**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** R. v. Close, 2005 NSSC 351

**Date:** 20051230
**Docket:** S.Y. 226954
**Registry:** Halifax

**Between:**

Stephen Close

Appellant

- and -

Her Majesty the Queen

Respondent

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| **Judge:** | The Honourable Chief Justice Joseph P. Kennedy |
| **Heard:** | April 1, June 6, 2005, in Halifax, Nova Scotia |
| **Decision:** | December 30, 2005 |
| **Counsel:** | Joel E. Pink, Q.C. for the Appellant<br>Diane L. McGrath for the Respondent |

**By the Court:**

[1] On the 28th day of April 2004, Judge Robert M. Prince of the Provincial Court found the appellant, Stephen Close, guilty on the following offences:

> That he did, between the 1st day of January A.D. 2003 and the 15th day of March 2003, at or near Osborne Harbour, County of Shelburne, Province of Nova Scotia, did:
>
> (I) Commit an assault on Rebecca Atkinson, contrary to s. 266 of the Criminal Code;
>
> (ii) Between the 1st day of February 2004 and the 29th day of February 2004, at or near Shelburne, County of Shelburne, Province of Nova Scotia, did by word of mouth knowingly utter a threat to Rebecca Atkinson to cause bodily harm to Rebecca Atkinson, contrary to s. 264.1(1)(a) of the Criminal Code; and
>
> (iii) On or about the 1st day of February A.D. 2004 and the 29th day of February 2004, at or near Shelburne, County of Shelburne, Province of Nova Scotia, being at large on his undertaking given to a justice and being bound to comply with a condition of that undertaking directed by the justice, to wit: keep the peace and be of good behaviour, did unlawfully fail to comply with that condition, contrary to s. 145(3) of the Criminal Code.

[2] These charges had been sworn on March 5, 2004, and the Crown had proceeded summarily on all counts.

[3] Stephen Close now appeals from those convictions.

[4] The grounds of appeal as set out in the Notice of Appeal are as follows:

> **THAT** the trial was unfair because the appellant received ineffective legal representation;
>
> **THAT** as a result of receiving ineffective legal representation the appellant's rights as guaranteed under s. 7 and s. 11(d) of the *Charter* have been violated;

[5] The Crown has cross-appealed questioning the jurisdiction of the sentencing judge, an issue that I will speak to subsequently.

BACKGROUND

[6] In March 2004 the Shelburne R.C.M.P. were contacted by an employee with the victim/witness assistance program in Perth, Ontario. That employee had been working with a client named Rebecca Atkinson who was, at the time, living in Nova Scotia.

[7] Rebecca Atkinson was a complainant in a criminal matter involving the appellant Stephen Close which was upcoming for trial in Ontario.

[8] The two had been involved in a relationship that resulted in the birth of a daughter.

[9] During the Ontario investigation Atkinson had made accusations against Close that related to times when the couple had resided in Nova Scotia.

[10] Cpl. Gary White of the Shelburne RCMP contacted Rebecca Atkinson and requested she attend at their office for an interview.

[11] During the course of the interview Atkinson stated that in February of 2004 the appellant had threatened to “cut the throat of anyone who prevented him from seeing his daughter”. Atkinson said that she inquired as to whether “that included her” to which the appellant replied that it did.

[12] Subsequently Atkinson advised Cpl. White that, on a previous occasion, sometime in January or February 2003, during a heated argument, Close had

pushed her head into the wall. This assault, she alleged, had left a crack in the wall.

[13] At trial before Judge Prince the appellant was represented by David Hirtle, a member of the Nova Scotia Barristers Society.

[14] It is the position of the appellant that that legal representation was so deficient as to amount to incompetence resulting in ineffective legal assistance which caused his rights pursuant to s. 7 and s. 11(b) of the *Charter* to be violated.

