IN THE SUPREME COURT OF NOVA SCOTIA
Citation:R v. Black, 2002 NSSC 276

Date: 20021220
Docket: Cr. # 145665
Registry: Halifax

Between:

Her Majesty The Queen

Crown

v.

Frederick William Logan Black

Defendant

Judge:	**The Honourable Justice John Murphy**
Heard:	May 17, 21, 22, 23, 24, 27, 28, 29 and 30, 2002 **June 3, 4, 5, 6, 11, 12, 17, 18, 19, 20, and 27, 2002** **July 2, 3, and 4, 2002** **August 20 and 21, 2002** **December 20, 2002**
Written Decision:	**December 20, 2002**
Counsel:	**Gary Holt, for the Crown**
	Frederick W.L. Black, personally

By the Court:

I BACKGROUND

[1] **The accused, Frederick William Logan Black, was president and principal shareholder of NsC Diesel Power Inc ("NsC"), which participated in a business arrangement with Krupp MaK Maschinenbeau GmbH ("MaK"), a German corporation, during 1988 and 1989. The venture involved MaK's supplying marine engines to Halifax Dartmouth Industries Limited ("HDIL") during refit of the vessel "Louis St. Laurent" ("LSL Contract").**

[2] NsC's roles included assisting MaK to secure the LSL Contract, for which NsC or a related company was to earn a commission from MaK, and the development of an engine and generator assembly and testing facility at Sheet Harbour, Nova Scotia ("Sheet Harbour Project").

[3] Collaboration during the LSL Contract and the Sheet Harbour Project was expected to lead to a long term relationship whereby NsC would provide sales representation for MaK in North America, with the Sheet Harbour facility serving as a major assembly and test site for equipment supplied by MaK in all North American markets.

[4] NsC arranged financing for the Sheet Harbour Project via a $6.33 M credit facility from ABN Bank of Canada (ABN) and an Atlantic Canada Opportunities Agency (ACOA) repayable capital cost contribution of $5.1 M. These financing arrangements, which also contemplated ACOA insuring 85% of the ABN loan, were contained in documentation executed during January and February, 1989.

[5] NsC encountered financial difficulties and sought protection under the *Companies Creditors Arrangement Act* during December 1989. ABN foreclosed on the Sheet Harbour facility during September 1990, and in December 1991 NsC was adjudged bankrupt. The Sheet Harbour Project was not completed, and the relationship between NsC and MaK terminated before MaK finished the LSL Contract. MaK eventually supplied engines for the vessel without pre-installation testing in Nova Scotia as originally contemplated.

[6] On February 16, 1989, when construction of the Sheet Harbour facility was beginning, and before funds were advanced to NsC under the ABN or ACOA financings, NsC had received $1M, less banking charges, by bank transfer from MaK (the "$1M Transfer").

[7] The Office of the Superintendent of Bankruptcy and other individuals and organizations, eventually including the RCMP, conducted extensive investigations with respect to the financial affairs of NsC and the administration of its estate. Those inquiries included examination of the circumstances relating to the $1M Transfer, and will be described in reasons for dismissal of various pre-trial motions ("Motions") brought by Mr. Black to challenge the process which culminated in laying of charges against him.

[8] Corporal Ian Black, the RCMP Investigating Officer, ("Informant"), swore an information January 8, 1997, alleging that the Accused, Mr Black, defrauded MaK, ABN, and ACOA in connection with the $1M Transfer.

[9] After several appearances in Provincial Court, Mr. Black waived Preliminary Hearing, and trial with jury was scheduled. Mr. Black re-elected trial by judge alone, and after disposition of the Motions, evidence was heard at trial from May 17th to July 4th, 2002, followed by written and oral submissions, which were completed August 21, 2002.

Mr Black represented himself throughout the Motions hearings and trial.

II PRELIMINARY ISSUES

[10] Notwithstanding the dismissal of the Motions, Mr Black continued to maintain throughout the trial that the investigation and laying of charges violated his rights pursuant to the Canadian Charter of Rights and Freedoms.

A. EVIDENCE OBTAINED BY SEARCH WARRANTS

[11] During the Motions hearings Mr. Black sought exclusion of evidence obtained by the RCMP pursuant to warrants which authorized document searches at various premises, none of which were occupied by Mr. Black. He alleged that the Informant provided false information to court officials when seeking those search warrants, and thereby denied or infringed upon his rights to be secure against unreasonable search and seizure. When dismissing the Motions, I ruled that the search warrants had been obtained based upon proper and valid Informations

containing only statements which the Informant had reasonable and probable grounds to believe. I found no irregularities with respect to the Informations used to obtain the warrants, and concluded that they were properly issued and the searches duly authorized.

[12] At the Motions hearings, Mr Black conducted direct examination of the Informant over a period of approximately 7 days. The Crown prosecutor did not insist upon strict compliance with the rules of evidence, which were applied liberally. However, when Mr. Black's "direct" questioning amounted to cross-examination on the sworn statements which the Informant had made when seeking the search warrants, I upheld the prosecutor's objection. Mr. Black did not then seek leave to cross-examine the Informant concerning those statements , nor did he apply to challenge the validity of the search warrants.

[13] The Informant was a prosecution witness at trial, and during cross-examination Mr. Black sought to question him concerning his sworn statements in the Informations used to obtain the search warrants. Mr. Black continued to insist that evidence was false, notwithstanding the

previous ruling upholding the search warrants and directing that evidence obtained by their authority was admissible.

[14] As Mr. Black may not have known the procedure available to seek to quash search warrants or realized the need to obtain leave to cross-examine while the Informant was testifying during the Motions hearings, he was permitted at trial to cross-examine the Informant concerning the sworn statements made in support of the search warrant applications. I advised that the ruling given during the Motions hearings could be changed and the evidence developed pursuant to the search warrants excluded if Mr. Black's cross-examination of the Informant at trial established that the statements were false, or that the Informant did not have reasonable and probable grounds to believe what he claimed to be true.

[15] Following Mr. Black's cross-examination during trial I remained satisfied that the Informant had reasonable and probable grounds to make the statements contained in the Informations, and that he believed them to be true. I found that the Informant gave credible evidence when swearing Informations in support of the search warrants and

during the Motion hearings and trial. The conclusion reached during the Motions hearings that the search warrants were obtained based on proper and truthful evidence and that the documentation and information developed as a result of the search warrants was admissible was affirmed following Mr. Black's cross-examination of the Informant during trial.

B. THE INFORMATION

[16] Mr. Black also took the position at trial that the Information sworn January 8th, 1997 stating the charges against him contained false statements, and he alleged that the Informant knew facts which would either remove any reasonable or probable grounds for making those statements, or cast reasonable doubt upon them. Although he indicated an intention to do so, Mr. Black did not seek to interrupt the trial process to challenge the Informant's grounds for laying the charges, after being advised that the Crown's burden to prove its case beyond reasonable doubt was more onerous than establishing that reasonable and probable grounds had existed for laying the Information.

III COUNT NO. 1 - ALLEGED FRAUD UPON MAK

A. THE CHARGE

[17] The first charge against Mr. Black is that he:

> **between the 1st day of February, 1989 and the 15th day of July, 1989, at or near Halifax, in the County of Halifax, Province of Nova Scotia, did unlawfully, by deceit, falsehood or other fraudulent means defraud KRUPP MaK MASCHINENBEAU GmbH, of a sum of money in excess of five thousand dollars ($5,000.00), by misrepresenting the need for and use to which NsC Diesel Power Inc. would put a loan of $1,000,000.00 from Krupp MaK Maschinenbeau GmbH, contrary to Section 380 (1) (a) of the Criminal Code.**

[18] The Accused acknowledged that NsC received the money, but denied misrepresentation or fraud, and maintained that the $1M Transfer was not a loan. It is the Crown's position that Mr. Black requested and obtained from MaK a $1M loan which he falsely represented would be used by NsC for specific purposes; the Accused claims that the 1M Transfer was not a loan, but an advance of funds which NsC was entitled to receive from MaK and disburse without accounting to MaK.

B. THE FACTS

(1) REQUEST FOR FUNDS

[19] The principal witnesses presented by the prosecution were Eckhard Jensen, who was MaK's export sales manager responsible for the North American market between 1982 and 1999, Randy Hartlin, senior manager commercial banking at Bank of Nova Scotia's Halifax main branch during 1988-1989, and the Informant,

the primary RCMP investigator whose duties included assembling and analysing extensive documentation.

