

**NOVA SCOTIA COURT OF APPEAL**

Cite as: Black v. Ernst & Young Inc., 1993 NSCA 8

**BETWEEN:**

FREDERICK W.L. BLACK and  
NsC CORPORATION LIMITED

Applicants/  
Appellants

- and -

ERNST & YOUNG INC.

Respondent

Maschinenbau

)  
)  
) Frederick W.L. Black  
appeared in person

)  
) Tim Hill  
for Ernst & Young Inc.

)  
) David G. Coles  
for ABN AMRO Bank Canada

)  
) Thomas MacDonald and  
Delphus Caldwell  
for Krupp MaK

)  
) GmbH and Krupp MaK Diesel  
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 by the appellants for a stay of the effect of a decision of Justice Boudreau dated February 12, 1993. No order has been issued yet in respect of that decision.

Justice Boudreau, in his decision, granted the application of the trustee in bankruptcy for an order preventing Mr. Frederick Black from continuing to appear as counsel for NsC Corporation Limited in the bankruptcy proceeding concerning NsC Diesel Power Incorporated. The appeal of that decision is set to be heard in this Court on June 3, 1993.

The proper test for granting a stay is set out by Justice Hallett in **Fulton Insurance Agencies Limited v. Purdy** (1990), 100 N.S.R. (2d) 341 where he stated at pp. 346-7:

" In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

- (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
- (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case."

I find the appellant has not satisfied the primary test. Although there is possibly an arguable point on the appeal, there is no evidence before me that the appellant will suffer irreparable harm if the stay is not granted. However, I do find that the appellant has met the secondary test; that is, that there are exceptional circumstances in this case that would make it fit and just to grant the stay. The reasons for granting the stay in this case are very similar to those in **Fulton Insurance**; firstly, this is a judgment on an interlocutory matter. The main proceeding has yet to be tried. Secondly, there are ongoing proceedings, not only in the bankruptcy but in related actions. To not grant a stay of the interlocutory decision could, in effect, be a stay of the whole proceeding pending the appeal of this matter or result in the proceeding continuing without one of the parties having representation.

Therefore I will order that the effect of the decision of Justice Boudreau dated February 12, 1993 be stayed pending the determination of the appeal to be heard on June 3, 1993. There will be no costs on this application.

J.A.