THE LAW

[15] The Supreme Court of Canada has recognized the right to effective assistance of counsel as a principle of fundamental justice protected by sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

[16] In *R. v. G.D.B.*, [2000] 1 S.C.R. 520 (S.C.C.), the court held that when ineffective assistance of counsel is raised as a ground of appeal, the appellant must establish two components:

1. That trial counsel's acts or omissions constituted incompetence (the "performance component"); and
2. That a miscarriage of justice resulted from the incompetence (the "prejudice component").

[17] The general approach to be taken in assessing an ineffectiveness of counsel claim was set out by Major, J. at para. 26 :

> The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (U.S. Sup. Ct. 1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, [page 532] first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[18] The appellant acknowledges that he must be able to show incompetence on the part of trial counsel in a forum in which deference will be given to decisions made by that counsel in the course of the defence put forward and where a presumption of competence must be overcome.

[19] In *R. v. Boudreau* (1991), 105 N.S.R. (2d) 15 (N.S.C.A.) MacDonald, J.A. of this Province's Court of Appeal states at p. 19:

> Defence counsel assumes a great deal of responsibility in the conduct of a criminal case. He is called upon to make tactical decisions which he and his client must live with. It is not the function of this court to second-guess trial tactics employed by counsel.

[20] In *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) at p. 58 Doherty, J.A. outlined reasons underlying this restrained approach by appellate courts to claims of incompetency by trial counsel.

> This court, following the lead of the Supreme Court of the United States, has taken a cautious approach to claims based on the alleged incompetence of trial counsel: *R. v. McKellar* (1994), 19 O.R. (3d) 796, at p. 799 (Ont.C.A.). Such claims can be easily made. It would be a rare case where, after conviction, some aspect of defence counsel's performance could not be subjected to legitimate criticism. Convictions would be rendered all too ephemeral if they could be set aside upon the discovery of some deficiency in counsel's defence of an accused. Appeals are not intended to be forensic autopsies of counsel's performance at trial.

[21] On the other hand, Doherty, J. says at p. 57:

> The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal

> allegation is best determined by "partisan advocacy on both sides of the case": U.S. v. Cronic, 104 S. Ct. 2039 (1984), per Stevens J. at p. 2045. Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution, as well as marshal and advance the case on behalf of the defence. We further rely on a variety of procedural safeguards to maintain the requisite level of adjudicative fairness in that adversarial process. Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.

THE EVIDENCE

[22] The appellant made application to introduce fresh evidence on appeal.

[23] He sought to testify himself and have his mother testify, not to the issues before the trial judge, but rather, as to the contact he had with his counsel prior to trial.

[24] Further, he asks to be permitted to call James E. Lockyer, Q.C., a professor of law at the University of Moncton to give expert opinion evidence as to the quality of the defence provided at trial.

[25] I allowed the application, for reason given during the proceeding, and heard evidence from the appellant, his mother and the expert Lockyer.

[26] Both the appellant Close and his mother complained about restricted contact with counsel, Mr. Hirtle, prior to trial.

[27] The mother, who seems to have taken a significant role in arranging for her son's defence, said that she spoke to counsel three to five times by telephone and then met with him for a total of one and one-half hours the day before the trial.

[28] Significantly, she said that she had previously mailed to Mr. Hirtle a letter from the complainant to Close dated May 26, 2003 after the alleged assault.

[29] This letter becomes an important factor in this appeal.

[30] The appellant, Close, likewise complained about limited access to counsel prior to trial. He mentioned three telephone conversations and the one face-to-face meeting the day before trial.

[31] Professor James Lockyer produced a report and testified. He teaches both trial and appeal advocacy at University of Moncton Law School and prepares and coaches that institution's trial moot teams which have had considerable success in regional and national competitions.

[32] In preparation of his report he listened to the recording of this trial "three to four times to get the sense of it".

[33] His concluding opinion is that there was not adequate preparation skill, or judgment provided to the defence by counsel Hirtle and therefore the appellant was not provided with an "appropriate defence to the charge".

[34] He particularizes the inadequacies of the defence. I mention some of his concerns.