[20] Mr. Jensen first met the accused at MaK headquarters in Kiel, Germany during 1987, when MaK and NsC were beginning their quest to secure the LSL Contract and other North American business. He worked with Mr. Black and NsC as they undertook the Sheet Harbour Project, and he maintained an office in Halifax after MaK and HDIL entered the LSL Contract.

[21] By February 1st, 1989, Mr. Black and NsC had committed to develop the Sheet Harbour facility, and their efforts were focussed on that project to enable MaK to undertake engine tests within the time limits required by the LSL Contract. Although all documentation between NsC and MaK concerning the Sheet Harbour Project and the long term venture had not been executed, NsC anticipated receiving a commission from MaK on the LSL Contract in accordance with a Representation Agreement made during February 1987 between MaK and Blythman-Black Inc., another company in the group controlled by the Accused.

[22] Mr. Black summarized the context in which the Sheet Harbour project was being undertaken and its progress as follows in paragraph numbered 1 of a memorandum faxed February 8th, 1989 to Mr. Fritz Gogarten, Mr. Jensen's superior in the MaK organization, who passed away several years before the trial. (Exhibit 39):

> **When Krupp MaK and Black started working on the Louis St. Laurent contract for the final bid in early 1988, it was decided that Black would arrange to provide the test facility and to do so at no additional cost to Krupp MaK. During the deliberations for the contract, Black confirmed this to Krupp MaK and gave them an outline on how this could be accomplished to the satisfaction of the Diesel Division. During the late summer and early**

> **fall when it became obvious and apparent that we would be the successful suppliers for the propulsion package for the mid-life refit of the Louis, we started in earnest the applications to ACOA and we started work on the preliminary engineering and planning so that we would be capable of living up to our commitments to deliver the completed propulsion package to the shipyard.**

[23] **NsC had accepted the financing offers from both ABN and ACOA prior to February 1989, but funds from those sources had not yet been advanced, pending NsC's meeting conditions precedent, including in each case providing equity for the Sheet Harbour Project in amount $5,000,000. NsC advised MaK that because of delays receiving financing, it was experiencing cash flow difficulty, and needed funds to meet commitments and outstanding payments. Between February 7th and 9th, 1989, Mr. Black, using NsC stationary, transmitted three fax messages to MaK, directed to Mr. Gogarten and copied to Mr. Jensen (Exhibits 38, 39 and 40), which included the following statements:**

> **Exhibit 38 - February 7th, 1989 fax:**
>
> **1. Enclosed find the summary of expenditures and commitments.**
>
> **2. Due to the delay in financing our ACOA money - original final date Jan 31st/89 - we need an advance (loan) until we can get the ACOA funds.**
>
> **3. We need C$2,000,000 to cover outstanding payments and payments due up to the end of February/89. All payments due only for the diesel facility. Regards**
>
> **The second page of Exhibit 38 was entitled SUMMARY OF NsC**
>
> **DIESEL (F. W. L. BLACK'S) COMMITMENTS AND PAID**

EXPENDITURES, and listed amounts "paid" and "committed"

totalling more than $4,000,000 under various headings.

[24] Exhibit 39 - February 8, 1989 fax:

4. Presently, we are on target to meet our construction and delivery deadlines and the present delays in Krupp MaK completing its part of this very short schedule has caused us some difficulty in our cash flows. Presently, we have paid out in excess of $600,000.00 in cash and we have committed to pay in excess of $4,000,000.00 in contracted undertakings. We anticipated we would be able to close the ACOA documentation, loan guarantees and contributions forms with all necessary documentation from all parties, including Krupp MaK by late January, 1989. We now find ourselves in a very difficult position because as of today, February 8, we have cash requirements for in excess of $2,000,000.00 to pay our suppliers and contractors and we still do not have the necessary documentation and transfer of funds from MaK. I propose to satisfy this requirement and MaK will advance $2,000,000.00 for a maximum of 30 days, which will be repaid to MaK as soon as the drawdowns are effected from the ACOA financing. I plan to be in Krupp MaK on Monday and would be available to meet for all parties concerned on this matter. In the meantime, we urgently need some bridge capital to cover this unexpected delay. We do not need to have our credibility put in question at this time, and neither do I.

[25] Exhibit 40 - February 9, 1989 fax:

Telefax To: KmaK

Attention: LD - Gogarten

DV2 - Jensen

Reference: Delay for NsC

Immediate Cash Flow Problems

1. Our planned signing of the ACOA Finance Documents was originally set for January 31, 1989. All companies performing work were told payment of invoices over and above the initial $600,000 + would be made on/or before Feb. 3rd (Jan 31st + two days to receive $ money).

2. Based on the fact that the Krupp MaK outstanding items be concluded by Feb 22nd:

- technology agreement signed

- letter of intent signed

- transfer of short term loan $4,000,000. (1-2 Days)

Then NsC can complete the Documents by Feb 22nd and the first draw down of ACOA money can be concluded by Feb _____.

If this schedule can be followed exactly then the immediate cash needs are only C$1,000.000 and this short term loan can be repaid on 24th or 27th. This loan must be in our Bank on Feb 10th or absolute latest Feb 13th without doubt.

3. The balance of our immediate cah needs, the additional C$1,000,000., will be met from ACOA drawn down on Feb 24th. You remember the total requirements to the end of Feb were $2,000,000.

I will call you late today.

Best regards

F.W.L. Black

(Underlining in the foregoing extracts was present in the original exhibits; emphasis has been added)

[26] Mr. Jensen testified that after receiving Exhibits 38, 39 and 40, MaK engaged in discussions with Mr. Black, which led to further documentation and eventually resulted in the $1M Transfer. His evidence was that he understood from conversations with Mr. Black that NsC needed the funds to address four of the commitments set out on page 2 of Exhibit 38 which were coming due at that time, being:

(1) Engineering - $217,307.32

(2) Excavation - $330,000.00

(3) Building - $980,000.00

(4) Seimens - $443,000.00

Mr. Jensen made handwritten explanatory notes next to those amounts on his copy of Exhibit 38 to provide additional information for Mr. Gogarten.

[27] After Mr. Jensen received Exhibit 40, in which NsC reduced its request to $1,000,000, he asked Mr. Black by telephone to explain why that amount was needed. He recorded Mr. Black's response in a German language handwritten note which appears on Exhibit 40, the relevant part of which he testified translates as follows into English:

After phone call with Mr. Black, the $1.0 Million is needed for

(1) Engineering - $217,000.00

(2) Excavation- $330,000.00

(3) Building - $100,000.00

(4) Seimens - $443,000.00.

[28] Mr. Jensen testified that further deliberations at MaK which eventually resulted in the $1M Transfer were premised upon the Accused's advice that the funds would be applied to the four commitments which Mr. Jensen noted on Exhibit 40.

(2) DISBURSEMENT OF $1 MILLION

[29] Mr. Jensen testified that after speaking with Mr. Black following receipt of Exhibit 40, he was concerned that deadlines for payments to NsC's subcontractors be met in order to allow the Sheet Harbour Project to proceed. He convinced his bosses at MaK, Messrs. Gogarten and Werner, that it was necessary to transfer $1,000,000.00 to NsC no later than February 13, 1989. He testified that disbursing so large an amount required the approval of MaK's Board, but that because the Board could not authorize an unsecured loan quickly enough to meet the transfer time deadline, the request for $1,000,000.00 was presented to the Board as an advance payment for services to be rendered by NsC/Mr. Black.

[30] The Board approved the $1M Transfer, as an advance, subject to NsC executing an appropriate agreement.

[31] The accused and representatives of MaK executed an agreement dated February 13,1989 in the German language, the title of which translated to English is

"Agreement on Advance Payments". The document was introduced as Exhibit 42 at trial including the following English translation:

Agreement on Advance Payments

To solve the current liquidity problems at NsC Diesel, the following agreement has been made between MaK and Mr. Black:

1. MaK makes an advance payment of 80% out of the commission claims in the amount of Can $500,000.00 to which Mr. Black is entitled from the Louis St. Laurent order. = Can $400,000.00

2. With respect to performances which NsC Diesel still has to make in connection with the aforementioned order, namely

Operation of the test bed	**Total value**	**Can $350,000.00**
Construction of the base frame	**Total value**	**Can $500,000.00**
		Can $850,000.00

MaK makes an uncovenanted advance payment of 75% = Can $ 600,000.00
Can $1,000,000.00

3. An appropriate agreement on interest payment will be reached with respect to the above-mentioned payments in advance.

4. MaK will immediately make a telegraphic remittance of the total amount of 1 Million Canadian Dollars to the account ..... at the .....Bank. (handwritten figure: # 17110)
(Handwritten Note): Bank of Nova Scotia
Main Branch, Hollis St.
Halifax, N.S. Branch 7000

Kiel, February 13, 1989

[32] MaK transferred $1,000,000.00 ($999,990.00 after $10.00 transfer fee) to NsC's account at the Bank of Nova Scotia, Halifax on February 16th, 1989.

