NOVA SCOTIA COURT OF APPEAL

Citation: ***Meister v. Coyle***, 2011 NSCA 119

Date: 20111220
Docket: CA 335866
Registry: Halifax

Between:

Charles Benjamin Meister

Appellant

v.

Michael Vaughan Coyle

Respondent

Judge(s):	MacDonald, C.J.N.S.; Oland and Farrar, JJ.A.
Appeal Heard:	September 15, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Farrar, J.A. concurring.
Counsel:	David S. Green, for the appellant Michael J. Wood, Q.C., and Jason Cooke, for the respondent

Reasons for judgment:

[1] In this proceeding, the appellant Charles Meister maintains that the respondent lawyer, Michael Coyle, was professionally negligent when he represented the appellant in a criminal proceeding. He argues that, in finding that this was not the case, the trial judge erred.

[2] The appellant was a school bus driver. On March 1, 1994 he was driving an empty bus when he came upon the scene of an accident. Mr. Meister then collided with a car, which tragically resulted in the deaths of two people in that car. He was charged with two counts of dangerous driving causing death pursuant to s. 249(4) of the *Criminal Code of Canada*.

[3] Mr. Coyle represented the appellant at the preliminary inquiry and at his trial in 1995 before a judge and jury. At the conclusion of the trial, the jury found Mr. Meister guilty on both counts.

[4] The appellant retained different counsel to conduct his appeal. In 1997 this court overturned the convictions and ordered a new trial. See *R. v. Meister*, [1997] N.S.J. No 104, 1997 NSCA 48 (Q.L.). At the start of the new criminal trial later that year, the Crown withdrew the indictment and all charges against the appellant were dismissed.

[5] In 2002, Mr. Meister sued Mr. Coyle for professional negligence and breach of contract. Both claims were based on the respondent's failure to object to the admission of certain evidence which the Court of Appeal had found to be inadmissible. In her decision dated April 4, 2010 and reported as 2010 NSSC 125, Smith, A.C.J. of the Nova Scotia Supreme Court dismissed his action. The appellant appeals her Order dated August 10, 2010.

[6] For the reasons which I will develop, I would dismiss the appeal.

Facts

[7] The accident in which Mr. Meister was involved happened on Highway 103 which leads from Halifax to Bridgewater. It occurred at approximately 6:10 a.m. on March 1, 1994. It was just starting to get light; the sun did not rise that day

until 6:54 a.m. Road conditions were described as very good. There was no evidence to suggest that the appellant was impaired by drugs or alcohol, or that he was driving erratically or at an excessive speed.

[8] Before the accident, a truck caught fire and pulled off the highway onto the north shoulder of the road. Another vehicle headed in the same direction struck the side of the burning truck. Three other cars had stopped, on the south side of the highway.

[9] Mr. Meister was driving in the southerly lane of the highway. His bus came upon this confusing scene with a truck on fire, smoke and cars on both sides of the highway, and collided with a Chrysler New Yorker. Two of the car's three occupants died. None of the drivers of the vehicles on the sides of the highway saw the Chrysler before the bus struck it. Witnesses testified they saw Mr. Meister come out of the bus and heard him say that he was "looking at the truck" on fire and asked "Where'd the car came from".

[10] Cst. Joseph Thivierge, a traffic analyst with the R.C.M.P., was called to the scene the day of the accident. It was his first case as an accident reconstructionist. He videotaped the scene and took various measurements and photographs.

[11] Six weeks later, the constable returned and tried to "reconstruct" or "re-enact" the scene in order to determine when various vehicles would have been visible to the appellant in his bus and whether there was enough time to stop. In doing so, he assumed that the Chrysler was stationary when struck by the bus driven by the appellant. Cst. Thivierge determined that a bus driver could see the Chrysler from 300 metres and that, at a speed of 90 kilometers per hour, the bus could travel for 8.6 seconds and stop without hitting the Chrysler. At 59 kilometres per hour, it could travel for 15.7 seconds and stop without colliding with that vehicle.

[12] The Crown's theory was that the Chrysler was not moving at the time of the collision, the appellant had had plenty of time to see it and to respond, there was more than momentary inattention on his part, and his failure to pay attention created a marked departure which supported the dangerous driving charges.

