C.A. No. 106544

# NOVA SCOTIA COURT OF APPEAL

**Cite as: Silver v. Morris, 1995 NSCA 18**
**Chipman, Freeman and Pugsley, JJ.A.**

**BETWEEN:**

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| **CAROLYN ESTHER SILVER** | ) | G. F. Philip Romney |
| | ) | for the Appellant |
| Appellant | ) | |
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| | ) | |
| - and - | ) | |
| | ) | |
| | ) | Harry E. Wrathall, Q.C. |
| | ) | David Graves, Esq. |
| | ) | for the Respondent |
| **J. PATRICK MORRIS** ) | | |
| | ) | |
| Respondent | ) | |
| | ) | |
| | ) | Appeal Heard: |
| | ) | January 12, 1995 |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | March 14, 1995 |
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**THE COURT:** The appeal is dismissed with costs in the amount of $1,500.00, plus disbursements, per reasons for judgment of Pugsley, J.A.; Freeman, J.A., concurring and Chipman, J.A. dissenting by separate reasons.

**Pugsley, J.A.:**

Carolyn Silver, an intelligent and successful business woman, sued her lawyer, Patrick Morris, for failing to give her proper tax advice respecting the sale of her H&R Block Tax Business. The transaction was concluded by Mr. Morris in January, 1991. After a two-day trial in June, 1994, her action was dismissed. She now appeals. The principal ground is that Mr. Morris breached a duty to give competent tax advice to her, causing her a loss of approximately $50,000.

After completing Grade 8 and some upgrading through correspondence, Ms. Silver worked as a seasonal employee for H&R Block in Bridgewater from 1976 to 1980 preparing individual tax returns.

She entered into partnership with the owner of the business in 1980. She took advanced tax courses through H&R Block. She, as well, taught a basic tax course to the employees of the business. She purchased her partner's interest in 1982.

She worked long hours to increase the profit of the proprietorship from $17,000 in 1982 to almost $60,000 in 1990.

She listed the business and premises with a realtor in 1988 for sale at a combined price of $250,000. After rejecting several offers she agreed to sell for $235,000 in June of 1990.

She testified that the purchasers requested her to retain a lawyer so "they could get some agreement in writing".

The evidence establishes that s. 110.6(14)(f) of the **Income Tax Act** would have permitted Ms. Silver, if she had transferred all, or substantially all, of the assets of her proprietorship to a corporation, and then sold those shares, to take advantage of a capital gains exemption respecting the sale of shares of a small business corporation. This arrangement would have resulted in a substantial tax saving.

Ms. Silver related that she took the offer to Mr. Morris and asked him if he would represent her "in the sale of my business".

She testified that at the outset she asked him:

> "Would I save tax by incorporating? But then I rephrased the question because I told him, 'Well, I could figure the tax out myself....all I need to know is, if I incorporate, would I qualify for the Small Business Corporate Share Deduction, and he told me he didn't know anything about taxes but he could give Roger Hartling a call and find out for me."

The trial judge found Ms. Silver was not credible "on some matters. She is contradictory and vague.... After hearing all of the evidence, I do not believe that the word 'qualified' was ever used by Mrs. Silver, although she may have had it in her own mind. I have no doubt, and this is agreed to by Mrs. Silver, that Mr. Morris had indicated that he had absolutely no knowledge of tax matters."

Mr. Hartling, a well known chartered accountant in Bridgewater, was called on behalf of Ms. Silver. His evidence was accepted by the trial judge.

Mr. Hartling recalled a very short telephone conversation with Mr. Morris:

> "It was a very generic, short question to the extent that would a purchaser of a business pay more for the shares or the assets of a

> business... To which I would have responded that a purchaser would normally pay more for the assets because he would get a bump up in the cost base of those assets and be able to depreciate them, or write them off, against future income from the business. ... Having listened to what went on before, there was no questions about should somebody incorporate or did they qualify."