(3) NsC's USE OF THE 1$M TRANSFER

[33] The prosecution introduced extensive documentary evidence, including monthly statements, cancelled cheques, ledger records, and balance statements, which showed the activity in NsC's account at Bank of Nova Scotia, through which all the company's banking activity was channelled. Mr. Hartlin testified concerning the operation of the account, and interpreted the documentation which illustrated all account transactions during the period October 1988 through January 1990. The Court was also provided with Exhibit 78, a spreadsheet and graphic depiction prepared by RCMP investigators illustrating activity in the account during the period November 1988 through March 1989 inclusive. The banking documentation and testimony show that from November 2nd, 1988 until February 16, 1989 when the $1 M Transfer entered the account, NsC was in an overdraft position. Between February 7th, 1989 and February 13th, 1989, while NsC sent Exhibits 38, 39, and 40 requesting funds from MaK and when the Accused advised Mr. Jensen that the $ 1 M Transfer would be used to address commitments related to engineering, excavation, building and the Seimens account, NsC's bank overdraft was $234,873.74.

[34] The RCMP's analysis of NsC's banking transactions, summarized in Exhibit 78 and supported by the banking records, shows that $235,369.96 from the $1M Transfer was immediately used to retire the overdraft. Examination of the banking records to determine the transactions which had led to the overdraft established that engineering expenses contributed $1800.00 and payments for excavation

contributed $35,180.00 to the overdraft. The evidence does not indicate that any building expense or Seimens account payments contributed to the overdraft.

[35] Analysis of the activity in NsC's account shows that $36,980.00 of the overhead reduction could be traced to commitments which Mr. Black advised Mr. Jensen would be satisfied, while the additional $197,893.74 overhead eliminated had arisen from uses of funds for purposes other than those specified to MaK by Mr. Black.

[36] The RCMP bank account analysis, described during the Informant's testimony, supported by banking records and summarized in Exhibit 78, shows that the entire $1M Transfer had left the NsC account by March 6th, 1989 when it returned to an overdraft position. Examination of the out flow from the account between the time $1M Transfer arrived until March 6th, 1989 shows that the following amounts were applied to the four areas to which Mr. Black had indicated the $1,000,000.00 would be allocated;

Engineering -	**$ 101,800.00 (including $1800.00 overdraft allocation)**
Excavation -	**$ 53,388.11 (including $35,180.00 overdraft allocation)**
Building -	**$ 60,000.00**
Seimens -	**$ 8,480.90**
Total:	**$ 223,669.02**

[37] The evidence, including the RCMP analysis summarized in Exhibit 78, shows that the balance of the money was disbursed from the account as follows:

NSC Corporation	**$487,506.49**
Woodside Fabricators	**150,000.00**
Logan Black and Associates	**30,507.85**
Wiseman Black	**16,364.73**
Total to Related Companies	**$ 684,379.07**
Bank Charges	**10,310.70**
Other	**81,631.21**
Total	**$776,320.98**

[38] Despite vigorous cross-examination during which the Accused attempted to challenge the information contained in the exhibits and oral testimony of Messrs. Jensen, Hartlin and the Informant, those witnesses were firm in recalling events as described during their direct testimony, and the factual information contained in the documentation was not impugned.

(4) POST TRANSFER DEALINGS AMONG MaK, NsC AND THE ACCUSED

[39] Mr Black maintains that communications and documentation exchanged after the funds were provided show that the $1M Transfer was not a loan, but rather an advance of money due to NsC from MaK, so that NsC had no obligation to account to MaK concerning its use of the funds, and was not bound by Mr. Black's representation. The Crown took a contrary view.

[40] Mr. Jensen testified that after the $1M Transfer, he held telephone discussions with Mr. Black, who reacted to one of those conversations by sending a memo to MaK dated April 12th, 1989, Exhibit 43. That memorandum was headed

REF: Repayment of Krupp MaK advance ($1,000,000.00)

> **and contained the following paragraph numbered 3:**
>
> **3. I propose to pay $675,000.00 to Krupp MaK with a transfer the first week of May with receipt by Krupp MaK by May 5th, 1989. The balance of $325,000.00 by June 9, 1989.**

[41] Mr. Jensen testified that after receiving Exhibit 43, he wrote to Mr. Black expressing his concern that the $1M Transfer had not yet been repaid to MaK. His correspondence, contained in Exhibit 44, included the following, which Mr. Jensen testified resulted from his concern that MaK's Board may have received mis-information when the $1M Transfer was approved:

> **This is a personal letter that no one at MaK is aware of..**
> **The listing and confirmation of the pay-back of the 1.0 Mio $ has not only surprised me, but makes me deeply concerned. After it was initially offered, to pay back this amount in a few days, subsequently until 30.04., new dates are now put forward. Regardless of the fact, that no one here in house understands the reasons, these statements about the pay back commitments burden the confidence in our mutual plans considerably.**

> **According to our understanding, the 1.0 Mio $ was planned to be used to pay outstanding invoices, until such time when the ACOA credit would be available. In the meantime all conditions for the ACOA credit have been met, so that upon presentation of the supplier-invoices the pay-back to MaK should present no problems. Nobody understands, why this cannot be done after all. Therefore it is now thought that the money has been used for other purposes. Since I personally have always contradicted these rumours, I am getting increasingly into greater difficulties. I therefore urge you again to either remedy this situation immediately, or at least to "lay the cards on the table" to me personally.**

[42] Mr. Black responded by memorandum dated April 17th, 1989 to Mr. Jensen (Exhibit 45) which began "This note in response to your personal thoughts" and then continued to list "Expenditures of Special Nature for NsC Diesel" which totalled $1,310,850.00.

[43] The expenditures listed in the April 17th memo differed substantially from the payments for which Mr. Black had advised Mr. Jensen on February 9th, 1989 that NsC required the $1M Transfer, as recorded by Mr. Jensen on Exhibit 40 during telephone discussion with Mr. Black.

[44] Mr. Jensen testified that the use of funds set out in the April 17th, memorandum varied significantly from MaK's previous understanding of how the $1M would be spent; he testified that if MaK had known in February 1989 the money was to be used as set out in the April 17th memo instead of for the purposes Mr. Black had told him, he would not have taken the same position in going to the MaK Board seeking approval for the $1M Transfer.

[45] On April 28th, 1989, Mr. Black provided a memorandum, Exhibit 46, to Mr. Werner of MaK, which provided as follows:

To: M/C Werner

From: F.W. L. Black

Date: April 28, 1989

Re: The Agreement dated February 13, 1989 between Krupp MaK and NsC Diesel regarding the advance of $1,000,000.00 in in (sic) interim funding.

This will confirm that $600,000 will be repaid the first week of May, 1989 with the balance of $400,000 applied against future commission payments (Louis St. Laurent)
With reference to Paragraph 3 of the February 13 document, this will confirm that interest will be calculated on the loan amounts outstanding from time to time. This interest rate will be confirmed by Werner upon his return to Germany and will be based on the Bank discount rate, plus an adjustment.
Krupp MaK Maschinenbau Gmb NsC Diesel Power Inc.

[46] The Memorandum was signed by Mr. Black and by two members of the MaK Board.

[47] I find that the Accused represented to MaK that the $1M Transfer would be used for specific purposes, that Mak disbursed the money relying on that representation, and that the funds were not applied as Mr Black represented they would be.

C. FRAUD: THE OFFENCE DEFINED

[48] ***S. 380 (1)(a)*** **of the** ***Criminal Code*****, provides:**

Fraud - Every one who, by deceit, falsehood or other fraudulent means whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security of any service

> **(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars;**

[49] The term "defraud" has been defined as follows:

> **To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." (London v. Globe Finance Corp. Ltd., [1903] 1 Ch. 728 at pp. 732-3**

[50] In *Scott v. Metropolitan Police Commissioner* (1974), 60 Cr. App. R. 124 the House of Lords held that the foregoing definition was not exhaustive and that to "defraud" ordinarily means: "to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled."

[51] My finding (previously set out in Paragraph 47) that the evidence establishes that Mr. Black misrepresented to MaK the use to which the $1 M Transfer would be applied is not itself sufficient to support a conviction for fraud. The Crown must also establish that the misrepresentation dishonestly deprived MaK of something to which, but for the misrepresentation, it was entitled.

