

NOVA SCOTIA COURT OF APPEAL

Citation: *Ocean v. Economical Mutual Insurance Company*,
2009 NSCA 33

Date: 20090407

Docket: CA 301593

Registry: Halifax

Between:

May Ocean

Appellant/Applicant

v.

Economical Mutual Insurance Company of Canada

Respondent

Judge: The Honourable Justice M. Jill Hamilton

Application Heard: April 1, 2009, in Chambers

Held: Directions Given

Counsel: May Ocean, the appellant, in person
Patricia Mitchell, for the respondent Economical Mutual
Insurance Company of Canada

Decision:

[1] Ms. Ocean is a self-represented appellant. This is the third Chambers decision of this court dealing with her appeal. The other two decisions are reported at 2009 NSCA 9 and 2009 NSCA 24. Justice Joel E. Fichaud outlined the relevant facts in his decision:

[2] Ms. Ocean's statement of claim alleges that she was injured in a motor vehicle accident with a vehicle operated by Mr. Sullivan, who was uninsured. In December 2002, Ms. Ocean, through counsel, sued Mr. Sullivan and Ms. Ocean's insurer, Economical Mutual Insurance Company. In August 2006, Ms. Ocean's solicitor withdrew and Ms. Ocean has since represented herself.

[3] In June 2008, Ms. Ocean applied to amend her statement of claim and Economical cross applied to sever the trial of the new causes of action. According to Smith A.C.J., in the decision under appeal, during those applications "Ms. Ocean indicated that she did not feel that she is mentally capable or competent to represent herself in this proceeding". As a result of that statement, later retracted by Ms. Ocean, the judge asked Ms. Ocean to obtain a certificate of competence from her family doctor. On August 11, 2008 Ms. Ocean filed a document signed by her family doctor saying that "the above is competent to defend herself in court".

[4] The judge's decision (2008 NSSC 282, para. 6, 8) referred to statements by Ms. Ocean in various documents filed with the court which raised a concern about Ms. Ocean's competency.

[5] On September 17, 2008 the judge heard a motion by Economical whether Ms. Ocean should be directed to submit to an independent medical examination of her competence to represent herself at the trial. Economical filed an affidavit of Dr. Edwin Rosenberg, a psychiatrist, who was questioned orally at the September 17th hearing. The judge issued a decision on September 30, 2008 directing that Ms. Ocean be examined. This was followed by an order of December 15, 2008, with more detail, directing an examination by Dr. Aileen Brunet to determine Ms. Ocean's competency to represent herself in this proceeding.

[6] Ms. Ocean, representing herself, has appealed Smith A.C.J.'s order to the Court of Appeal. On January 22, 2009, Justice Oland in chambers granted a partial stay and set the dates for the filing of the appeal book and factums and a hearing date of one-half day on May 25, 2009. On March 12, 2009, Ms. Ocean applied in chambers for directions on several matters. ... This decision contains the directions on the following eight points.

[2] Following Justice Fichaud’s decision, on March 17, 2009 Ms. Ocean filed another notice of motion. At the hearing she clarified that she is seeking to have a panel of this court grant two orders: (1) that the disputed evidence and materials contained in her affidavits sworn and filed on March 17, 19, 25 and April 1, 2009 be admitted as fresh evidence or determined to be part of the appeal record or added to it (hereinafter called “fresh evidence motion”) so that they can be considered on her appeal; and (2) that the RCMP conduct an investigation and prepare a report to be admitted as fresh evidence with respect to the alleged illegal activities of the respondent and others evidenced by their activities in relation to her law suit against the respondent.

[3] She also indicated that she is seeking to have me as the Chambers judge do two things. First, she seeks an order that only the portions of certain court proceedings prior to September 17, 2008 that she wants this court to consider in connection with her appeal need to be transcribed by an official court reporter, as opposed to the whole of the proceedings. Second, she asks that Exhibit “R” to her March 17, 2009 affidavit in support of her motion, the transcript of the September 17, 2008 hearing that gave rise to the decision under appeal, also be used by the panel in connection with her appeal. This would save her the cost of recopying it to include in the appeal book.

[4] Respondent’s counsel agreed that Ms. Ocean’s fresh evidence motion should be referred to a panel and that Exhibit “R” to Ms. Ocean’s March 17, 2009 affidavit be used by the panel for the fresh evidence motion and for the appeal. She objected to my referring Ms. Ocean’s motion to order an RCMP investigation to a panel, arguing that I should dismiss this motion because this court does not have jurisdiction to make the order requested. She also objected to my ordering that only a portion of prior court proceedings be transcribed, suggesting this would be revisiting Justice Fichaud’s decision that can only be done on application to the Chief Justice pursuant to **Civil Procedure Rule 90.38**.

[5] **Fresh Evidence Motion** – I refer Ms. Ocean’s fresh evidence motion to the panel of this court that will hear Ms. Ocean’s appeal, to be heard at the same time as her appeal. Ms. Ocean’s March 17, 19 and 25 and April 1, 2009 affidavits constitute the evidence to be considered by the panel on this motion and will be considered to be Volume 1 of “Disputed Evidence and Materials,” as that term is used in Justice Fichaud’s earlier decision. If there are any documents listed in

Schedule “A” to Ms. Ocean’s March 17 affidavit that she has not included copies of in her March 17, 19, 25 or April 1 affidavits and that will not form part of the appeal book prepared in accordance with Justice Fichaud’s prior directions, copies of those documents shall be bound and included in a volume to be entitled Volume 2 of “Disputed Evidence and Materials” to be filed with the Court and served on the respondent at the same time as the appeal book, that is on or before April 14, 2009. Volume 2 must contain an index and its pages must be numbered sequentially.