[35] Professor Lockyer says that counsel did not develop a "theory" of the defence which he described as an essential "roadmap" or "rudder" that directs the decisions made by the defence in preparation for and during trial.

[36] He submits that, because there was no clear strategy, the impression was created that counsel was just “going through the motion” with no objective to be obtained by direct or cross-examination.

[37] Professor Lockyer was particularly critical of counsel’s cross-examination of the complainant who he described as an “astute and capable” witness.

[38] He suggests that the Crown’s direct examination of the complainant had been focussed and “to the point” establishing the facts surrounding the three charges, based almost entirely on her testimony.

[39] It was clear, he suggests, that the complainant’s credibility would have to be undermined by the defence.

[40] In his report Professor Lockyer says this about the cross-examination of Atkinson by defence counsel:

> *(P. 9)* Defence counsel’s cross-examination lasted approximately 35 minutes.

Counsel opened his cross-examination by asking questions of the complainant as to the travels of the couple followed by the locations where they lived at different points in the relationship. At about the 4 minute mark of the cross-examination, the Crown objected, saying the questions do not relate to the charges. The judge agreed and wanted counsel to ask questions on the circumstances of the charges. It was not clear why defence counsel followed this line of questioning.

...

*(P. 10)* Counsel then spent most of the time in cross-examination questioning the complainant on various Family Court Orders including custody and protection issued by Ontario and Nova Scotia courts affecting the later stages of their relationship. Crown counsel objected as to the relevancy once again.

The judge did not understand why defence counsel was pursuing the issue of Family Court Orders and suggested they may not be relevant to the issues before the court. Defence counsel seemed to be taking the position the Family Court Orders provided a backdrop for the events relating to the charges.

...

*(P. 11)* The listener is left wondering as to why the issue of orders was pursued at all. The questions on these orders did not focus on the charges. In the case of the protection orders, the questions only served to highlight the fact that the defendant has various orders issued against him and reinforced the notion the accused has a tendency to resort to violent behaviour. The result was that the accused was put in a darker light and the attention of the court was focussed on issues remote from the charges and inconsistent with the interest of the client.

...

> *(P. 13)* Counsel's questions did not appear to be focussed, targeted, or, have specific objectives. He asked questions which would allow the witness to confirm or embellish her story. There was little control of the witness thereby allowing her opportunities to develop or explain any point she wished. He was unable to stop the witness from volunteering information that would enhance her position; an opportunity she frequently took. It is very important, in cross-examination, to control the witness. Leading questions requiring short answers would have helped the cross-examination.
>
> *(P. 14)* ... The relevance of the questions put to the witness was a constant concern of the court. The questions did not serve to mitigate the circumstances of the alleged assault. There were no questions relating to the charge of threat. The cross-examination did not advance the cause of the accused.
>
> ...
>
> *(P. 15)* ... Defence counsel did not improve his client's position, in any respect, with the cross-examination of the complainant.

[41] Lockyer testified that it was evident from an examination of the transcript that defence counsel had "no idea where he was going". He highlighted to his prejudice that his client had been the subject of protection orders.

[42] Overall, he characterized the cross-examination of the complainant as having helped her credibility.

[43] The expert was also highly critical of the defence counsel's direct examination of his own client.

*(P. 16)* Many of the questions asked by defence counsel in direct examination were vague and void of any specificity. Many began by directing the accused to provide comment on the answers made by the complainant in direct examination. For example, "You heard the comments of Rebecca Atkinson on ...; what do you say to that? The questions were often vague. Frequently the defendant repeated the question to the examiner in order to obtain some confirmation or precision as to what the examiner was looking for in terms of a response. This methodology continued throughout the direct examination. Later the accused responded to a very general question, put to him by his lawyer, by asking, "What do you mean?" The questions were often imprecise and it was unclear what defence counsel was attempting to elicit as the point of the question.

*(P. 17)* Defence counsel moved on to focus on the defendant's visitation rights and access. The judge intervened again to say the various court orders do not relate to charges before the court.