D. ANALYSIS: DID THE ACCUSED COMMIT FRAUD?

(1) WAS THE $1M TRANSFER A LOAN?

[52] The Crown maintains that the $1M Transfer was a "loan", to be used by NsC as Mr. Black represented and repaid; it is the Accused's position that the $1M was not a "loan", but rather an "advance payment" of monies due from MaK to NsC made in circumstances where repayment was not required and which do not support an allegation of fraud.

(a) DEFINITIONS: "LOAN" vs. "ADVANCE"

[53] Both the Crown and Defence referred to several definitions of "loan", "advance", "interest" and related terms found in legal and English language dictionaries.

[54] The definitions of "loan" consistently contemplate the eventual return of the subject matter, in the case of money, with or without interest or other compensation for its use. For example, Black's Law Dictionary 5th Edition, includes the following:

> **Loan: A lending. Delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest. Anything furnished for temporary use to a person at his request, on condition that it shall be returned, or its equivalent in kind, with or without compensation for its use;**
>
> **and the Shorter Oxford English Dictionary:**
>
> **Loan: 2. A thing lent; esp. a sum of money lent for a time, to be returned in money or money's worth, and usually at interest.**

[55] The thrust of Mr. Black's position is that MaK's referring to the $1 M Transfer as an "advance" rather than as a "loan" implies that repayment was not contemplated.

[56] "Advance" is defined as follows in the Shorter Oxford English Dictionary:

> **2. To pay before due; and hence to pay or lend on security of future reimbursement.**

[57] Webster's International Dictionary, 2nd Edition, includes the following definition of "advance":

> **A furnishing of something before an equivalent is received (as money or goods) towards a capital or stock, or on loan; payment beforehand; the money or goods thus furnished; money or value supplied beforehand. In the case of an *advance,* as distinguished from an *advancement,* there arises the relation of debtor and creditor, or else the advance is in the nature of an absolute gift.**

[58] Black's Law Dictionary contains extensive definition of "advance", "advance payment", and "advances", as follows:

> **Advance: To move something forward in position, time or place. To pay money or render other value before it is due; to furnish something before an equivalent is received; to loan; to furnish capital in aid of a projected enterprise, in expectation of return from it. To supply beforehand; to furnish on credit or before goods are delivered or work done; to furnish as part of a stock or fund; to pay money before it is due; to furnish money for a specific purpose understood between the parties, the money or sum equivalent to be returned; furnishing money or good for others in expectation of reimbursement; money or commodities furnished on credit. A loan, or gift or money advanced to be repaid conditionally; may be equivalent to 'pay'. See also Advances.**
>
> **Advance payments: Payments made in anticipation of a contingent or fixed future liability.**
>
> **Advances: Moneys paid before or in advance of the proper time of payment; money or commodities furnished on credit; a loan or gift, or money advanced to be repaid conditionally. ...**

[59] Despite the Accused's forceful argument to the contrary, I have concluded that an "advance" or "advance payment" can be a loan, if the evidence establishes a transfer occurred in circumstances consistent with the making of a loan, ie. in the case of

money with expectation it would be earned or repaid, even if the transaction is not consistently labelled a "loan" or not expressed in writing to be a "loan".

(b) THE NATURE OF THE TRANSACTION

[60] The Accused raised several issues which may be characterized as submissions that, even if an "advance" could in some circumstances be a "loan" (which he did not admit), the $1M Transfer was not a loan in this case.

(i) MAK'S AUTHORITY TO MAKE A LOAN, AND THE PARTIES' COMMUNICATION AND INTENTION

[61] Mr. Black maintained that MaK's Board did not authorize a loan because it did not have the corporate power to do so, and therefore the $1 M Transfer could not be a loan. His argument was based upon Mr. Jensen's evidence that Board approval was required to make the $1 M Transfer, and that he and others at MaK were concerned that the Board would not provide authority if the transaction were structured as a loan to NsC, when the money was required on short notice and NsC was not in a position to provide security. To obtain that approval MaK personnel described the transaction to their Board as an advance payment for services to be rendered by or on behalf of Mr. Black, NsC or a related company. I find that the $1 M Transfer was characterized by MaK as an advance against money it would owe NsC at a

future time if NsC performed its role in connection with the Sheet Harbour project and the LSL contract.

[62] When Mr. Black insisted during cross-examination of Mr. Jensen that MaK could not make a loan, Mr. Jensen, who throughout his testimony, had repeatedly described the transfer as a loan, responded:

> **It was a loan. ... You asked for a loan, and we transferred a loan.**

[63] Despite Mr. Black's repeated suggestions to the contrary while conducting cross-examination, Mr. Jensen maintained that he always understood the transaction was a loan. He testified that based on the Accused's statement in his fax to MaK of February 9th, 1989 (Exhibit 40) that the $1,000,000.00 needed was a "short term loan" which "can be repaid on February 24th or 27th", the MaK Board authorized an advance payment.

[64] I am satisfied that MaK made an internal corporate decision to label the $1 M Transfer an advance, rather than a loan. The label MaK used, however, does not determine the nature of the transaction nor the recipient's obligation to repay. MaK transferred the money, the transaction had the characteristics of a loan, and failure to call the transfer a loan did not remove the repayment obligation which was clearly communicated between the parties. The evidence does not support Mr. Black's submission that MaK could not make a loan, and calling the transaction an advance

for internal purposes would not relieve any obligation the recipient would have to repay. Indeed, even if the $1,000,000.00 transfer had been made without any corporate authority or Board approval, which was not the case, an otherwise existing obligation upon the recipient to repay would not necessarily be relieved.

(ii) FAILURE TO REQUIRE A "LOAN AGREEMENT"

[65] **The Accused's position is that because there was no document called "Loan Agreement", and no written agreement executed by the parties describing the transaction as a loan, then the $1 M Transfer must have been something other than a loan. The prosecution conceded the absence of a written "loan agreement", and acknowledged the document which MaK required at the time of the transfer was entitled "Agreement on Advance Payment".**

[66] **The existence of a document entitled "Loan Agreement" is not a pre-requisite for a loan. Its absence in this case does not mean the $1 M Transfer could not be a loan, nor does it diminish the effect of the other written and oral communications in which the parties described the transaction as a loan.**

(iii) Did MaK OWE NsC $1 M?

[67] **The "Agreement on Advance Payments", Exhibit 42 attributed the $1M Transfer as follows:**

> **(A) advance payment of 80% of $500,000.00 commission claims to which Mr. Balck is sentitled for the LSL project $400,000.00**

(B) 75% of $850,000.00 work still to be performed in connection with operation of the test bed and construction of the base frame $600,000.00

[68] Mr. Black contended that those amounts were owing By MaK as of February 1989 when the $1,000,000.00 transfer was made. Their status will be considered separately as "The $400,000 Component" and The "$600,000 Component"

(aa) THE $400,000.00 COMPONENT

[69] Mr. Black submitted that commissions were owing by MaK to NsC or a related entity at the time of the $1 M Transfer. He argued that upon signing of the LSL Contract , MaK became obligated to pay a $1,000,000.00 commission to him, or to a related entity, Logan Black and Associates, for obtaining the contract bid. Mr. Black referred to the Representation Agreement between MaK and Blythman and Black Inc. , (Exhibit 21) in particular Annex A paragraph 3.1 which provided that commissions were payable by MaK within 30 days after it received payments from a customer. Even assuming that NsC was entitled to any benefit accruing pursuant to that Representation Agreement (which was not clearly demonstrated) the evidence did not establish that MaK had received any LSL Contract payment from HDIL, or that any commission was payable by MaK at the time the $1,000,000.00 transfer was made. There was no evidence concerning the timing of HDIL's payments to MaK under the LSL Contract; neither Mr. Jensen nor Andrew McArthur, the then President of HDIL who testified on the accused's behalf concerning other issues, was asked about such payments.

[70] No documentation was presented to support Mr. Black's argument that MaK had received payments from HDIL, which he argued would trigger commission payments. Mr. Black suggested during argument that he had been unable to trace commission payments because of a ruling made during the trial protecting the confidentiality of arrangements between HDIL and MaK, but there was no ruling applicable to possible evidence respecting any such payments. Objection was raised concerning providing details of the purchase order for the LSL contract; however when Mr. Black advised that he wished to refer to the document only to establish the identity of the parties' representatives who executed the document, the witness, Mr. Jensen, was allowed the give the information.