[13] While the accident had taken place before sunrise, the Thivierge re-enactment was done in bright sunshine at approximately 3 o'clock in the afternoon. It did not portray all of the vehicles and persons involved. Finally, and most importantly, there was no factual foundation for the assumption that the Chrysler was stopped prior to the collision with the bus.

[14] A preliminary inquiry was held in September 1994. At its end, the respondent argued that there was insufficient evidence upon which a properly instructed jury acting judicially could convict his client. The judge rejected his submissions and the appellant was committed to stand trial.

[15] Justice Donald Hall presided at the trial by judge and jury. Crown counsel referenced the re-enactment video in his opening address. During the trial, the Crown called Cst. Thivierge as an expert witness. The video was played during the constable's direct evidence and he gave opinion evidence.

[16] The respondent did not object at the pre-trial, or at the trial itself, to the admission of the videotape re-enactment, the still photographs of the re-enactment, or the opinions given by the constable concerning the time that a bus driver would have had to see the Chrysler and stop his vehicle. He did not ask for a *voir dire* or evidentiary hearing to determine the admissibility of Cst. Thivierge's material and opinion.

[17] At trial, the respondent cross-examined Cst. Thivierge to highlight the flaws in his evidence and thus in the Crown's case. He was able to elicit from that expert witness that the atmospheric and lighting conditions at the time of the accident were quite different from those in his re-enactment, his calculations were based on the stationery vehicle theory, and there was no evidence to support that theory. Moreover, he obtained an acknowledgement from the constable that the time the appellant might have had to see and avoid the collision with the Chrysler was not as he had portrayed in his evidence in chief.

[18] At the close of the Crown's case, the respondent made a motion for a directed verdict on the basis that the Crown had failed to adduce evidence on which a properly instructed jury could convict his client for dangerous driving. Justice Hall declined to direct the verdict.

[19] The respondent called his expert witness, Kenneth Zwicker, a recently retired R.C.M.P. officer with a very extensive background in accident reconstruction. Mr. Zwicker presented an alternate theory as to what had happened at the time Mr. Meister's bus collided with the Chrysler, and reaction/response times considerably shorter than those put forward by Cst. Thivierge. The appellant was not called to testify.

[20] The theory of the Crown was that when driving his bus, the appellant had been careless and inattentive for a prolonged period which amounted to a marked departure from the norm. The theory of the defence was that the Thivierge analysis was seriously flawed and based on assumptions such as the stationary vehicle scenario which had no factual foundation, and the evidence of its accident reconstructionist showed that it was at least reasonable to conclude that the accident happened considerably faster than the Crown claimed. As a result, the evidence did not prove beyond a reasonable doubt that the appellant's driving amounted to a marked departure.

[21] In his charge to the jury, Justice Hall stated that, in his opinion, the theory put forward by the defence was more reasonable than that put forward by the Crown. The Crown objected and sought a recharge. The judge refused to recharge.

[22] At the conclusion of the trial, the jury found the appellant guilty of both counts of dangerous driving.

[23] In 1997 this court quashed Mr. Meister's convictions and ordered a new trial. It held that, a sufficient factual basis not having been established, the trial judge had erred by allowing into evidence Cst. Thivierge's video re-enactment of the accident and opinion. Pugsley, J.A., writing for the court, stated:

> 44 The Crown's theory was simply not responsive to the facts developed by the Crown. The theory, and the demonstrative evidence supporting it, were misleading. It must have distracted the jury from the real issues in the case.
>
> 45 The evidence should not have been introduced by the Crown, nor should counsel have referred to the theory in summation.
>
> 46 <u>Defence counsel should have raised a timely objection.</u>

> 47 With respect, the trial judge erred when he failed to strike the offending evidence, and further erred when he failed to direct the jury to ignore the evidence completely. (Emphasis added)

[24] The appellant commenced proceedings against his trial counsel in 2002. Among other things, he claimed that his conviction was the result of the respondent's negligent advice and actions, including his failure to object to the admission into evidence of Cst. Thivierge's opinion and his video re-enactment.

The Trial Judge's Decision

[25] During the four day trial in the summer of 2009, the trial judge heard evidence given by the appellant, his son, the respondent and an expert witness for each of the parties.

[26] The respondent testified that, after graduating from law school in 1987 and articling, he did "purely litigation work, both criminal and civil litigation and appellate work." He was his firm's primary criminal law practitioner, sixty to seventy per cent of his cases were criminal cases, and he had conducted "quite a number of jury trials."

