NOVA SCOTIA COURT OF APPEAL

Cite as: Black v. Ernst & Young Inc., 1994 NSCA 229

IN THE MATTER OF:

THE BANKRUPTCY OF
NsC DIESEL POWER INCORPORATED

BETWEEN:

FREDERICK W. L. BLACK, as Officer of the Bankrupt Appellant	)	The Appellant appeared in person
- and -	)	Robert W. Wright, Q.C. for Ernst & Young, Inc. in its personal capacity
ERNST & YOUNG INC., Trustee of the Estate of NsC Diesel Power Incorporated, a Bankrupt, and ABN AMRO BANK CANADA Respondents	)	David G. Coles for ABN Amro Bank Canada
	)	Application Heard: November 17, 1994
	)	Judgment Delivered: November 24, 1994

**BEFORE THE HONOURABLE CHIEF JUSTICE CLARKE,
IN CHAMBERS**

CLARKE, C.J.N.S., IN CHAMBERS:

On October 26 and October 31, 1994, Justice Pugsley of this Court, sitting in Chambers, rendered a series of decisions and orders based thereon dealing with matters which are the subject of this application. The appellant seeks to appeal the decisions and orders of Justice Pugsley.

The detailed nature of the application giving rise to this proceeding can best be described by quoting from the notice of the appellant:

> TAKE NOTICE that the Appellant, pursuant to **Sections 193.(a), 193(b) & 193(c) and 195** of the **Bankruptcy and Insolvency Act (BIA),** will appeal by right from the Decisions/Judgements/Opinions and Orders of The Honourable Mr. Justice Pugsley of the Court of Appeal in Bankruptcy, in Chambers heard on October 20th, 1994 and delivered the 26th day and the 31st day of October, 1994, being Decisions and Orders flowing therefrom:
>
> a) dismissing a motion to nullify, pursuant to **Section 195** of the **BIA,** the Decisions of Associate Chief Justice Palmeter rendered on August 8th and 10th/94 and issued as Orders on August 8th, 1994 and Sept.7th/94 after the Court in Bankruptcy became a Party to an Appeal of an Order dated August 3rd, 1994, which order was a breach of natural justice, and for a change of venue and for out-of-pocket costs;
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> b) granting security for costs to two interested parties as potential intervenors and not as respondents, on the appeals of the August 3rd/94 Order of Palmeter ACJ;
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> c) dismissing a cross-motion dated Oct.14th/94, for want of jurisdiction, which motion was to find that Ernst & Young Inc., as a private party, is not and cannot be an interested party to these bankruptcy proceedings as Ernst & Young Inc., the Trustee is then in a breach of trust with its declared private interests as the private party trustee funding the administration of the Estate;
>
> d) to dismiss a cross-motion dated Oct.17th/94, for want of jurisdiction, which motion was to nullify the Decisions of the Court of Appeal dated April 9th/92, of Roscoe J. of the Supreme Court rendered April 28th/92 and a Decision of Hall J. of the Supreme Court rendered on April 12th/93;

The appellant states the grounds of appeal are:

1. **THAT** the learned Chambers Judge erred in law, insofar as

he failed to consider the **Sections** and **Rules** of the **BIA**, the fact that the Bankruptcy Court is a Court in equity, the laws of natural justice and the law on fiduciary duty, and rendered Reasons for Judgement and Orders in civil matters on October 26th/94 without judicial notice of the Bankruptcy Court and in ignorance of the **Rules**, specifically **Rules 1 & 7;**

2. **THAT** the learned Chambers Judge erred in law, insofar as he failed to consider that the Bankrupt as a corporation has the right to be represented by its duly appointed Officer pursuant the **BIA, Sec.2, 158, 159, 161** and **Directive #23** of the **BIA**;

3. **THAT** the learned Chambers Judge erred in law, insofar as he failed to consider the **Sections** and **Rules** of the **BIA** and failed to rendered Reasons for Judgement and Orders in matters properly placed before the Court of Appeal in Bankruptcy, pursuant to **Sec.193** and **34, 187.(3) and 187.(5), (7), (8), (10).**

4. **THAT** the learned Chambers Judge erred in law, insofar as he failed to consider evidence properly filed and present before the Court of Appeal in Bankruptcy and in the Bankruptcy file.

There has been considerable discussion among the parties respecting the style of cause which appears at the head of this application. Some of the respondents and intervenors allege that Mr. Black has devised this to his own liking and that, for example, it is inaccurate to include the Nova Scotia Supreme Court as a respondent. Mr. Black, on the other hand, contends that the Nova Scotia Supreme Court is indeed a respondent because in his view orders issued by Associate Chief Justice Palmeter of that Court were self-inspired and therefore the Supreme Court, through him, has become a party.