[71] Mr. Jensen testified that when the $1 M Transfer occurred, MaK didn't owe NsC or other Black interests any money. He testified that MaK usually paid commissions to representatives such as Mr. Black's company only when MaK received 100% payment from its customer. I accept the uncontradicted evidence of Mr. Jensen that no payment was due by MaK at the time the $1 M Transfer was made. Mr. Black's suggestion to the contrary during argument is based on speculation and not founded in any testimony or documentation which was placed or sought to be placed before the court.

[72] The status of the $400,000.00 portion of the $1 M Transfer was confirmed as an "advanced payment" by Memo of Clarification executed May 26th, 1989 by Mr. Black on behalf of NsC and by MaK.(Exhibit 68, pp. 11-14)

[73] Reference to commission payment was contained in a letter, introduced by the Accused at trial (Exhibit 66, Tab B, Document 152) from MaK to Deutsche Bank, copied to Logan-Black Inc., which states as follows:

> **This letter will confirm that effective with the contract signing for the propulsion system for the Louis St. Laurent, Canadian Coast Guard vessel, Krupp MaK will be obligated to pay upon delivery a sum of Canadian $1M (One Million) to the company Logan-Black. (emphasis added)**

The evidence does not suggest that the propulsion system had been delivered at the time of the $1 M Transfer.

[74] The Informant testified that he concluded, based upon his investigation including meetings with MaK representatives, that MaK was not indebted to to Mr. Black's interest when the transfer was made, and that MaK wouldn't owe money until the LSL Contract was complete.

[75] I find that when the $1,000,000.00 transfer was made, no amount was owing by MaK to Mr. Black's interest with respect to commission - Mr. Black's argument that the $400,000.00 portion of the transfer referred to in paragraph numbered 1 of Exhibit 42 was a payment then due by MaK is not supported by the evidence.

(bb) THE $600,000.00 COMPONENT

[76] MaK expected to require base frame structures for engine and alternator test positioning at the Sheet Harbour Project site, and prior to February 13th, 1989 had

entered an arrangement with Woodside Fabricators Limited, a company owned by Black interests, to fabricate those structures. The value of this work, as shown in Exhibit 42, the Agreement on Advance Payments, was $850,000.00. Referring to that document and to Exhibit 68, particularly pp. 13A and 14, the Memorandum of Clarification executed May 26, 1989 between Mr. Black and Mr. Werner of MaK, Mr. Jensen explained that $600,000.00 toward the expected test bed and test frame construction and operation was advanced as part of the $1 M Transfer. The Memorandum of Clarification paragraph 2.1, shows that $262,500.00 of the $350,000.00 test bed item and $337,500.00 of the $500,000.00 base frame construction item were the components of the $600,000.00 portion of the $1 M Transfer.

[77] The test bed/base frame work was not completed by Woodside Fabricators, and I find that the $600,000.00 component of the $1 M Transfer, which Mr. Jensen testified was a loan pending completion of that work, was neither earned by Woodside Fabricators Limited, nor repaid.

[78] I find that the $600,000.00 portion of the $1 M Transfer was not owing by MaK to NsC, Woodside Fabricators or any other party associated with the Accused when the $1 M was disbursed.

(cc) THE $600,000.00 DEUTSCHE BANK LOAN

[79] During cross-examination of Mr. Jensen and of the Informant, the Accused referred to a transaction involving $600,000.00 which occurred during October 17th, 1988, when Deutsch Bank made a $600,000.00 loan to NsC (the "Deutsche Bank loan"),

repayment of which was guaranteed by MaK. In connection with the LSL Contract, the Government of Canada had agreed to make a $600,000.00 payment destined for NsC, to be routed via HDIL and MaK. MaK guaranteed that NsC would repay the Deutsche Bank Loan because it knew money would eventually be flowing from the Government of Canada to enable NsC to do so. Mr. Jensen's testimony to that effect was supported by the Informant's evidence concerning his investigation, and is consistent with correspondence from MaK to Mr. Black contained in Exhibit 66, Tab B. p. 119.

[80] Mr. Black suggested that the confirmation which he provided to MaK to repay $600,000.00 on April 28, 1989, (Exhibit 46) referred to the Deutsche Bank Loan and not to a portion of the $1 M Transfer. That is not consistent with the evidence and indeed conflicts with the wording of the Exhibit 46, which specifically references the February 13th, 1989 agreement regarding the $1 M Transfer. Woodside Fabricators had not performed the work related to the base frame and test bed when Mr. Black undertook to MaK on April 28, 1999 to repay $600,000.00, and the portion of the $1 M Transfer disbursed for that work was still in issue.

[81] Notwithstanding Mr. Black's urging to the contrary, I find that the Deutsche Bank loan was a transaction entirely separate from the $1 M Transfer, and that the commitments to repay $600,000.00 contained in documentation exchanged between Mr. Black/NsC and MaK after February 13th, 1989 relate to the $600,000.00 which formed part of the $1 M Transfer, and not the Deutsche Bank loan. Mr. Black's attempts to relate to the Deutsche Bank loan references to repayment in Exhibit 46

and other documents exchanged after February 13th, 1989 are not supported by the evidence. Those references are to the $600,000.00 component of the $1 M Transfer, and reinforce the conclusion that it was a loan.

(2) OTHER DEFENCE ISSUES

[82] During cross-examination of witnesses called by the Crown and direct examination of defence witnesses, Mr. Black raised several other matters, which were also canvassed extensively in oral and written submissions. Those matters are not determinative of the issues before the Court, but are highlighted in the following paragraphs.

(a) DECEMBER 1989 DOCUMENTATION

[83] Mr. Black introduced testimony from William Moore, who was managing director of Collins Barrow Managing Consultants, which advised NsC concerning various aspects of its relationship with MaK in late 1989. Evidence was also presented from Michael Edwards, an accountant and tax advisor, who, with Mr. Moore, provided management and financial advice to NsC. Messrs. Moore and Edwards described documentation prepared during December 1989 summarizing past transactions which had occurred between MaK and NsC , including the $1 M Transfer. Participation by Mr. Moore and Mr. Edwards in the affairs of Mr. Black at NsC occurred almost a year after the $1 M Transfer, and neither their testimony nor the documents prepared in December 1989 to which they were directed provide assistance in determining the nature of the transaction which is the subject of the

charges. References in documents prepared following a meeting between NsC and MaK on December 4th, 1989 (Exhibits "C" and "D" to Affidavit of of William Moore, Trial Exhibit 69) describing the components of the $1 M Transfer as "advance payments" and amounts "advanced" do not preclude the transaction being a loan. Nothing contained in those documents, prepared almost a year after the $1 M Transfer, contradicts Mr. Jensen's testimony or affects the conclusions which I have reached based upon the situation which existed and the dealings among the parties at the time the $1 M was disbursed. The circumstances surrounding the preparation and execution and the contents of the memo of clarification of May 26th, 1989, (Exhibit T68 pp. 11-14) and the December 5th, 1989 Agreement (which was included in Exhibit 69), do not support the Accused's position that the $1 M Transfer was not a loan.

(b) SHARE/EQUITY ARRANGEMENTS

[84] The accused claimed that MaK did not fulfill agreements and perform various contractual obligations to him and/or NsC, including MaK's failure to acquire NsC shares and inject equity into the company. Any failure by MaK to complete agreements with NsC concerning share purchase, or otherwise was not directly related to the $1 M Transfer. A breach of contractual arrangements, if established, could give rise to civil remedies, but would not justify for any activity which would otherwise constitute fraud.

(c) CONSPIRACY THEORY

[85] A substantial part of the evidence elicited by Mr. Black, both during cross-examinations of Crown witnesses and questioning of defence witnesses was directed toward development of the "conspiracy" theory. Mr. Black maintained that a conspiracy against him and/or his companies including NsC was identified by Charles Piper, an auditor associated with the office of the Superintendent of Bankruptcy who provided a report during 1993 concerning matters related to NsC's December 13, 1989 receivership, and subsequent Bankruptcy. According to the "conspiracy" theory MaK, ABN, Peter Cleveland of Ernst & Young, and Ron Benn, Bruce Benn and Gary Wiseman of Corporation House Limited, all of whom were involved with NsC's affairs/or and its dealings with MaK concerning the LSL Contract, conspired to bring about the financial collapse of NsC and to divert the benefit of North American representation of MaK from Mr. Black and NsC to Corporation House, a financial consulting firm which advised both NsC and MaK. Mr. Black maintained that initiation of investigation for alleged criminal activity which led to the charges against him was a component of the conspiracy scheme. His submissions implied that his activity with respect to the handling of the $1 M Transfer was justified in light of the plot those parties allegedly launched against his interests and those of NsC.