[27] According to his evidence, the respondent had received a copy of the Thivierge re-enactment videotape some time prior to the preliminary inquiry. His initial reaction was that it was "outrageous". It clearly did not depict "in any way, shape or form" the scene as it would have appeared to the appellant on the day and time in question. Following the preliminary inquiry, the respondent knew that, not only had Cst. Thivierge made his calculations based on the assumption that the Chrysler was stationary when struck by the appellant's bus, but also that none of the Crown witnesses could say that this had been the case. The Crown had no evidence to support its stationary Chrysler theory.

[28] To the respondent, the videotape appeared to be "a wonderful illustration of the Crown's stopped vehicle theory", which he knew was flawed and wouldn't hold up. His concern was that if the Crown was deprived of the opportunity to put in its flawed stationary car theory, it might revert to another theory. He suggested that the Crown could have advanced what he called "the flaming truck theory" to which the constable had alluded.

[29] The respondent did not agree that, if he had made a motion to exclude, it was certain that the judge would have ruled Cst. Thivierge's evidence as inadmissible. It was his view that, as long as it was not introduced as a true and accurate depiction of the March 1, 1994 accident, the video re-enactment was admissible. He added that the officer's evidence included items that helped his client's case, such as skid marks which showed an effort to stop the bus.

[30] According to the respondent, his cross-examination of Cst. Thivierge was "quite successful." He was also able to put in a pretty effective case from Mr. Zwicker who was a considerably more qualified reconstructionist than the Crown's expert. The respondent characterized the judge's charge to the jury as "extraordinary" in the sense that he gave the jury his opinion that the defence theory was more reasonable than the Crown theory. This "very favourable charge" was "probably about as good as it gets." He was very disappointed with the jury's guilty verdict, and described Mr. Meister as "devastated".

[31] Each party called a very experienced criminal law practitioner to give opinion evidence on the conduct of a criminal proceeding by a lawyer in Nova Scotia. The appellant called (now judge) Warren Zimmer. In his written report and testimony, this expert witness was of the opinion that, by failing to object to Cst. Thivierge's opinion as being without fact or foundation and therefore inadmissible, and by failing to bring to the judge's attention his failure to direct the jury that no weight should be placed on the constable's opinion evidence, the respondent had fallen below the standard of a reasonably competent counsel. In his view, there was no reason to put the video re-enactment before the jury. Allowing it in only created problems to which the defence then had to respond.

[32] The respondent's expert witness, Donald Murray, did not agree. He urged a "contextual assessment" of the case. This witness distinguished between questions of competence and strategy - the former pertains to a lawyer's compilation and presentation of evidence which has a rational connection to the particular arguments or submission he wants to make to the trier of fact. In his view, the respondent identified a clear defence, and pursued that defence by cross-examination, calling evidence including his own expert, and setting out the conclusions he wanted the jury to reach in a coherent way. Mr. Murray took the position that everything the respondent did or did not do with respect to the video

re-enactment and opinion were strategic decisions rather than matters relating to issues of competence.

[33] This expert witness thought that there were benefits to having the enactment and opinion in evidence - the jury could see the accident scene, and they provided certain facts such as a braking effort by the appellant's bus that, since the appellant did not testify, were otherwise unavailable. Any difficulties with the constable's opinion could be, and were, properly dealt with by the respondent in his cross-examination of the expert. Mr. Murray testified that since the Crown's case was circumstantial, if the video was presented not as an accurate re-enactment but as a depiction of the scene of the accident, the judge would likely have refused any submission for its exclusion.

[34] In her decision, the trial judge reviewed the evidence and the law on when a decision made by a lawyer will be held to be a breach of the standard of care as compared to a mere error of judgment. Among the cases she considered were *Grand Anse Contracting Ltd. v MacKinnon* (1993), 121 N.S.R. (2d) 423 (N.S.S.C.), *Henderson v. Hagblom*, [2003] 7 W.W.R. 590 (Sask. C.A.), (leave to appeal to the SCC dismissed: [2004] 1 S.C.R. ix), *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.), and *Di Martino v. DeLisio* (2008), 58 C.C.L.T. (3d) 218 (Ont. Sup. Ct. J.). She correctly identified the standard of care:

> [44] I conclude from the above authorities that the standard of care owed by a lawyer to his client is that of the reasonably competent lawyer – no more – no less. Lawyers are not held to a standard of perfection nor are they responsible to ensure a certain result. They are, however, expected to represent their client in a reasonably competent manner making decisions and conducting a case within a range of reasonable, acceptable choices.
>
> [45] Trial counsel are required to make strategic decisions and exercise judgment on a regular basis. It must be remembered that the practice of law and the conduct of a trial is not a science. Answers to issues that arise during the course of a proceeding are not always clear. Sometimes the decisions and judgment calls that counsel make will be correct – other times they will be in error. They will not be liable to their client in negligence, however, unless the decision that they have made is outside the realm of acceptable possibilities in the circumstances of the case. In other words, if an ordinary competent lawyer could reasonably have made the same decision, counsel will not be liable in negligence even if the decision proves to be wrong.

> [46] In the case at bar the Defendant failed to object to evidence which has subsequently been found by the Court of Appeal to have been inadmissible. With the benefit of hindsight and, in particular, with the benefit of the Court of Appeal's comments, it is clear that the Defendant should have objected to Cst. Thivierge's opinion evidence concerning the time that the Plaintiff would have had to see the Chrysler and stop the bus without collision. It is also clear that the Defendant should have objected to the admission of the video re-enactment and the related still photographs. One must be careful, however, not to analyze this case with the benefit of hindsight. The Defendant did not have that benefit when considering how to conduct the Plaintiff's criminal trial and it would, in my view, be improper to judge the Plaintiff's actions with the Court of Appeal's conclusions in mind.

[35] The judge reviewed the expert evidence which she described as not "particularly helpful". The burden was on the appellant to satisfy her that the respondent's conduct breached the standard of care, and she was not satisfied he had established this. Later in my decision, I will examine her review of the expert evidence and her reasons. The judge dismissed the appellant's action and, in a separate costs decision reported in 2010 NSSC 320, awarded costs against him. The appellant appeals her Order dated August 10, 2010.

The Issue

[36] The sole issue on appeal is whether the judge erred in finding that the respondent's failure to object to the evidence of Cst. Thivierge did not breach the standard of care of counsel acting in a criminal proceeding.

Standard of Review

[37] Here it is acknowledged that the judge properly articulated the law of negligence in the solicitor-client context. The issue on appeal involves the judge's application of the facts to that law. This involves a question of mixed law and fact for which the standard of review is palpable and overriding error. See *Housen v. Nikolaisen,* 2002 SCC 33 at ¶ 33. Appellate courts have applied this standard in several cases involving allegations of lawyer negligence, including *Nichols v. Warner, Scarborough, Herman & Harvey,* 2009 BCCA 277 at ¶ 30 and *Mailhot v. Savoie,* 2004 NBCA 17 at ¶ 21. See also *Melara-Lopez v. Richarz,* 2009 CarswellOnt 6333 (Sup. Ct.) at ¶ 6.

Analysis

[38] The appellant's argument can be summarized as follows: The Crown attempted to admit highly prejudicial re-enactment evidence that was otherwise inadmissible because it simply had no foundation. Yet the respondent lawyer failed to object. Specifically, he should have objected to the Thivierge evidence as to the reaction/response time, which the appellant described as the heart of the Crown's case against him. There was no benefit to letting it in - all that did was put prejudicial evidence before the trier of fact which the defence would then have to try to rebut through cross-examination. Either the respondent did not know the law or, if he did know the law, his strategic choice was so wrong as to amount to negligence. The appellant says that, in granting him a new criminal trial this court in 1997 declared this evidence to be inadmissible and in the process criticized the respondent for failing to object to its admission.

[39] I will first consider the appellant's reliance on this court's earlier decision allowing his appeal from his convictions for dangerous driving. As I indicated earlier, that decision included a paragraph which reads:

> 46 Defence counsel should have raised a timely objection.

[40] It is important to realize that, in appealing his convictions, the appellant did not allege ineffective assistance of counsel. This court was <u>not</u> asked to assess the respondent's performance as defence counsel at trial. Moreover, since ineffective assistance of counsel was not included as a ground of appeal, the respondent was not provided with any notice of the appeal, any opportunity to apply for intervener status, nor any opportunity to respond or to provide evidence in regard to his conduct at trial. Not only did this court not receive any submissions from the appellant, it did not have the benefit of any evidence given by expert witnesses, such as that before the judge in the decision under appeal.