In the course of dismissing Ms. Silver's action the trial judge stated:

> "I am not satisfied on the balance of probabilities that Mr. Morris was retained to give tax advice. I am not satisfied on a balance of probabilities that he gave advice. I believe he said what Mr.Hartling said to him. Even if he did give tax advice, or even if he did give the advice that incorporation would not save money, which I doubt, I do not accept the fact that Mrs. Silver relied upon it. I believe she relied upon her own determination as to what was going on. I do not find a duty, I do not find a breach, and I do not find (Mr. Morris) negligent on the balance of probabilities."

Most of the issues raised by Ms. Silver on this appeal relate to findings of fact made by the trial judge.

Conclusions, based on these considerations, are normally not reversible on appeal. The scope of the principle was most recently summed up in **Toneguzzo-Norvel (Guardian Ad Litem of) v. Burnaby Hospital,** [1994] 1 S.C.R. 114, at page 121, where McLachlin J. stated:

> "It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see P. (D.) v. S. (C.), [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux-Dubé J.), and all cases cited therein, as well as Geffen v. Goodman Estate, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and Stein v. The Ship 'Kathy K', [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal."

Courts of Appeal are particularly reluctant to interfere with the decision of a trial judge, when his conclusions are based, in part, as they are here, on his assessment of the credibility of the witnesses.

In reaching the conclusion there was no duty on Mr. Morris, the trial judge noted that the tax issue, on which Ms. Silver allegedly required clarification, was a complex issue. She had greater familiarity with tax issues than Mr. Morris. Her response on discovery is revealing:

> "What was the point to discuss it with him, he told me he didn't know anything about taxes."

It was reasonable to conclude that a person with her business acumen would not have dealt with a matter of such complexity by referring it to Mr. Morris at all, let alone posing the question in a two-minute telephone conversation with Mr. Morris and being content with a two-minute response after the latter had discussed the matter with Mr. Hartling.

There is an additional matter that mitigates against Ms. Silver's submission. She accepted an offer of $235,000 for the sale of her business and building in June of 1990. This figure was significantly higher than the only previous offers she had received, namely $200,000 in the summer of 1988, and $180,000 in May of 1989. It is of interest that six months after the transaction was finalized, the new purchasers offered the business back to Ms. Silver at a figure of $190,000 and subsequently $150,000.

She rejected these offers and responded to the offerers:

> "If I wanted it, I wouldn't have sold it in the first place. And I said, 'I don't really want to go back to work and work the hours that I was working then'."

It is a reasonable inference that once having secured a firm offer of $235,000, Ms. Silver was not going to upset the apple cart by introducing new conditions.

There is one issue, however, that requires further consideration.

In the ordinary case, a solicitor retained by a client who acts in the sale of the client's business, should be alert to, and give competent advice, with respect to the tax implications arising on the sale. If not knowledgable, he should advise his client to seek advice from one who possesses the expertise.

The trial judge found:

> "I have no doubt, and this is agreed to by Ms. Silver, that Mr. Morris had absolutely no knowledge of tax matters."

The trial judge then, however, went on to observe:

> "It may have been that he should have referred her to an accountant if he was concerned, otherwise he says that sometimes he does it but he cannot recall that he did it in this particular case."

Ms. Silver's evidence on the point was very emphatic:

> "Not once did Mr. Morris ever say to me 'Well, I can recommend a good chartered accountant to you, why don't you give him a call and go sit down and talk to him'. Not once did he recommend that I go talk to an accountant myself because if he would have said that I most certainly would have went and called Roger Hartling myself and even went and sat down and talked to him."

The evidence of David Macdonald, at first glance, seems supportive of Ms. Silver's position. Mr. Macdonald, a solicitor engaged in general practice in Lunenburg since 1980, prepared a report at the request of Mr. Morris's counsel. A copy was

delivered to Ms. Silver's solicitor as the report of an expert witness, in accordance with **Civil Procedure Rule 31.08.**

Mr. Macdonald's report provided, in part:

> "In my opinion, a lawyer who is not a tax specialist and who is in general practice of law would not be expected to know whether or not a client would be entitled to qualify for the super capital gains exemption under the **Income Tax Act**, since the criteria for eligibility for that exemption are complex. The solicitor provided appropriate advice to the client when he indicated that the client should obtain advice from an accountant in this area of the transaction." (emphasis added)

Not surprisingly, Mr. Macdonald was called as a witness on behalf of Ms. Silver. He was examined in chief:

> "Q: So Mr. Macdonald, perhaps you can tell us the information that you based, made that statement that the client advised that they should seek specific tax advice?
>
> A. Yes, I believe that was Mr. Morris's evidence in the discovery, unsworn discovery examination, that I referred to ... I don't recall a specific place. ..."