[86] I find that the "conspiracy" theory has no relevance to the Charges, which arise from events which are alleged to have occurred between February 1st, and July 15th, 1989.

The conspiracy which Mr. Black claims existed did not commence until September 1989 at the earliest, and there is no evidence that it was suspected by Mr. Black until sometime thereafter. An accused's suspicion that he or his company is being conspired against is not necessarily justification for misrepresentation; in this case a defence based upon alleged conspiracy clearly does not exist, when the activities giving rise to the charges took place well in advance of any suspected conspiracy.

(d) NO SIDE LETTER TO ESTABLISH LOAN

[87] Mr. Black maintained that if the $1 M Transfer were a loan, but for internal corporate reasons MaK did not want to acknowledge making a loan in standard official documentation, it would have followed a practice of doing so in a side letter. He introduced evidence concerning other aspects of NsC's dealings with MaK where arrangements had been clarified by side letter, and in support of his position called as a witness Mr. Andrew McArthur, who was President of HDIL when the LSL Contract was being undertaken. Mr. McArthur testified that on one or two occasions he had known MaK to use side letters to alter the terms of an agreement; however, Mr. McArthur's evidence did not establish that it was an invariable, or even a common practice. The absence of a side letter labelling the $1 M Transfer as a loan does not affect my finding that the use of the term "advance" in the documents prepared by MaK to describe the transaction does not preclude the $1 M Transfer being a loan; my conclusion is that it was a loan.

(e) INFORMANT'S EVIDENCE - OPINION

[88] The Informant testified for 9 days during the trial, 8 of which were devoted to cross-examination. Much of that cross-examination involved the Accused's attempt to establish that the Informant did not have reasonable and probable grounds to obtain search warrants and to exclude evidence obtained pursuant to the search warrants. The Informant was a straight forward, credible witness, whose testimony I accepted completely with respect to the circumstances surrounding obtaining the search warrants and the investigation generally. During final argument, the Accused for the first time expressed concern that the Informant had testified that it was his "opinion" that the $1 M Transfer was a loan, and that he had been improperly permitted to express opinion evidence, without proper qualification and without a *voir dire* to determine admissibility. This submission by Mr. Black does not acknowledge that any opinions expressed by the Informant concerning the character of the $1 M Transfer, the corporate authority of MaK, or any other matters were provided only in response to questioning by the accused during cross-examination. The statements made by the Informant were properly expressed in response to questioning; however, I have not relied on any opinions expressed by him in determining the nature of the $1 M Transfer.

E. CONCLUSION COUNT NO. 1

[89] Notwithstanding the very detailed examination which the accused developed through oral and documentary evidence concerning the relationships and activities involving on one side MaK, and on the other side the accused, NsC and his other companies, the $1 M Transfer cannot be characterized as anything other than a loan. The transaction was initiated by the accused, who by fax dated February 7, 1989 (Exhibit 38) requested an advance and inserted the words "loan" in brackets immediately after the word "advance". In his memorandum of February 8th (Exhibit 39) the accused indicated that the "advance" would be "repaid", and he again referred to the transfer as a "loan" twice on February 9th in Exhibit 40. Subsequent correspondence and documentation consistently addressed "repayment" and payment of interest. I find that the Crown has established beyond a reasonable doubt that the $1 M Transfer was a loan.

[90] I also find that the accused falsely represented to MaK the purpose for which the $1 M Transfer would be used, and that the money was used for other things. Based upon the evidence from Mr. Jensen, examination of the Exhibits, including NsC's financial records, and the Informant's testimony concerning the very detailed RCMP investigation, I find that the loan established by the $1M Transfer was not repaid.

[91] To determine whether Mr. Black is guilty of the charge contained in the first count, the court must consider whether he deceitfully or dishonestly deprived MaK of something, whether he induced MaK to act to its detriment. The prohibited act and consequences comprising the elements of the offence of fraud are succinctly summarized by McLachlin J. (as she then was) speaking for the majority of the

Supreme Court of Canada in *Theroux v. The Queen* (1993), 79 C.C.C. (3d) 449 at pp.459 and 460:

> **. . . I return to the offence of fraud. The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk. The mens rea would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. To put it another way, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the actus of the offence (see Williams, ibid., c.3), the proper focus in determining the mens rea of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.**
>
> **. . .**
>
> **These doctrinal observations suggest that the actus reus of the offence of fraud will be established by proof of:**
>
> 1. **the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and**
>
> 2. **deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.**
>
> **Correspondingly, the mens rea of fraud is established by proof of:**
>
> 1. **Subjective knowledge of the prohibited act; and**
>
> 2. **Subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk.)**

> **Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.**

[92] **The evidence establishes beyond a reasonable doubt that Mr. Black, between the 1st of February and the 15th of July 1989 by deceit, falsehood or other fraudulent means defrauded MaK by misrepresenting the need for and use to which NsC would put a loan of $1 M from MaK. The accused falsely represented to MaK how the$ 1 M Transfer would be spent by NsC, he directed its transfer into an account which had gone into overdraft as a result of payments including those made for other purposes, and after the Bank satisfied the overdraft the balance of the $1 M Transfer, then under the control of the accused, was used for purposes other than those stated to obtain the funds. The representations which the Accused made with respect to the manner in which the money would be applied were false.**

[93] **As a result of the accused's false representations, MaK was deprived of 1 million dollars, which its representative Jensen testified was transferred on the basis that the money was going to be used for the purposes specified by Mr. Black. The money has never been repaid to MaK; the actions of the Accused have deprived MaK of 1 million dollars.**

[94] **The evidence establishes beyond a reasonable doubt that the accused had subjective knowledge of the false representation, and that he was aware that as a consequence of his false representations, MaK could (and would) be deprived of 1 million dollars.**

[95] The crown has established beyond a reasonable doubt the Accused's guilt with respect to count # 1.

IV COUNT NO. 2 : ALLEGED FRAUD UPON ABN

A. THE CHARGE

[96] The second charge against Mr. Black is that between February 1st 1989 and July 15th, 1989 he:

> **did unlawfully, by deceit, falsehood or other fraudulent means defraud the ABN Bank CANADA, of a sum of money in excess of five thousand dollars ($5,000.00), by misrepresenting the reason NsC Diesel Power Inc. received $1,000,000.00 from Krupp MaK Maschinenbeau GmbH, which caused ABN Bank CANADA to believe the $1,000,000.00 was an equity investment in NsC Diesel Power Inc. when in fact it was a loan from Krupp MaK Maschinenbeau GmbH to NsC Diesel Power Inc., contrary to Section 380(1)(a) of the Criminal Code;**

B. THE FACTS

[97] The one million dollars referenced in this count is the same $1 M Transfer which was the subject of the First Count.

[98] On January 6th, 1989, approximately six weeks prior to the $1 M Transfer, the accused on behalf of NsC accepted an offer dated January 3, 1989 from ABN to lend $5,972.000. dollars. (Exhibit 3) The offer contained the following condition precedent to be fulfilled by NsC in paragraph numbered 2 on page 5;

> **2. Evidence of full injection of equity (CAD 5 million) prior to drawdown.**

[99] A written loan agreement was executed by Mr. Black on behalf of NsC as Borrower and ABN as Lender February 17th , 1989 (The "ABN Loan Agreement", (Exhibit # 4). That agreement included the following provision as Article 6.01(J):

> **6.01 Conditions Precedent. The lender shall not be called upon to make any Advance under the Credits, if the Lender shall not have received on the date hereof, in form and content acceptable to the Lender, the following:**
>
> **. . .**
>
> **(j) receipt of evidence, satisfactory to the Lender in its sole and unfettered discretion, that the shareholders of the Borrower have made in the aggregate an equity investment in the Project of not less than Five Million Dollars ($5,000,000);**

[100] The Loan Agreement included the following definition of "Equity" in Article 1.01

. . .

> **"Equity" means at any time the aggregate amount of:**
> **(a) amounts paid up on all classes of shares;**
> **(b) contributed surplus;**
> **(c) retained earnings; and**
> **(d) any loans which are subordinated to the Indebtedness hereby secured, less any deferred taxes if any, all as appearing on a balance sheet of the Person, prepared in accordance with generally accepted accounting principles applied on a consistent basis.**
>
> **For the purpose of this definition, Equity shall exclude any amounts ascribed to intangible assets including goodwill, patents, trademarks and licences.**

[101] NsC and MaK entered an agreement for transfer of technology from MaK to NsC, which ABN accepted as an equity investment by NsC shareholders of 4 million dollars.