[41] In all these circumstances, the single sentence in the court's decision that "Defence counsel should have raised a timely objection" cannot be construed as a castigation which amounts to a finding that the respondent was negligent during the appellant's criminal trial. The issue of lawyer competence was not squarely before the court. It would not be fair nor appropriate to suggest that that remark significantly affects the issue of the respondent's conduct as trial counsel.

[42] The appellant then argues that the judge misinterpreted the evidence and report of its expert, Warren Zimmer. He submits that, although its expert's evidence was focussed on what a "reasonably competent counsel acting in a criminal proceeding" would do, the judge seems to have viewed his expert witness as exemplifying the gold standard for defence counsel.

[43] Support for the appellant's argument can be found in the decision under appeal. The judge began her assessment of the expert evidence by contrasting the positions of the expert witnesses called by the parties:

> [51] The Plaintiff's expert, Warren K. Zimmer, has given the opinion that reasonable counsel acting for the Plaintiff should have made timely objections to the evidence in question as noted by the Court of Appeal. The Defendant's expert, Donald C. Murray, Q.C., gave the opinion that a rational and justifiable choice was made by the Defendant not to challenge the admissibility of the Constable's opinion, the videotape and the related still photographs. Unfortunately, I did not find either opinion particularly helpful.

[44] She then stated:

> [52] Mr. Zimmer is a specialist in the field of criminal law, and in my view, is much more knowledgeable in this area than your ordinary competent solicitor. I am fully satisfied that Mr. Zimmer would have objected to the evidence in question and would have handled the Plaintiff's case in a manner different than that chosen by the Defendant. Mr. Zimmer has not satisfied me, however, that the ordinary competent solicitor (who is not a criminal law specialist) would have necessarily conducted the case in the manner suggested by him.
> (Emphasis added)

[45] The judge's references to an "ordinary competent solicitor" and a "criminal law specialist" show that she misapprehended what the appellant's expert had said. According to the record, his opinion was directed to the actions of a "reasonably competent counsel acting in a criminal proceeding," rather than a criminal law specialist.

[46] However, an examination of her decision shows that what the judge emphasised in her analysis was the fact that the evidence before her included different opinions on the admissibility of the impugned evidence.

[47] Turning to the respondent's expert, Mr. Murray, "also a criminal law specialist," the judge, while discounting certain aspects of this evidence, nonetheless found it to be instructive. Specifically, she found that reasonable competent lawyers might disagree on the admissibility of this impugned evidence:

> [55] While I may disagree with some of Mr. Murray's opinions his testimony highlights the fact that reasonable, competent professionals can and do have different opinions on the admissibility of evidence. It also highlights the fact that there are often no "right" or "wrong" answers when it comes to evidentiary issues or the conduct of a trial. Judgment calls are made by counsel whether to object to evidence or tackle its flaws in some other manner. Sometimes errors are made when exercising that judgment. As indicated, counsel will only be held liable for an error in judgment if it is outside the realm of reasonable, acceptable choices. (Emphasis added)

[48] That it was the divergence of views which led the judge to determine that the appellant had not met the burden of proof is clear by two other matters contained in her decision, namely the failure of Justice Hall at the appellant's criminal trial to raise the admissibility of Cst. Thivierge's re-enactment video and the insistence of Crown counsel at that trial that the evidence was clearly admissible. The judge reasoned:

> [57] In arriving at this decision, I have taken into consideration the fact that a very experienced trial judge presided over the Plaintiff's criminal proceeding and he, too, did not raise the issue of the admissibility of the evidence in question. Judges obviously rely on counsel to make timely objections to inadmissible evidence and they are sometimes reluctant to raise issues that counsel have not raised themselves out of a desire not to interfere with counsel's trial strategy. Ultimately, however, they are the gatekeepers of the evidence and they will raise issues with counsel that are of particular concern. The fact remains that in the case at bar the trial judge did not raise any of the issues presently complained of. This suggests to me that the situation was not as clear as it now appears to Mr. Zimmer and that what seems obvious to him would not necessarily be obvious to others conducting the trial – including an experienced trial judge. (Emphasis added)

[49] With respect, the judge's suggestion that, as gatekeeper of the evidence, the criminal trial judge should have done more does not seem entirely justified. At the outset of the trial Justice Hall could not have known what the re-enactment video contained, or that its depiction lacked factual underpinnings.