(That part of Mr. Morris's pre-trial discovery tendered at trial does not support Mr. Macdonald's belief.)

Mr. Macdonald's evidence was the only expert evidence placed before the court by any practitioner in the community to establish the normal practice of the profession.

The trial judge does not make any express reference in his decision to Mr. Macdonald's testimony, or his report. Such a failure could constitute a material error if Mr. Macdonald's opinion was predicated on facts accepted by the trial judge.

I am of the opinion, however, that Mr. Macdonald's understanding of the facts was not in accordance with the facts as determined by the trial judge.

Mr. Macdonald was questioned:

> "Q. So, if I may ask you that, am I reading it from your letter that the standard that you would think a solicitor should be in Lunenburg County when asked a tax question as we are discussing here, the advice would be to seek specific tax advice from an accountant?
>
> A. I would say, yes, if they are asked a specific question. And I make a distinction between the general hypothetical type of question and a specific opinion in a specific case. In my view, while in my practice, I frequently call accountants with general questions, if I am comfortable with the area of law and the area I am dealing with. If it is something specific I would refer the client to an accountant for advice." (emphasis added)

The trial judge concluded that the question Mr. Morris was asked to pose to Mr. Hartling was not a specific question, but a general question (i.e., would a purchaser of a business pay more for the shares or the assets of a business?).

The trial judge determined further that Mr. Morris only passed on to Ms. Silver, Mr. Hartling's response to the general question.

Mr. Macdonald's opinion was not based on the facts determined by the trial judge. The omission of the trial judge to refer to Mr. Macdonald's report and testimony does not, in my opinion, constitute a material error.

Was Mr. Morris under a duty to refer Ms. Silver to a tax expert?

In the circumstances of this case, I conclude he was not.

Ms. Silver was not unsophisticated in the area. She had managed a successful business for a period of eight years to which the public were invited to bring their tax problems Mr. Morris had no knowledge in this area - a fact well known to Ms. Silver.

In addition, Ms. Silver had direct access through the H&R Block network to specialized advice on all tax issues, a network she had used in the past.

The evidence supports the conclusion that in the circumstances of this case there was no duty on Mr. Morris to advise Ms. Silver to seek advice from a lawyer or accountant who possessed tax expertise.

**Additional Ground of Appeal**

It is submitted on behalf of Ms. Silver that the trial judge erred in law in permitting the late filing of an expert accountant's report (Brian Keough) on behalf of Mr. Morris, and further erred in allowing Mr. Keough to testify at trial.

On October 27th, 1993, Mr. MacDonald's report was forwarded to Ms. Silver's solicitor with the notation that "possibly an accounting report may be presented" on behalf of Mr. Morris.

At a pre-trial telephone conference on October 28, 1993, MacAdam, J. of the Supreme Court ruled that in view of a trial date of February 4th, 1994, any further expert reports were to be completed and filed by the end of December, 1993. The

report of Mr. Keough was only forwarded to Ms. Silver's solicitor on January 11, 1994 - some eleven days after the date determined by Justice MacAdam.

Counsel for Ms. Silver raised this issue at the commencement of the trial.

The trial judge noted that the trial date of February 4th, 1994 had been postponed to June 1st, 1994, that there had been ample time for Ms. Silver's counsel to examine Mr. Keough on discovery before the commencement of trial and, accordingly, determined that the report of Mr. Keough was admissible, and that he should be permitted to testify at trial.

This court will only interfere in the exercise of a trial judge's discretion in the conduct of a trial where there has been a serious error of law or a rank case of injustice (**A.C.A. Co-operative Association Limited v. Associated Freezers of Canada Inc.** (1989) 95 N.S.R. (2d) 35) or unless "serious or substantial injustice, material injury or very great prejudice would resul**t" (Re Keddy Motor Inns Limited** (4) (1992) 110 N.S.R. (2d) 247 at 255).