[102] The basis of the Charge contained in Count 2 is the Crown's allegation that the $1 M Transfer was falsely or fraudulently represented by the Accused to be the remaining $1,000,000.00 equity requirement pursuant to the ABN Loan Agreement.

[103] The factual determination made during consideration of Count # 1 that the $1 M Transfer was a loan establishes the nature of that transaction in the context of Count # 2.

[104] Edward Merbis, who was President and CEO of ABN during 1988-89, testified concerning the negotiation and finalization of the ABN Loan Agreement, including the NsC equity requirement and the drawdown of loan proceeds. His testimony confirmed the arrangement described in para. 6.01 of the ABN Loan Agreement, whereby it was a condition precedent to advancement of loan funds that ABN receive satisfactory evidence of the $5,000,000.00 equity investment in NsC, and he explained that if that equity investment precondition were not met, ABN would not advance funds unless alternate conditions were established.

[105] Mr. Merbis testified ABN made a loan advance of approximately $6,000,000.00 after it was satisfied that the equity investment precondition had been met. He testified that in determining that the precondition had been met, ABN relied upon a letter dated March 9th, 1989 from NsC's auditors, Collins Barrow (The Collins Barron Certificate, Exhibit # 24), which provided as follows:

> **To Atlantic Canada Opportunities Agency and ABN Bank Canada**

As requested by NsC Diesel Power Incorporated, we have examined the company's compliance as at March 9, 1989, with the equity requirement in paragraph 2 of the conditions precedent of the ABN Bank loan agreement dated January 3, 1989 and Section 5.01(a) of the Atlantic Canada Opportunities Agency loan agreement dated January 30, 1989.

. . .

Our examination was solely to examine the injection of equity as outlined in the attached schedule. The procedures followed do not enable us to express an opinion on the amount of shareholders' loans outstanding as of March 9, 1989.

In our opinion, except as noted in the above paragraph, the company is in compliance with the equity requirement provisions of Paragraph 2 of the conditions precedent of the ABN Bank loan agreement and Section 5.01 (a) of the Atlantic Canada Opportunities loan agreement

Collins Barrow

Chartered Accountants

Halifax, Nova Scotia

March 9, 1989

Equity injection

1. **Purchase of 400 non-cumulative, non-voting, preferred shares of NsC Diesel Power Incorporated by NsC Corporation Limited**

   4,000,000

2. **Transfer of $1,000,000 to the account of NsC Diesel Power Incorporated by NsC Corporation Limited that is subordinated to other debt through a shareholder's postponement of claim agreement dated March 8, 1989**

   1, 000 ,000

$ 5,000,000

[106] Mr. Merbis' testimony establishes that ABN advanced funds to NsC based on ABN's reliance on Collins Barrow's opinion that the equity requirement condition precedent had been met.

[107] Mr. Merbis' evidence in that regard is supported by the testimony of Rod Burgar, who transmitted the Collins Barrow Certificate to ABN Solicitors March 10, 1989.

[108] The Collins Barrow Certificate was prepared by Ross Drake, who testified that when employed with Collins Barrow during February and March of 1989 he performed the required audit of the NsC equity injection to satisfy loan requirements for ABN and ACOA. Although the Collins Barrow Certificate refers to ABN Bank Loan Agreement dated January 3, 1989, it was apparent from Mr. Drake's evidence that the reference was to paragraph 2 of the conditions precedent in the offer dated January 3, 1989; the relevant condition precedent in that offer was incorporated in the loan agreement which was dated February 17th, 1989. During his testimony, Mr. Drake reviewed Collins Barrow's file material and described receiving background information concerning the ABN and the ACOA loans, including NsC equity requirements provided by Mr. Burgar. His evidence established that the Collins Barrow Certificate had been prepared in reliance upon two principal documents;

(1) copy of the electronic transfer of funds evidencing the movement of the $1 M Transfer from Mak to NsC's account at Bank of Nova Scotia February 16th 1989, and

(2) Statutory declaration dated March 9th, 1989 sworn by the accused before Mr. Burgar, a copy of which Mr. Burgar transmitted to Collins Barrow.

In response to questioning by Mr. Black during cross-examination, Mr. Drake had no recollection that Collins Barrow considered the $600,000.00 Deutsche Bank loan prior to providing the Collins Barrow Certificate.

[109] Rod Burgar, who was legal counsel during 1988 and 1989 for NsC and other companies controlled by Mr. Black in connection with the ABN Bank and ACOA loans, testified that the Collins Barrow Certificate was required by ABN Bank and ACOA to confirm that NsC had met the conditions precedent with respect to equity injection contained in the loan agreements.

[110] Mr. Burgar confirmed that he provided a statutory declaration executed by Mr. Black March 9th, 1989 to Collins Barrow in the following form. (Exhibit # 74)

H651

PROVINCE OF NOVA SCOTIA)

IN THE MATTER OF CITY OF HALIFAX)

AN AUDITOR'S CERTIFICATE

ISSUED BY COLLINS BARROW,

Chartered Accountants,

1600 Central Trust Tower,

Halifax, Nova Scotia

concerning NsC DIESEL POWER

INC. ("NsC Diesel")

DECLARATION

I, Frederick Black, of the City of Halifax, in the Province of Nova Scotia, do solemnly declare as follows:

1. I am the President of Logan Black and Associates ("Logan Black"), NsC Corporation Limited ("NsC Corp.") and NsC Diesel, and as such, have knowledge of the matters hereinafter deposed to.

2. Krupp MaK Maschinbau GmbH ("Krupp") owed $1,000,000 (Cdn.) to Logan Black for services rendered to Krupp.

3. That NsC Corp. agreed to loan $1,000,000 (Cdn.), which Krupp was advancing to Logan Black in satisfaction of the above-mentioned debt, to NsC Diesel by way of subordinated shareholder's loan.

4. I instructed Krupp to deposit $1,000,000 (Cdn.) to the account of NsC Diesel on February 16, 1989 on behalf of and for the benefit of NsC Corp.

5. A transfer of $999,990 (Cdn.) occurred by way of wire transfer from Krupp through the Deutschee Bank (Toronto) and was subsequently transferred by wire transfer to the Bank of Nova Scotia in Halifax to the account of NsC Diesel.

6. NsC Corp. entered into a subordination and postponement of claim agreement on March 8, 1989, a copy of which is attached hereto as Schedule "A".

7. The subordination and postponement of claim agreement remains in full force and effect and I confirm that NsC Corp. loaned in excess of $1,000,000 (Cdn.) to NsC Diesel and a minimum of $1,000,000 (Cdn.) is outstanding and owed by NsC Diesel to Nsc Corp. and will not be repaid except in compliance with the subordination and postponement of claim agreement.

8. I hereby acknowledge and confirm to the best of my knowledge and belief that the foregoing statements are true and correct as of the date hereof and I acknowledge that Collins Barrows is relying on this declaration to complete its investigation of NsC Diesel.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing it has the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

[111] The Postponement of Claim by NsC Corporation Limited (which Mr. Burgar testified owned all shares of NsC) provided that no repayment of interest or debt or obligation owing to it by NsC would be accepted if the result were to reduce the equity in NsC to less than $5,000,000.00 Canadian.

[112] Mr. Burgar testified that he prepared the Statutory Declaration based upon information given to him by Mr. Black, who swore to its truth in his presence. Mr. Burgar described sending the Statutory Declaration to Collins Barrow, receiving that firm's certificate (Exhibit 24) shortly thereafter, and then relaying it to ABN's counsel.

[113] Mr. Burgar stated that the postponement agreement was generally in ACOA standard form, and he did not recall it being provided by his firm.

C. ANALYSIS AND CONCLUSION COUNT NO. 2

[114] **The evidence establishes that the ABN advanced approximately $6,000,000.00 to NsC Diesel based upon the understanding that $5,000,000.00 equity had been injected into the company, $4,000,000.00 resulting from the technology transfer arrangement (which is not in issue) with the balance being the $1 M Transfer. The information provided by Mr. Black in the Statutory Declaration, which was relied upon by Collins Barrow to produce the Certificate, provided the assurance ABN required. The Statutory Declaration refers to the $1 M Transfer, specifying the date of the transaction in para. 4. Collins Barrow issued the Certificate, and ABN advanced the loan relying on the information in the Statutory Declaration.**

[115] **The $1 M Transfer is the only source of the $1M equity referred to in the Statutory Declaration, and no evidence was offered to establish that the final $1,000,000 equity required to fulfill the ABN Loan condition precedent was available from any other source.**

[116] For reasons set out during consideration of Count # 1, I have found that the $1 M Transfer was a loan from MaK to NsC. That loan does not meet the requirements of an equity contribution as defined in the ABN Loan Agreement. It is not an amount paid up on shares, contributed surplus, or retained earnings. The only loans permitted to be included as equity are those which are subordinated to NsC's debt to ABN, and there is no evidence that any such subordination had been provided by MaK with respect to the $1 M Transfer.

