history of this entire matter, a Chambers judge may very well limit the number of people to be examined, initially; and, in addition, may wish to place time constraints or other restrictions on such examinations.

In summary, and in conclusion on this issue, Mr. Black's initial application for examinations under s. 163(2) of the **Bankruptcy Act**, supported as it was by the Inspectors, was not, on its face, without merit. The Case Management Judge erred in dismissing the application, and Mr. Black should be at liberty to make a fresh application to be heard, and decided upon, on its merits.

In granting the appeal on this issue, and if a Supreme Court judge grants Mr. Black an order for s. 163 examinations, it is my hope that these matters can be handled expeditiously; and that all parties will co-operate to provide whatever relevant information and documentation is requested. This long outstanding bankruptcy matter must be moved forward instead of standing still as it has done for the past number of years.

It is my further hope that if these examinations do not bear the fruit which Mr. Black anticipates they will, that he will heed his own conclusions which he indicated to the panel hearing this appeal, i.e., that he will decide that "it's over" - "I am not going to beat the drum forever".

Appeal from the decision of Goodfellow J. - (April 11, 1996)

Section 187(5) of the **Bankruptcy Act** provides as follows:

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

On April 11th, 1996, Mr. Black made an application before Justice Goodfellow of the Supreme Court for an order to "review and rescind" the Order requiring counsel dated August 3rd, 1994. He did not request that the Court "review, rescind or vary" the Order because of any particular change of circumstances. Mr. Black wanted to have the Order requiring counsel dated August 3rd, 1994, rescinded, because, as he alleged, it was unfair.

In dismissing Mr. Black's application Justice Goodfellow said the following:

"Well, I've already - the reasons are, one, in my view I have no discretion or authority to overrule and rescind an order that was granted almost two years ago by a fellow justice. Secondly, if I have such discretion, the delay in my view is such and the background of this matter is such that it's not an appropriate exercise in discretion almost two years later to resurrect something that ought to have been dealt with before. And you have had a run at the Court of Appeal. I'm not a hundred percent certain what transpired there, quite frankly, but in my view if I have discretion it would be inappropriate to exercise my discretion with such a long, long period of delay. So, there, you can take those remarks to the Court of Appeal."

With respect to Justice Goodfellow's concern as to whether he had the

jurisdiction to review, rescind or vary a prior order of a judge of the same Court, in my view, a judge of the Supreme Court clearly has such jurisdiction under s. 187(5) of the **Bankruptcy Act**. The obvious purpose of s. 187(5) is to provide the flexibility that is needed to deal with the changing circumstances which can arise in a lengthy bankruptcy administration. Any number of legitimate reasons could arise which would make it expedient for the Court to review, rescind or vary a previous order. If, for example, it could be argued that the Order requiring counsel dated August 3rd, 1994, prevented Mr. Black from bringing his application for s. 163 examinations; then, in that case, it would be appropriate to request a variation order, under s. 187(5) of the **Bankruptcy Act**, to enable the examinations to proceed.

However, Mr. Black's application, as it was presented to Justice Goodfellow, had no merit. It was an application to rescind a prior order because that Order was alleged to be unfair, rather than alleging a change of circumstances. Further, the application followed shortly after Mr. Black's appeal of that Order, to this Court, had been dismissed. Mr. Black was, essentially, using s. 187(5) of the **Bankruptcy Act** as a method of launching a further appeal. Section 187(5) is not an appeal provision, and Mr. Black's application was, therefore, without merit.

In my opinion Mr. Black has no basis for an appeal of Justice Goodfellow's dismissal of this application. I would, therefore, dismiss the appeal with respect to this issue.

Success on this appeal has been divided; and considering all of the circumstances I would make no order as to costs.

Flinn, J.A.

Concurred in:

Matthews, J.A.

Freeman, J.A.

NOVA SCOTIA COURT OF APPEAL

IN THE MATTER OF THE BANKRUPTCY OF
NsC DIESEL POWER INCORPORATED

BETWEEN:

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Appellants

- and -

ERNST & YOUNG INC. et al.

Respondents

REASONS FOR
JUDGMENT BY:

FLINN, J.A.