There are two principal reasons why I do not propose to venture into debate or resolution of this issue. The first is that whatever the style, I am satisfied that all parties, intervenors and interested persons have been given notice of all the proceedings before both Justice Pugsley and me. All have been given a full and complete opportunity to be heard, to reply, to rebut and to sur-rebut.

The second is that there is no mystery involved in tracking the court records

which underlie the application which is numbered C.A. 110664. Preceding this application are the series of decisions and orders of Justice Pugsley numbered C.A. 107528. Preceding those are a multitude of decisions and orders all of which are numbered, matters of public record and discernable and capable of discovery without undue difficulty. So far as I can determine, the records of the courts concerning these proceedings are well known to all the parties and persons interested therein.

Mr. Black contends the decisions rendered by Justice Pugsley are defective in that they are not styled as being before this Court, in bankruptcy.

I have examined in careful detail the series of decisions rendered by Justice Pugsley on October 26 and 31, 1994. I am satisfied that they relate to proceedings in bankruptcy in which this Court has jurisdiction. Of that, there simply cannot be any doubt. A person totally unfamiliar with the issues upon reading the decisions for the first time could not help but conclude that they relate to a bankruptcy. That is what lies at the heart of all of them.

I do not propose to detail here a narrative respecting the circumstances which arose in each of the decisions Justice Pugsley rendered. In addition to them being well known to all the participants in this application, the decisions of Justice Pugsley are, again, matters of public record. The reader, however, is not left in the dark. Sub-paragraphs a), b), c) and d) of the notice filed by the appellant, which are quoted verbatim at the beginning of these reasons, provide a description of the procedural issues which are before me.

Having determined that these are proceedings in bankruptcy, I turn to consider the jurisdiction of this Court to deal with them. The relevant legislation is the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3.

"Court" is defined in s. 2 as follows:

> "court", except in paragraph 178(1)(a) and sections 204.1 to 204.3 and subject to subsection 243(1), means the court having jurisdiction in bankruptcy or a judge thereof, and includes a registrar when exercising the powers of the court conferred on a

registrar under this Act;

The Court having jurisdiction in Nova Scotia is described in s. 183(1)(c):

> 183. (1) The following named courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> ...
>
> (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

Thus it is that in Nova Scotia the Supreme Court has "original, auxiliary and ancillary jurisdiction in bankruptcy ..."

Section 183(2) relates to the jurisdiction of the Court of Appeal by stating:

> (2) The courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Returning to the definition of court in s. 2, it "... means the court having jurisdiction in bankruptcy or a judge thereof .." . Applied to these proceedings I conclude that Associate Chief Justice Palmeter of the Supreme Court exercised "original, auxiliary and ancillary jurisdiction" as the court of first instance (s. 183(1)(c)) and Justice Pugsley of this Court of Appeal exercised jurisdiction conferred on him by the reading together of s. 2 and s. 183(2). In respect to those matters which were before Pugsley, J.A. and did not involve Associate Chief Justice Palmeter of the Supreme Court, the underlying original jurisdiction appears to have been exercised by others than Justice Pugsley.

As a result I conclude and find that Justice Pugsley was within the jurisdiction of the Court of Appeal in bankruptcy and exercised that jurisdiction as a judge thereof.

Mr. Black contends that he has the right to appeal the decisions and orders of Pugsley, J.A. by virtue of s. 193.

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

Mr. Black asserts that this application qualifies for appeal to the Nova Scotia Court of Appeal because the fact driven circumstances fall within the "cases" described in (a), (b) and (c).

However, before getting to the "cases", initial consideration must be given to the opening words of s. 193, "... from any order or decision of a judge of the court ...".

It appears to me that "a judge of the court" does not mean a judge of the Court of Appeal, but rather a judge of another court who has rendered "any order or decision". I am considerably strengthened in this view by what I was informed during oral argument on this application. Counsel and Mr. Black informed me that throughout the **Act** while reference is made to the Court of Appeal it is specifically referred to as the Court of Appeal and accordingly "court" with a low case letter "c" relates to a court of original jurisdiction other than the Court of Appeal. I accept that as being an additional and reasonable aid to interpretation.

However, in my opinion, the major hurdle confronting the appellant/applicant in this proceeding is whether (a), (b) and (c) of s. 193 have any application at all. The bottom line of this application is to have me reverse and set aside the referenced orders of Pugsley, J.A. or, possibly, grant leave to have them considered by a panel of the Court of Appeal. Many of the issues with which Justice Pugsley dealt are procedural

in nature. I am reluctant to describe them all as procedural because in instances of this sort it can be argued the dividing line is blurred.