[6] In addition, if any additional documents are discovered by Ms. Ocean as she completes the appeal book that she wishes the panel to consider as part of her fresh evidence motion she will make copies of these and include them in Volume 2 of “Disputed Evidence and Materials” to be filed with the appeal book.

[7] As indicated previously by Justice Fichaud, Ms. Ocean’s arguments on her fresh evidence motion to the extent they are not already included in her March 17, 19, 25 and April 1, 2009 affidavits, are to be included in her factum to be filed on or before April 14, 2009.

[8] **RCMP Investigation** – I refer Ms. Ocean’s motion regarding an RCMP investigation and report to the panel of this court that will hear her appeal, to be heard at the same time as her appeal. There is no provision in **Civil Procedure Rule 90** that authorizes me as a single judge of this court sitting in Chambers to make the order requested or dismiss this motion.

[9] **Transcripts** – The matter of the transcripts of court proceedings prior to September 17, 2009 was before Justice Fichaud previously:

[15] Sixth: Ms. Ocean says that she wishes to place before the Court of Appeal copies of transcripts of other motions heard by Smith A.C.J. I direct that any such other transcript be included in the Disputed Evidence and Materials volume. It will then be up to Ms. Ocean either to make a motion to add the transcript to the appeal record, as discussed above, or to submit that the Court of Appeal should consider this material was part of the record in the motion under appeal. Ms. Ocean should include her submissions on this matter in her factum due April 14th.

[16] Seventh: Ms. Ocean asks that, instead of having these additional transcripts prepared by an official court reporter, she be permitted to type the

transcripts herself. At one point in the hearing before me, Ms. Ocean suggested that she would prepare only those portions of the transcripts that supported her position. **When questioned, she said she would type the entire transcripts.** I deny Ms. Ocean's request that she may tender transcripts prepared other than by an official court reporter. Official court reporters are neutral to the dispute between the parties. The court is entitled to rely on that neutrality for transcription of the evidence. This appeal will be complex enough, without adding still another layer of debate between Economical and Ms. Ocean about accuracy of transcription. (Emphasis added)

[10] Ms. Ocean argued that it is too costly for her to have transcripts prepared for the whole of the proceedings. She argued that it should be satisfactory for her to provide transcripts of the portions of the proceedings that she wants to refer to at her appeal hearing, which transcripts have now been transcribed by an official court reporter and are attached to her April 1 affidavit, together with the CDs of the complete proceedings. Her argument is that if members of the panel have any questions about what happened in other parts of those proceedings, they can listen to the CDs. She indicated that she wants the panel to listen to parts of the CDs in any event to show she was ill during some of these proceedings.

[11] Counsel for the respondent argued that Justice Fichaud previously ordered Ms. Ocean to have the whole of the proceedings transcribed and that I could not revisit this as Chambers judge because **Rule 90.38** outlines the appropriate procedure to be followed when seeking review of an order of a Chambers judge and that Ms. Ocean has not followed that procedure.

[12] I am not satisfied Justice Fichaud previously directed that Ms. Ocean have the whole of the prior court proceedings transcribed. Reading the highlighted portion of ¶16 of his decision set out above satisfies me he may not have had to deal with this issue given Ms. Ocean's promise that she would prepare the whole of the transcript. Justice Fichaud's direction was that any transcripts must be prepared by an official court reporter.

[13] While I am mindful of the cost of transcripts, an issue in many appeals, I am not satisfied that proceeding with Ms. Ocean's appeal on the basis of partial transcripts and CDs as proposed by Ms. Ocean would result in the efficient conduct of her appeal. The reason transcripts are routinely required is because they afford efficient, precise and reliable access to prior proceedings both in preparation for and at the hearing of the appeal. Often what is said in one part of a proceeding is

explained or expanded by the context of the whole proceeding. Ms. Ocean has not satisfied me that her proposal would result in an efficient and just conduct of her appeal. I direct that if Ms. Ocean determines that reference to what was said in other proceedings is relevant to her appeal, transcripts of the whole of those proceedings prepared by an official court reporter will be required. They would be included in Volume 2 of “Disputed Evidence and Materials” as directed by Justice Fichaud, to be filed with the appeal book on April 14, 2009.

[14] **Exhibit “R”** – Exhibit “R” to Ms. Ocean’s March 17, 2009 affidavit, the transcript of the September 17, 2008 hearing before Associate Chief Justice Smith, will be used by the panel for the purpose of Ms. Ocean’s fresh evidence motion and for the purpose of her appeal.

[15] The respondent seeks costs on this motion noting its lack of clarity which resulted in wasted preparation time and the fact that Justice Fichaud already dealt with some of these issues previously. I agree Ms. Ocean’s motion lacked clarity resulting in wasted effort and that Justice Fichaud previously dealt with certain aspects of the fresh evidence motion. Accepting Ms. Ocean’s submission that she required further clarification, I am not persuaded that I should order costs on this motion.

Hamilton, J. A.