

NOVA SCOTIA COURT OF APPEAL

Cite as: NsC Corporation Ltd. v. NsC Diesel Power Inc. Estate, 1993 NSCA 114

Matthews, Hart and Chipman, JJ.A.

BETWEEN:

NsC CORPORATION LIMITED and FREDERICK W.L. BLACK)	The Appellant appeared in person
Appellants)	
- and -)	
ERNST & YOUNG INC., Trustee of the Estate of NsC DIESEL POWER INC., a Bankrupt)	Tim Hill and Charles F. Scott for the Respondent
Respondent)	
- and -)	
ABN AMRO BANK CANADA)	David G. Coles) and Stephen McGrath for the Intervenors
Intervenor)	
)	Appeal Heard: June 22, 1993
)	
)	Judgment Delivered: June 22, 1993

THE COURT: Appeal dismissed with costs to the respondent of \$3,000.00 and to the Intervenor of \$2,000.00, including disbursements in each case and to be paid forthwith by the appellants jointly and severally as per oral reasons for judgment of Chipman, J.A.; Matthews and Hart, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

The appellants appeal from a decision of Boudreau, J. in chambers: (a) dismissing the appellant Black's application for intervenor status on the motion before him; (b) granting the

respondent's motion for a declaration that the appellant Black is not permitted to continue to act as attorney representing the appellant NsC Corporation in proceedings relating to the bankruptcy of NsC Diesel Power Inc.; and, (c) staying proceedings taken by NsC Corporation in the bankruptcy until such time as counsel is engaged.

On December 20, 1991, a receiving order was made against NsC Diesel Power. That company had previously admitted its insolvency in an application under the **Companies Creditors Arrangement Act**. Its proposed arrangement under that **Act** failed when it was rejected by its creditors. Upon that failure the court appointed the respondent as receiver of the assets of NsC Diesel Power. A major creditor of NsC Diesel Power, ABN Amro Bank thereafter brought the bankruptcy petition. The respondent was then appointed as trustee of the estate of NsC Diesel Power in bankruptcy.

NsC Corporation is the sole shareholder of NsC Diesel Power. NsC Consultants Limited is the sole shareholder of NsC Corporation.

The appellant, Black, is one of two shareholders of NsC Consultants. In argument before Boudreau, J. he described himself as principal shareholder, director and president of NsC Corporation. He is an officer and director of each of NsC Consultants, NsC Corporation and NsC Diesel Power.

NsC Corporation has brought a number of interlocutory applications in the bankruptcy proceedings relating to NsC Diesel since the granting of the receiving order. NsC Corporation has also commenced actions in the courts of this Province, Ontario and the Federal Court against a number of parties arising out of the operations of NsC Diesel Power. In most of the proceedings NsC Corporation has been represented by Black. Black is not a lawyer. He resides in Ottawa.

The respondent brought the application in the bankruptcy proceeding seeking the declaration that Black not be permitted to continue representing NsC Corporation in proceedings relating to the bankruptcy and an order staying proceedings taken by NsC Corporation in the bankruptcy until such time as counsel is engaged.

The motion was heard by Boudreau J. in chambers on February 13, 1993. The interlocutory notice application *inter partes* was served on Black on or about January 20, 1993, at his Ottawa address in accordance with the directions of Boudreau, J. as Case Management Judge respecting the time of service.

At the hearing of the application Black sought intervenor status personally. He based this application on the contention that NsC Corporation was not properly served with notice of the application to remove him as attorney.

Prior to the hearing of this appeal, ABN Amro Bank Canada, was added by order of the Chief Justice in chambers as an intervenor on the appeal.

As to the contention that NsC Corporation was not properly served with notice of the application Boudreau, J. said:

"In my view, the Corporation is presently before the court through its Agent or Officer who has been acting for the Corporation, NsC Corporation, all along, and he has been served, accepted service and has dealt with preparations for this application today on behalf of the Corporation, and Mr. Black is present and in my view, represents the Corporation here today, which has been properly and adequately served of the proceedings."

It is clear that although the interlocutory notice did not state at the foot thereof that it was directed to NsC Corporation; it was addressed to Black who at all times had acted for NsC Corporation in these proceedings. He had participated in a case management conference before Boudreau, J.. When the dates for service of the documents and for the hearing of the application itself were set he was duly served with formal written notice of the application together with copies of the supporting materials. He appeared at the application and opposed it.

There is no merit in this ground of appeal.

Extensive written briefs were filed on behalf of the parties with Boudreau, J. prior to the hearing of the application. After lengthy and complete argument he denied the application of

Black to intervene and granted the order sought by the trustee. Although it was urged that the order to remove Black as attorney could be supported on three grounds it is clear that Boudreau, J. was influenced chiefly, in reaching his conclusion, by the undisputed fact that Black was going to be a major witness in interlocutory proceedings and at the trial. In his decision he said:

"The crux of this case, first, is the very significant and personal involvement of Mr. Black as the prime witness in these proceedings as well as advocate for the respondent. I must conclude I cannot conceive, especially based on the procedural and evidentiary record in the files to date, where it would be possible to avoid these extensive duplicate roles. Secondly, the court must consider the extensive and at times questionable procedures which have been employed to date, and the procedural difficulties encountered during the numerous hearings when Mr. Black has acted both as prime mover witness and counsel for the respondent. Also, in considering the record, I find compelling the comments made by the Chief Justice and four other justices of this court and at least one justice of our Court of Appeal. In my view, each case must be considered on its own peculiar circumstances and merits and I would be loathe to deprive any corporate litigant of an opportunity to be heard. Mr. Black has indicated he intends to retain counsel and that he has made tentative arrangements for legal counsel for the respondent, NsC Corporation Limited, for the main hearings in other lawsuits which have also been undertaken simultaneously with the present bankruptcy proceedings.

The respondent has not satisfied this court that counsel cannot be obtained. I am therefore satisfied, on the circumstances of this case, that counsel can and should be obtained in any further proceedings before this court, otherwise these proceedings cannot unfold and be presented in a just, orderly, fair and manageable fashion for all parties."

After reviewing the extensive record we agree with this conclusion and this appeal can be disposed of on this ground alone. In reaching his conclusion Boudreau, J. exercised a discretion vested in him on such an interlocutory application. Our limited powers of interference with the exercise of such a discretion are well established. It has not been shown that the discretion was wrongly exercised.

It is not necessary to deal with the other issues raised on this appeal.

The appeal is dismissed with costs of \$3000.00 to the respondent and \$2000.00 to the Intervenor respectively, each to include disbursements and to be paid forthwith by the appellants jointly and severally.

J.A.

Concurred in:

Hart, J.A.

Matthews, J.A.

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and FREDERICK W.L. BLACK)

Appellants)

- and -)

ERNST & YOUNG INC.,)
Trustee of the Estate of)
NsC DIESEL POWER INC.,)
a Bankrupt)

Respondent)

- and -)

ABN AMRO BANK CANADA)

Intervenor)

REASONS FOR
JUDGMENT BY:
CHIPMAN, J.A.