

NOVA SCOTIA COURT OF APPEAL

Cite as NsC Corporation v. ABN Amro Bank Canada, 1993 NSCA 1

BETWEEN:

NsC CORPORATION LIMITED	)	Frederick W.L. Black
	)	for the Applicant/Appellant
)	
Applicant/ Appellant	)	Tim Hill
	)	for the Respondent,
	)	Ernst & Young Inc.
)	
- and -	)	David G. Coles
	)	for the Respondents,
	)	ABN AMRO Bank Canada
	)	and Boyne Clarke
)	
ABN AMRO BANK CANADA, ERNST & YOUNG INC., BOYNE CLARKE, KRUPP Delphus Caldwell	)	Thomas MacDonald and
MAK MASCHINENBAU GMBH and KRUPP MAK DIESEL INC.))
	)	for the Respondents,
	)	Krupp MaK Maschinenbau
	)	GmbH and Krupp MaK Diesel
Respondents	)	Inc.
)	
	)	Alan Hayman
	)	for the Official Receiver
	)	(watching counsel)
)	
	)	Application Heard:
	)	February 18, 1993
)	
	)	Decision Delivered:
	)	February 18, 1993

BEFORE THE HONOURABLE MADAM JUSTICE ROSCOE, IN CHAMBERS

ROSCOE, J.A. (in Chambers)

This is an application made by NsC Corporation Limited to set down the hearing of an appeal from five interlocutory orders made in Chambers as follows:

1. Hallett, J.A., April 9, 1992
2. Roscoe, J., April 28, 1992
3. Glube, C.J., June 4, 1992
4. Tidman, J., July 21, 1992
5. Davison, J., September 1, 1992.

Mr. Black, on behalf of NsC Corporation Limited, filed a notice of appeal of these five decisions on February 11, 1993 and this morning seeks to have the appeal set down. He has also filed an application for leave to extend the time for appealing those decisions. The application brought by NsC Corporation is opposed by the ABN Bank, by the Krupp companies, and by the trustee, Ernst & Young, and they each bring an application to quash the notice of appeal.

The test for granting an extension of time for appeal is as set out in the decision of this Court in **Maritime Co-op Services Ltd. v. Maritime Processing Co. Ltd.** (1979), 32 N.S.R. (2d) at p. 71, as summarized in Nova Scotia Annotated Rules of Practice (Ehrlich) at p. 308:

" The time period for filing a notice of appeal should only be extended where:

(1) The appeal has sufficient merit, on the basis that it is arguable that the trial judge made a clear error in his perception and evaluation of the evidence;

(2) There was a **bona fide** intention to appeal while the right to appeal existed;

(3) A reasonable excuse for the delay in launching the appeal is advanced."

In this case the time limit for appealing these various decisions expired, since they were interlocutory orders, ten days after each of the orders, so as pointed out by Mr. MacDonald, each of these is more than 100 days late and the oldest one is almost ten months late.

The reason given this morning, or the explanation for the delay, if I've understood it properly, appears to be based on an oral decision given September 28, 1992 by Mr. Justice Tidman in which he ordered that Ernst & Young be represented by independent counsel because of a conflict of interest. Mr. Black is saying, based on that decision, all these other decisions are in error and that had each of the other five judges known, or agreed, that there was a conflict of interest between ABN Bank and Ernst & Young, that these decisions would have been different. Even if that were the case, and I'm not accepting that that is the case, that still does not explain the delay from September 28 until today, except that Mr. Black says that that decision was appealed and it was not until last week that the appeal from the decision of Justice Tidman was abandoned or discontinued and basically Mr. Black is saying that the time starts to run from last week.

I can't accept any of that. The main thing that is lacking in this application to set the matter down is an indication of some intention to appeal before the time for appealing had expired and I have absolutely no indication of that before me.

Mr. Justice Tidman's decision is not retroactive. It speaks of a conflict existing at that time and requires Ernst & Young to have independent counsel for future applications, which apparently it has done. It has obtained independent counsel from the date of Justice Tidman's decision or order.

I do not see any merit in the grounds of appeal and I would dismiss the application to extend the time for setting the matter down for appeal and grant the applications of the three respondents to quash the notice of appeal. I would order costs payable by the appellant, who is NsC Corporation Limited, to each of the three respondents who have been represented, that is,

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ABN Bank, the Krupp companies, and Ernst & Young Inc., each in the amount of \$750.00 and payable forthwith.

J.A.