[50] That said, in the case under appeal, the respondent's expert witness was not alone in urging that the Thivierge video and opinion were admissible. As A.C.J. Smith notes this had also been the strenuous position of Crown counsel:

> [58] I have also taken note of a comment contained in the Crown's appeal factum. At para. 13 of the said factum (dealing with the videotape in question) it is stated "It can not be seriously contended that evidence of the kind given by Cst. Thivierge was not admissible". While this comment is obviously made by a party seeking to support the admissibility of the evidence, the fact that the Crown states that it could not seriously be contended that this evidence was inadmissible emphasizes the fact that the question of whether evidence is admissible is often not clear. Obviously, it *can* be contended that the evidence in question was inadmissible – three Court of Appeal judges have found that to be the case. The point is, however, that appeal counsel was of the view that the matter was beyond question – and she was wrong. I am satisfied that the matter was not as clear cut as it now appears with the benefit of hindsight and the Court of Appeal's decision. [Emphasis added]

[51] It was this analysis that led to the judge's conclusion that the appellant had not established that the respondent's conduct had breached the standard of care owed by a lawyer to his client. While she misapprehended the evidence of the appellant's expert, that misapprehension was not material to her reasoning.

[52] Next is the appellant's argument that the respondent deliberately allowed evidence to be tendered knowing full well that it was inadmissible. Yet the judge found at ¶ 49 of her decision that the respondent believed that, although flawed, the reconstruction video and Thivierge opinion were in fact admissible. Where she saw and heard the witnesses, including the respondent, under direct and cross-examination, and no palpable and overriding error has been identified in this regard, I am unable to accept this submission.

[53] The judge also said:

> [59] The suggestion was also made by the Plaintiff that the Defendant did not have a reasonable knowledge of the applicable or relevant law concerning the admissibility of the evidence in question. I have reviewed the transcript of the criminal trial as well as the *viva voce* evidence of the Defendant and I am satisfied, and I find, that the Defendant had a reasonable knowledge of the applicable law relating to these issues. He erred, however, in the application of that law to the facts of this case. That is something that can occur in any trial.

> Counsel cannot be expected to be correct in their analysis each time an evidentiary issue arises. (Emphasis added)

[54] At the hearing before us the respondent acknowledged that he made an error in judgement with his defence strategy. According to the appellant, this amounts to professional negligence.

[55] Neither party presented any case law where a lawyer's choice of strategy was tantamount to negligence. However, as the respondent acknowledges, this does not mean that such determination is impossible. Much will depend on the particular fact situation.

[56] On the facts of this case, the judge found that the respondent's failed strategy (to allow the re-enactment and opinion evidence to go before the jury without objection) did not amount to negligence. In my view, this conclusion was based on the judge's reasonable assessment of all the evidence including Mr. Murray's expert opinion that supported this conclusion. It does not reflect palpable and overriding error.

[57] Furthermore, the Thivierge video and opinion were not the sum total of the Crown's case. The Crown also presented the evidence of the witnesses at the scene of the burning truck and the collision with the Chrysler New Yorker who heard Mr. Meister say when he got out of the bus that he was "looking at the truck" on fire and asked "Where'd the car came from." The Crown could have relied on this evidence to argue that the appellant had been inattentive to a degree sufficient to constitute the marked departure necessary for dangerous driving. I also point out that the judge who presided at the preliminary inquiry refused to accept the respondent's argument that there was insufficient evidence to proceed to trial. Moreover, the criminal trial judge refused his request for a directed verdict at the close of the Crown's case. This was after Cst. Thivierge had been cross-examined and acknowledged the numerous and significant flaws in his re-enactment of the accident. These are important indicators that these judges were of the view that there was evidence on which a jury could find the appellant guilty of dangerous driving.

[58] In short, the respondent attempted a strategy that failed. With hindsight it may appear to have been a very unwise strategy. However, on the facts of this

case, the judge found that it did not represent negligence. This conclusion does not reflect palpable and overriding error and accordingly I would defer to it.

DISPOSITION

[59] I would dismiss the appeal but, on the circumstances, without costs.

Oland, J.A.

Concurred: MacDonald, C.J.N.S.

Farrar, J.A.