...

There was no attempt to focus the testimony of the accused. The direct examination was very loose. Most of the examination had little to do with the charges before the court. There was one question dealing with the alleged threat and two or three dealing with the alleged assault.

*(P. 19)* Credibility was a very critical issue in this case. With no witnesses, it should have been obvious that credibility was going to be the key to winning this case. Yet, the accused's demeanour was not supportive in developing credibility. The accused did not appreciate the role his demeanour could play in developing his defence. There is no reason to believe counsel spent any amount of time preparing the client for his testimony in court. It is not evident he had been instructed on the importance of demeanour in presenting testimony.

[44] As to defence counsel's closing argument, Professor Lockyer said (p. 22):

> Defence counsel's closing argument lasted 7 minutes. He began by repeating the substance of the three charges against his client. He did not deal with any points raised in evidence. He simply stated that the accused provided an explanation for the crack in the wall and he would not "recapitulate" the evidence as it had already been heard by the judge. There was no highlighting of the evidence important to his client.
>
> He said the defence was one of denial of all charges. He said the evidence of the accused was credible and it was, "deserved of belief". But he did not say why it was more credible and why it should be believed. There was no reason given as to why his client's testimony should be preferred.
>
> *(P. 23)* Defence counsel does not, in the closing argument, address the second charge of uttering a death threat. No mention of it is made. This is a serious omission.
>
> This case would be decided on the credibility of the complainant and the accused. There are two conflicting stories with no witnesses. Yet there was no effort directed by defence counsel at enhancing the credibility of his client.

[45] Central to the appellant's argument is a letter dated May 16, 2003 that was written by the complainant and addressed to Stephen Close. This document was in the hands of defence counsel well prior to trial.

[46] The letter is significant because it was written after and relatively proximate to the date of the alleged assault.

[47] It is handwritten, seven pages, and is, submits the appellant, highly relevant to the issue of the complainant's credibility, the central issue in the trial.

[48] The letter appears to be a concerted effort on the part of Rebecca Atkinson to resume and sustain a relationship with Stephen Close.

[49] She refers to the two as "soul mates" (p. 1).

[50] She writes:

> *(P. 4)* I know you are doing your best for us, that you have a big plan for our life and you are working hard towards it. Thank you for your effort.
>
> (P. 5) Thank you for not giving up on us when things are rough ...
>
> I want to work towards a life together and mutual understanding and respect.
>
> (P. 6) I love you. I respect you. I admire you. I trust you. I want you. I appreciate you.
>
> (P. 7) I believe we are meant to be. My faith has been challenged because I have felt out of control, not myself. But deep inside I believe that everything will turn out as it is supposed to.

[51] She signs, “Love Rebecca”.

[52] The appellant suggests that the letter raises issues about Atkinson’s credibility and motivation.

[53] He asks: Was this a letter written by a woman who had just, months before, been physically assaulted and was in fear of the accused?

[54] Did these allegations result when it became clear to the complainant that the relationship, that she so clearly wants, is not going to happen?

[55] Counsel Hirtle did not use the letter to cross-examine the complainant, nor attempt to introduce it through his client. It was not produced.

[56] Professor Lockyer suggests that in a so-called “he said - she said” trial that this letter could have been highly favourable to the accused.

[57] He says that in its components and as a whole, it communicates the “exact opposite of what she is saying about him on the stand”.

[58] It was Professor Lockyer's contention that the letter properly used could have compromised the credibility of the complainant to the extent that might well have produced a different result in this trial, given that it was the judge's finding as to the credibility of the complainant that resulted in the convictions.

[59] The appellant's defence counsel testified.

[60] He first spoke to pre-trial preparation, confirming that his first meeting with Close was on April 27th, 2004, the day before the trial, but said that an appointment to meet with his client on the day prior was changed by Close.

[61] He testified that in fact, there were "multiple" telephone discussions with Close and that he had spoken to his lawyer in Ontario.