In my opinion such an error, injustice or prejudice has not been established.

I would dismiss the appeal with costs in the amount of $1,500.00 plus disbursements.

Pugsley, J.A.

Concurred in:

Freeman, J.A.

**CHIPMAN, J.A.: (Dissenting)**

We must accept that the question put to the respondent was limited to whether a purchaser would pay less for shares and that the answer in the affirmative was relayed by the respondent from Hartling to the appellant. This was in the context of the respondent's disclaimer to the appellant of any expertise in income tax matters, a fact which the appellant readily acknowledged.

The question is whether any duty of care on the respondent's part arose in these circumstances and whether it was breached. I take into account the respondent's knowledge of the fact that the appellant, although not a lawyer, generally had expertise in income tax matters. The subject of income tax embraces a very broad field. The precise nature of the appellant's expertise in this context is not entirely clear. She had taken the H. & R. Block Income Tax Course which involved lectures two nights a week over a 13 week period. She also took advanced classes related to this basic course and later taught the course. She testified that she did not know the circumstances under which sale of a company's shares would qualify for the larger tax exemption available on the disposition of small business corporation shares. There is no evidence that the respondent had knowledge of her expertise, if any, in this area. The

appellant's principal function as an H. & R. Block franchisee was dealing with individual income tax returns.

In my opinion it was a material error on the part of the trial judge not to relate the report and testimony of David Macdonald, and the law generally, to the facts as he found them.

The appellant consulted the respondent as a solicitor. As the respondent put it in his evidence, she retained him "in relation to the transaction". As such, the respondent was obliged to exercise due care to see that the appellant's interests were protected. In these days it is a given that in a commercial transaction income tax considerations require expert assessment. A solicitor acting on such a transaction, if not possessing such expertise is, in my opinion, obliged to advise the client not only that such is the case but that the client should secure the expertise elsewhere. The respondent did not do this.

Was the mere fact that the client was known by the respondent to have knowledge of income tax matters sufficient to relieve the respondent of the burden to advise her to seek expert advice?

The passing on by the respondent of the expert's answer to a general question (would a purchaser pay more for shares or assets) appears to have led the trial judge to conclude that the appellant relied not on the respondent but "upon her own determination as to what was going on".

With respect I do not think the respondent's responsibilities can be so lightly dismissed. The respondent participated as a messenger in the relaying of certain information which he knew or must have known was relevant to tax considerations. The bald fact that a purchaser would pay less for shares must, on reflection, alert a reasonable professional to the fact that such information would, in and of itself, be of very little value to the client. How much less? A review of Mr. Keough's report

suggests that the difference between what would be paid for shares as opposed to assets would not be great. This is because although assets are more attractive than shares to the purchaser in that they offer an opportunity for depreciation allowances, such is less in the case of goodwill than in the case of other assets.

Having involved himself in the act of relaying fragmentary and incomplete information bearing on a tax point, it was all the more important for the respondent to advise the appellant that she should seek expert tax advice. If he had given it more than a moment's thought, he would have realized that even if the appellant was expert in this particular aspect of taxation she was obviously not getting information which would be of assistance to her. There was from this a clear warning signal to the respondent that the appellant could not be making a proper analysis of her tax position.

The respondent testified:

> "A. Well, the best I can. As soon as she started talking about super capital gains tax exemptions and words that flowed from the Income Tax Act, I immediately put up my standard defence and said, "Look, I don't know anything about income tax, I'm not the right person to talk to." And we carried on this conversation to a limited extent, very limited in my point of view because it is an area that I have no particular knowledge, or special knowledge of income tax. I distinctly remember telling her that, however, that I didn't have any knowledge whatsoever of income tax matters or tax matters generally speaking. But I remember that the conversation evolved, if you will, to the point where we were discussing whether a purchaser would be willing to pay as much for shares of an incorporated company as a purchaser would pay for the assets being transferred from a proprietorship. And that was the question that was in my mind when I called Roger Hartling. And I believe that it was Carolyn who brought this question up because, actually, I would say at that point in time my level of knowledge in these things was so minimal that I would not have really appreciated the difference as to why a purchaser would pay more or less for one or the other. But this question was prevalent in my mind, about whether a purchaser would pay as much for, one, the shares of, two, the assets of a business. I called Roger and basically my call to Roger was to confirm this notion that a purchaser would not pay as much for shares. Which Roger confirmed to me, and I called Carolyn back and said, "Roger confirms it that a purchaser will not pay as much for shares ordinarily as he would for assets." That's about, that's just about it."