[117] NsC's Banking records, which were provided as Exhibit 70 during the testimony of Randy Hartlin, as well as Exhibit # 78, the RCMP analysis of the NsC Bank account, do not disclose any other payments by MaK to NsC nor any involvement of NsC Corporation in the $1 M Transfer. Examination of NsC's banking records, between the opening of its account at Bank of Nova Scotia, September 22nd, 1988 and March 9th, 1989, the date the accused swore the Statutory Declaration, does not support Mr. Black's statement in paragraph 3 that NsC Corp loaned in excess of $1,000,000.00 to NsC. Those records do not disclose any funds flowing from NsC Corp. to NsC; on the contrary, they disclose a steady

movement of monies in the other direction, from NsC to NsC Corp. as follows:

September 22, 1988	**$ 20,000**
October 19, 1988,	**$ 395,000**
November 18, 1988	**$ 143,000**
February 16, 1989	**$ 300,000**
February 28, 1989	**$ 35,000**
TOTAL	**$ 893,000**

[118] I find that Collins Barrow issued its Certificate and funds were advanced by ABN to NsC based upon the following misrepresentations made by the Accused in the Statutory Declaration:

1) Para. 2: MaK did not owe $1,000,000.00 (Cdn.) for services rendered

(2) Para. 3 – the evidence does not establish that NsC Corporation agreed to loan $1 Million to NsC.

(3) Para. 4 – the evidence does not support Mr. Black's statement that he instructed MaK to make the $1 M Transfer to NsC on

behalf of NsC Corp. On the contrary, the evidence establishes that the Accused obtained the $1 M Transfer from MaK by representing that the funds would be used by NsC to pay costs related to building, engineering, excavation and settlement of Siemens account.

[119] The premise upon which the statements contained in the Subordination Agreement attached to the Statutory Declaration were based – that NsC was indebted to NsC Corp - are contrary to the evidence, which shows NsC providing funds to NsC Corporation, rather than NsC Corporation loaning to NsC as stated in para. 7 of the Statutory Declaration.

[120] False misrepresentations in the Statutory Declaration misled Collins Barrow, who then incorrectly stated in the Collins Barrow Certificate and accompanying Schedule that the transfer of $1,000,000.00 to the NsC account constituted a subordinated loan from NsC Corp in compliance with the $1,000,000.00 component of the $5,000,000.00 equity requirement.

[121] The accused's misrepresentation in the Statutory Declaration, relied upon by Collins Barrow, ultimately caused ABN , relying in turn on the Collins Barrow Certificate, to believe a $1,000,000.00 equity investment had been made. The Crown established through the evidence of Mr. Merbis that ABN Bank loaned approximately $6,000,000.00 to NsC based upon the Collins Barrow Certificate. The false statements by the Accused in the Statutory Declaration accordingly deprived ABN Bank of money loaned, which the evidence established has not been repaid.

[122] The accused was personally aware of all aspects of the $1 M Transfer, the affairs of NsC and NsC Corporation and NsC's dealings with MaK. The prosecution has established beyond a reasonable doubt that Mr. Black had subjective knowledge of the prohibited act and knew that the consequence of swearing the false Statutory Declaration could (and would) be deprivation of ABN's funds in excess of $5,000.

[123] The crown has accordingly established beyond a reasonable doubt the accused's guilt with respect to Count # 2.

V. COUNT # 3 ALLEGED FRAUD UPON ACOA

A. THE CHARGE

[124] The third charge against Mr. Black is identical to the second, except that ACOA instead of ABN is the party allegedly defrauded as a result of misrepresenting the $1 M Transfer to be an equity investment when it was a loan.

B. THE FACTS

[125] An equity infusion of $5,000,000.00 was also a condition precedent to ACOA's participation in the financing of the Sheet Harbour Project. ACOA's involvement in those financing arrangements was two-fold – providing a repayable contribution in excess of $5,000,000.00, and insuring 85% of the ABN loan. The ABN loan insurance aspect is not relevant to the charge against Mr. Black, which relates to the equity infusion requirement with respect to the repayable contribution.

[126] The arrangements concerning the ACOA Financing were described during the testimony of Tony Purchase, who was the ACOA Account Manager assigned to NsC, and Stewart MacDonald, ACOA's Program Director. NsC sought financial assistance for the Sheet Harbour Project from ACOA during 1988, and on January 30th 1989, ACOA offered to provide NsC a repayable contribution to the project in excess of

$5,000,000.00. That offer, Exhibit # 22 was accepted by written endorsement signed by the Accused the same day. The offer letter contained the following para., numbered 5.01(a) :

> **The Applicant shall attain equity, satisfactory to the Minister in the total amount of $ 5,000,000 on or before the commencement of commercial production of the facility established as described in Annex 1, and maintain this level of equity until the end of the controlled period.**

[127] The definition of "Equity" applicable to all ACOA projects at that time was contained in a document entitled <u>ACOA Action Program Element II, Terms and Condition for Contribution to Projects"</u> Trial Exhibit # 19. In Part 1 of those terms and conditions, "Equity" is defined as follows;

> **Equity means, in relation to an applicant, the aggregate of**
> **(a) the applicant's**
> **(i) share capital,**
> **(ii) proprietor's capital accounts, or**
> **(iii) partner's capital accounts,**
> **(b) the applicant's earned, contributed or other surplus,**
> **(c) the applicant's deficit accounts not considering operational losses allowed by the Minister;**
> **(d) loans to the applicant by shareholders if the loans are subordinated to all other liabilities for a period specified by the Minister, and**
> **(e) where the Minister agrees, loans to the applicant by persons other than shareholders, if the loans are subordinate to all other liabilities for a period specified by the Minister,**
> **less any amounts included in paragraphs (a) to (e) that, in the opinion of the Minister, unreasonably inflate net worth.**

[128] ACOA's offer to NsC was made following extended discussions between Mr. Purchase and Mr. Black and after formal written application, executed by Mr. Black, was submitted on NsC's behalf.

[129] Both Mr. Purchase and Mr. MacDonald testified that the equity injection by NsC was an absolute requirement for the ACOA financing – Mr. Purchase explained that if condition 5.01 (a) of the Offer were not met, that the ACOA financing would not proceed. ACOA understood that a part of the equity infusion would involve the value of technology transferred from MaK but did not specify the exact form it had to take.

[130] Mr. Purchase and Mr. MacDonald testified that ACOA relied absolutely on the Collins Barrow Certificate as confirmation that the ACOA equity requirement had been met. Upon accepting of the Collins Barrow Certificate, ACOA made an advance to NsC later in 1989 in an approximate amount of 2.6 million dollars which has not been repaid. Mr. MacDonald's evidence was that ACOA's acceptance of the Collins Barrow Certificate included reliance that one million dollar's equity had been injected into NsC in the manner described in the Statutory Declaration.

C ANALYSIS AND CONCLUSION - COUNT NO. 3

[131] Mr. Black misrepresented in the Statutory Declaration the basis upon which the $1 M Transfer was made, and the Statutory Declaration contained the false statements previously described during consideration of Count # 2. Those statements constitute a fraudulent act by the accused upon which NsC's auditors relied when issuing the Collins Barrow Certificate, which ACOA in turn relied upon for confirmation that the equity required for the ACOA financing had been provided. The $1M Transfer,

which I have found to be a loan from MaK, did not quality as NsC equity as that term is defined in the relevant ACOA documentation. As in the case of ABN in Count # 2, ACOA in Count # 3 suffered deprivation as a result of the fraudulent statements made by Mr. Black when ACOA contributed financing to NsC Diesel, which it would not have done had it known the $1M Transfer was not an equity injection.

[132] The Accused was the directing mind of NsC, the false statements in the Statutory Declaration were made by the Accused, he negotiated the contracts, he sought the ACOA advance, managed NsC's financial affairs and knew the advance was made. Mr. Black had the necessary *mens rea* required to commit the offence of fraud – he had subjective knowledge of both the prohibited act and the consequence that it could (and did) deprive ACOA of loan proceeds advanced in excess of 2 million dollars. Although actual economic loss is not an essential element of fraud, in this case ACOA was not only put at risk, but suffered actual financial loss when funds advanced were not repaid.

[133] The crown has established beyond a reasonable doubt the Accused's guilt with respect to the charge contained in Count No. 3.

J.