[62] Defence counsel claimed that, "I most certainly did have a theory of the defence". There had been an extensive family court history between the parties. I thought that was what these criminal charges were about - an effort by the complainant to get an advantage in the battle over the child of the union.

[63] Defence counsel said he also wanted to raise other possible alternatives for the crack in the wall that the complainant said was caused by her head being pushed into it.

[64] As to the demeanour of his client, counsel said, “I warned Close about showing anger in court - told him demeanour was important that ‘everything would depend on his credibility’ that he ‘must control himself’ ”.

[65] As to the cross-examination of the complainant, counsel said “It was very frustrating, she was a very polished witness”, “I tried to get her to corroborate what I expected him to testify to - I attempted to illicit that she interacted with him after the alleged assault and before the charges.”

[66] Defence counsel spoke of the letter and explained why he hadn’t used it. “I reviewed it carefully and agonized over it.” “I knew they would be upset if I didn’t use it.” “I thought the letter made her complaint more plausible and I decided not to use it. It was my professional opinion that the letter would not help.”

FINDINGS

The First Component

[67] I have considered the performance of counsel, mindful of the deference that I must show towards the subject counsel's handling of this matter and the onus on the appellant.

[68] I accept counsel's testimony as to his pre-trial contact with his client and find no fault in that respect. If the time had been well spent it should have been sufficient.

[69] Otherwise, I agree with Professor Lockyer and counsel for the appellant, Mr. Pink, that defence counsel's performance in numerous aspects of this defence is questionable.

[70] Defence counsel says that he had developed a "theory of the case", but there is little to show that the defence was an organized effort. If he intended to show that these accusations were motivated by family court proceedings, he did not do so, or effectively explain to the trial judge what he was trying to do.

[71] I agree that the cross-examination of the complainant, which was of prime importance to the defence, was not well conducted. If not enhancing her credibility at least it did no damage to it.

[72] I noted that Judge Prince in his oral decision described the cross-examination of the complainant as “vigorous” so that it might have seemed better at trial than the transcript suggests, however “vigorous” is not synonymous with organized and accomplished.

[73] Counsel’s direct examination of his client was not successful. In the end Close did little more than deny the accusations.

[74] Direct examination could have been better prepared allowing a difficult witness to have been more forthcoming, and better addressing the specific allegations.

[75] Defence counsel's argument at closing was, as Professor Lockyer suggests, disorganized and ineffective. In fact, Mr. Hirtle acknowledged that "there are better closing arguments than I gave".

[76] I am particularly troubled that counsel made no use of the letter in presentation of this defence.

[77] It was essential to the defence that counsel successfully attack the credibility of the complainant.

[78] In this "he said she said" scenario, she was much the better witness.

[79] She was permitted to make unchallenged statements negative to the appellant.

[80] I make reference to some of the complainant's testimony.

[81] As to the assault charge in January or February 2003 she says at p. 13 of the transcript "I was worried about the safety of the child." "I was terrified...", further

at p. 17, “It’s a survival thing ...”, “My intent was to get away from the bedroom so that she (the child) would be safe”.

[82] She says generally at p. 24, “He is inherently capable of causing - physical harm.”

[83] Explaining why she didn’t complain to the R.C.M.P. she says, “because it would frustrate his access - that’s what the threat was about” “It would put me in harms way ...”

[84] The complainant is able to testify that in January or February of 2003, because of the actions of the accused, that she is “worried about the safety” of the child, that she was “terrified” that it was a “survival thing”, all without challenge.

[85] She described the accused as “inherently capable of causing physical harm” and subsequently that she believed that contact with him would “put me in harms way”.

[86] She is not asked to explain the words “I love you, respect you, trust you, want you, appreciate you” as found in the letter, written after she says she was assaulted, after she had had her head pushed into a wall, after she was “terrified” and had concerns for the “safety” of the child, after she experienced a “survival thing” all because of the alleged actions of the appellant.

[87] Counsel’s explanation for his decision not to use the letter is simply not fathomable. It is unclear to me how this letter would have “made the complaint more plausible”.