The nature of the relief sought by the appellant is best stated by quoting from his notice:

> **AND THAT** the Appellant will seek that the Decisions Appealed be reversed as follows:
>
> 1. **THAT** the Decision of The Honourable Mr. Justice Pugsley dated October 26th, 1994 that he would not nullify the Decisions of Associate Chief Justice Palmeter rendered on August 8th and 10th/94 and issued as orders on August 8th, 1994 and Sept.12th/94, be reversed and that these decisions (4) and orders (2) be declared nullities as before the Courts in Bankruptcy and that a change of venue and out-of-pocket costs be awarded as requested in the Notice of Motion;
>
> 2. **THAT** the Decisions and Order granting security for costs to Ernst & Young Inc. as a private trustee and ABN AMRO Bank Canada as two interested parties and potential intervenors on the appeals of the August 3rd/94 Orders of Palmeter ACJ be overturned and out-of-pocket costs be awarded as against the applicants;
>
> 3. **THAT** the Decision and Order, to dismiss a cross-motion dated Oct.14th/94 to find that Ernst & Young Inc., as a private party cannot be an interested party as the Trustee of the Estate, Ernst & Young Inc., would then be in a breach of trust with its declared private interests as the private trustee funding the administration of the Estate, be overturned; and that the order requested [finding Ernst & Young Inc., the private party and a purported interested party, in breach of trust in this bankruptcy proceeding and on the Motion for Security for Costs], be granted and out-of-pocket costs be awarded as against the Respondent on the application.
>
> 4. **THAT** the Decision to dismiss a cross-motion dated Oct.17th/94 to nullify the Decisions of the Court of Appeal dated April 9th/92, of Roscoe J. of the Supreme Court rendered April 28th/92 and a Decision of Hall J. of the Supreme Court rendered on April 12th/93 be overturned, and that the order requested on Cross-motion be granted and out-of-pocket costs be awarded as against the Respondent on the application;

As earlier noted, Mr. Black contends that this application falls within (a), (b) and (c) of s. 193. After careful consideration of the submissions made by Mr. Black and the counsel appearing on this application, I have concluded that they do not apply. I am

persuaded that, as s. 193 has been interpreted and applied, the present application does not involve "future rights" or is "likely to affect other cases of a similar nature" or "exceeds in value ten thousand dollars". In support, I refer to the comments and observations of authors **Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada**, 3rd ed., vol. 2, and especially at 7-51, 7-52, 7-53 and 7-54. Furthermore there is no indication in any of the decisions of Justice Pugsley, which are central to this application, that he found cause to exercise his residual authority under s. 193(e) to grant leave to appeal to a panel of the Court of Appeal. In my opinion Justice Pugsley did not err either in law or in the exercise of his discretion. He did not grant leave, nor do I. (See **Houlden and Morawetz,** 7-56)

The appellant also asks in the present application that pursuant to s. 195, the bankruptcy proceedings dealing with a series of matters be stayed. Most, if not all, appear to me to relate to matters which were or continue to be before Associate Chief Justice Palmeter of the Supreme Court. Justice Pugsley, in his decision delivered October 26, 1994, considered s. 195 and concluded it does not apply in the manner requested by the appellant. I agree.

For the reasons given, I dismiss, without costs, the application of the appellant in all respects.

. . .

I also have before me two notices of motion made pursuant to **Civil Procedure Rule 62.13(2)**.

One is by Ernst & Young Inc., in its personal capacity, and the other by ABN AMRO BANK CANADA. Each describes Frederick L. Black, as Officer of the Bankrupt, as the appellant.

Both allege that the appellant defaulted in posting security for costs in the amount of $1,000.00 on or before November 15, 1994 and thus the appeal to be heard by this Court on December 1, 1994 should be dismissed. The appeal arises out of the proceeding numbered C.A. 107528, and in the lower court as S.H. No. 80055.

On October 26, 1994, Justice Pugsley considered applications brought by these respondents for orders for security for costs. In his reasons for judgment delivered October 26, 1994, he wrote:

> In short, Ernst & Young Inc. in its personal capacity and ABN Amro Bank have at all times been treated, by all parties including Mr. Black, as interested parties in all the proceedings relating to the bankrupt.
>
> With respect to the second argument advanced, Mr. Black at all times has acted as the amanuensis and controlling persona in these matters since this labyrinth of litigation was commenced almost five years ago. I do not accept the submission that it is only in the capacity of an officer of the bankrupt that he has launched this appeal.
>
> MacDonald, J.A. of this Court on commenting on C.P.R. 62.13 stated in **Frost v. Herman** (1976), 18 N.S.R. (2d) 167 at 168:
>
> > In my view, however, the discretion given a judge on the present Rule 62.13 to order security "as he deems just" should not be exercised in favour of any applicant unless special circumstances exist for doing so.
>
> In my opinion, the applicants have established that "special circumstances" do exist in this case in the light of:
>
> 1. the history of these proceedings;
>
> 2. the background information disclosed in the case management communications placed before me;
>
> 3. the failure of Mr. Black to honour an order of this Court when costs were awarded against him;

> 4. the absence of any information before me to suggest that Mr. Black's ability to prosecute the appeal will he inhibited in the event this order is made.
>
> This Court follows the English practice wherein the amounts set for security are intentionally less than the amounts that may probably be taxed (**L.E. Powell and Company Limited v. Canadian Railway Company et al.** (1975), 11 N.S.R. (2d) 532).
>
> An order shall be issued requiring Mr. Black personally to post security with the Registrar of the Court of Appeal in the amount of $1,000.00 respecting each application, the security to be posted on or before November 15th, 1994.