The respondent indicated that when he spoke to Hartling the latter made reference to the advantage to the purchaser in terms of "bumping up and depreciation". On cross-examination the respondent further indicated that Hartling was talking to him in income tax language of a bump up and depreciation and super capital gains tax, language that the respondent said was not part of his vocabulary. He said that in dealing with the appellant and Hartling at that time, it did not stick too well with him. After talking to Hartling, he went back to the appellant with the latter's answer. He also recalled the appellant talking about super capital gains tax exemption or small business capital gains tax exemption, words which he said meant very little if anything to him at the time. He spoke in terms of talking a foreign language to somebody.

The respondent reiterated that he did not give the appellant tax advice but admitted that he was trying to facilitate a certain amount of discussion on the subject of incorporation. It is obvious from the discussions about "bumping up and depreciation" and the fact that he was dealing with a tax expert that this related to income tax considerations.

The respondent was getting into something that was too complicated for him. He was over his head. There was in these circumstances a duty to advise the appellant that she should take her inquiry to a tax expert for a full assessment. This is what a reasonable professional would have done. It would not take knowledge of income tax law in order to appreciate this general duty.

In my opinion, the trial judge understated the duty on the respondent here. He said:

> "It may have been that he should have referred her to an accountant if he was concerned; otherwise he says that sometimes he does it but he cannot recall if he did it in this particular case.
>
> In any event, the evidence of Mr. Hartling, which I accept and which is very clear, indicates that there was only one question put to him. That was a question as to whether a purchaser would pay more for assets

> or shares. That supports what Mr. Morris says generally. And I accept Mr. Hartling's evidence."
> (emphasis added)

I am satisfied that the respondent must have known that the appellant was not getting tax advice elsewhere. Although he knew the appellant was involved in an H. & R. Block franchise, he was not entitled to assume that she knew any more than he did about the capital gains exemption on the disposition of small business corporation shares. If she did, why would she rely on him to secure this information from Hartling - a tax expert - which information could have no other bearing than on the question of income tax relief?

In my respectful opinion the respondent breached his duty to advise the appellant of the need of expert tax advice. The consequences that flow from this breach of duty are adequately spelled out in Mr. Keough's report. It is a fair inference that one as astute as the appellant would have seized upon the advantage to be gained by proceeding in this manner and have negotiated or attempted to negotiate a better deal with her purchasers. She had been very tough in her negotiations with them. Even their final offer was not so tempting that she was in any hurry to accept it. When she consulted the respondent the deal was not settled, and she was giving the matter further consideration. The respondent's first letter to the solicitor for the purchaser makes clear that there was still negotiation to be done.

The loss can be assessed on the basis of the inherent probabilities. I accept the estimate of Brian Keough, the respondent's expert, that a "reasoned negotiation" regarding the price for shares would have yielded a share price of approximately $210,500. From this he concludes that the appellant's additional net after tax proceeds would have been $12,500 had she incorporated the business and sold shares. In addition he estimates that she lost an amount ranging from $0 to $15,600, the upper end of the range representing the estimated incremental out of pocket tax costs on her

unrealized capital gains as of December 28, 1993. For this I would allow $5000 damages to be added to the sum of $12,500 making a total of $17,500.

I would allow the appeal, award damages of $17,500 with costs of the trial fixed on the basis of that sum as the amount involved with reference to the application of scale 3. I would also allow disbursements at the trial as well as costs of this appeal in the amount of 40% of the trial costs plus disbursements.

J.A.