[88] This letter, as Professor Lockyer suggests, would seem to have had the potential to contradict or at least compromise important aspects of the complainant’s testimony. The testimony that convicted the accused.

[89] Judge Prince found that her evidence had the “ring of truth” her credibility was central to the convictions.

[90] It is possible, of course, that the complainant would have been able to explain the content of the letter and have maintained her credibility, however, at a

minimum, the trier of fact would have had to wonder about the motivation, about the nature of the assault allegation and if her credibility had been compromised on that one count could she have been relied upon as the only witness on the additional counts?

[91] So, while not overlooking what Professor Lockyer and Appeal counsel Joel Pink have said about other suggested inadequacies, it is the frankly the inexplicable failure to utilize this letter that ultimately causes me to conclude that the trial counsel did not exercise “reasonable professional judgment” in this matter and that that failure constituted incompetence.

The Second Component

[92] Counsel’s failure to achieve competency standards does not necessarily lead to a reversal of conviction.

[93] The ultimate purpose of the appeal is not to assess counsel’s performance, but to determine if a miscarriage of justice has occurred.

[94] Justice Doherty in *R. v. Joanisse, supra*, at p. 57:

> In articulating the test to be applied in cases where the unfairness said to flow from incompetent representation relates to the reliability of the verdict, this court has again looked to Strickland v. Washington, supra, for guidance. O'Connor J. rejected as too low a standard which would require reversal whenever it could be said that counsel's errors had "some conceivable effect on the outcome of the proceeding". She also rejected as too demanding a test which would require that the appellant show on the balance of probabilities that the result was affected by counsel's errors (at pp. 2067-8). She settled on the following, at p. 2068:
>
> > The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different A reasonable probability is a probability sufficient to undermine confidence in the outcome.

[95] I have expressed that, notwithstanding the other problems with the defence put forward in this matter, it is the decision not to use the letter that most concerns this Court.

[96] It has been my experience that the assessment of credibility, in a case such as this where corroborative evidence is lacking, is a challenge that trial judges find both difficult and troubling.

[97] If you are wrong about credibility then injustice is a probable result.

[98] I believe that a trial judge in this matter, making the most difficult finding as to the credibility of the complaint, would have wanted to consider that letter and assess its effect on the issue.

[99] It would have been hugely beneficial to a trial judge to have heard the complainant cross-examined as to the content of the letter, to hear her explanation added to the mix of evidence considered, when ultimately assessing her credibility.

[100] The letter and the testimony that would have been created as a result of its production might well have caused a trial judge concern as to the credibility of the complainant.

[101] That evidence, if produced, would have raised issues about her credibility which, after the proper judicial process was accomplished, could have resulted in a reasonable doubt as to the guilt of the appellant on those charges.

[102] I am satisfied that trial counsel's incompetence that I have found in this matter is such as to create a "reasonable probability sufficient to undermine confidence in the outcome".

[103] Having so found I direct that the charges in this matter be sent back to the Provincial Court for retrial.

[104] My findings as to counsel's competence are, of course, specific to one trial and should not be taken to reflect on his general capability.

CROSS-APPEAL

[105] The Crown cross-appealed herein and appealed the sentence imposed on the basis that the trial judge, Judge Robert Prince, did not impose the sentence.

[106] The sentence hearing was scheduled for June 23, 2004. On that date Judge Prince was attending a conference and Judge John R. Nichols was the presiding judge. He was prepared to sentence in the matter.

[107] The appellant, then represented by his current counsel, Mr. Pink, agreed to this procedure, however the Crown objected, claiming that Judge Nichols had no jurisdiction, pursuant to s. 669.2 of the *Criminal Code* or otherwise.

[108] Judge Nichols proceeded to sentence over the Crown objection. Thus the cross-appeal.

[109] Having found that the matter should be retried by the Provincial Court, I will not determine this issue.

Chief Justice Joseph P. Kennedy