His reasons were followed by an order issued out of this Court, also dated October 26, 1994, which provides:

> IT IS ORDERED THAT the notices of motion by Ernst & Young Inc., in its personal capacity and ABN Amro Bank Canada are allowed;
>
> IT IS ORDERED THAT Mr. Black personally post security with the Registrar of the Court of Appeal in the amount of $1,000.00 respecting each application, the security to be posted on or before November 15, 1994.

It is agreed the security has not been provided.

In dealing with appeals to the Court of Appeal, **Rule 49(4)** of the **Bankruptcy and Insolvency Rules** states:

> (4) The Court of Appeal may increase, decrease or dispense with security for costs.

The effect of the order of Pugsley, J.A., dated October 26, 1994, was to increase the security for costs in the forthcoming appeal.

Rule 51 of the **Bankruptcy and Insolvency Rules** provides:

> 51. Subject to the Act and these Rules, appeals to the Court of Appeal shall be regulated by the ordinary rules of that court relating to appeals in civil actions or matters.

Turning to the ordinary **Rules** of the Court, **Civil Procedure Rule 62.13** states:

> 62.13 (1) A Judge on application of a party to an appeal may at any time order security for the costs of appeal to be given as he deems just.
>
> (2) If a party fails to give security for costs when ordered, a Judge on application may dismiss or allow the appeal, as the case may require.

Mr. Black advances two principal grounds why the security for costs order should not apply. First, he contends that the order of Pugsley, J.A. has been issued out of a "civil court" and not a "bankruptcy court". I have earlier stated in these reasons that if there is one matter certain it is that all of these proceedings relate to bankruptcy, writ large. The authority for the order of Justice Pugsley begins in the **Bankruptcy and Insolvency Rules 49(4)** and **51**. It is **Rule 51** that engages or triggers **C.P.R. 62.13**. I find no support for Mr. Black's first contention.

The second is that Mr. Black comes before the Court as an Officer of the Bankrupt: He is standing in the shoes of the Bankrupt: He has statutory duties to perform: He is a natural person acting in a capacity and therefore is not subject to the order in any personal capacity.

Justice Pugsley has already considered the second contention of Mr. Black. Quoted above from his judgment are the reasons that cause Pugsley, J.A. to make his resulting order. It was not an order made on the spur of the moment. It was made after argument and taking time to consider. It was an order which, in my opinion, was within the discretion of Justice Pugsley to make.

The **Civil Procedure Rules** permit the respondents to advance their present applications by way of separate motions. The **C.P.R. 62.13(2)** applies. The security for costs not having been posted pursuant to the order of Pugsley, J.A. causes me to exercise my discretion under **C.P.R. 62.13(2)** and dismiss, without costs, the appeal to

be heard in the Nova Scotia Court of Appeal on Thursday, December 1, 1994, at 10:00 o'clock in the forenoon, in the matter numbered C.A. 107528. The reason is non-compliance with the order respecting the posting of the security for costs.

CONCLUSIONS

1. The application of the appellant is dismissed, without costs.
2. The motions of the respondents are granted, without costs.

CLARKE, C.J.N.S.

C.A. No. 110664

NOVA SCOTIA COURT OF APPEAL

IN THE MATTER OF: THE BANKRUPTCY OF **NsC DIESEL POWER INCORPORATED**

BETWEEN:

FREDERICK W. L. BLACK, as Officer of the Bankrupt Appellant	The Appellant appeared in person
- and -	Tim Hill for the Respondent
ERNST & YOUNG INC., Trustee of the Estate of NsC Diesel Power Incorporated, a Bankrupt and ABN AMRO BANK CANADA,	David G. Coles for ABN AMRO Bank Canada
KRUPP MaK MASCHINENBAU GmbH & KRUPP MaK DIESEL INC. Respondents and Intervenor	Robert W. Wright, Q.C. for Ernst & Young, Inc. in its personal capacity
	D. Bruce Clarke for the Superintendent in Bankruptcy
	Thomas M. MacDonald for Krupp Mak Maschinenbau Gmbh and Krupp Mak Diesel Inc.
	Application Heard: November 17, 1994
	Judgment Delivered: November 24, 1994

BEFORE THE HONOURABLE CHIEF JUSTICE CLARKE, IN CHAMBERS