IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Ocean v. Economical Mutual Insurance Company, 2010 NSSC 20

Date: January 19th, 2010
Docket: Hfx No. 190673
Registry: Halifax

Between

MAY OCEAN, of White's Lake, in the Province of Nova Scotia

Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY, a body corporate, registered to carry on business in the Province of Nova Scotia and RAYMOND PATRICK SULLIVAN of Lantz, in the Province of Nova Scotia.

Defendants

Oral Decision: **January 19th, 2010 (Application to Quash Subpoenas)**

Judge: **Deborah K. Smith, Associate Chief Justice**

Heard: **January 15th, 2010 in Halifax, Nova Scotia**

Written Decision: **January 19th, 2010**

Counsel: **Christa M. Brothers and Scott R. Campbell, for the Applicant, The Economical Mutual Insurance Company**

May Ocean for the Respondent (Self-represented)

Megan Blaikie, (Watching Brief) for the Defendant, Raymond Patrick Sullivan

By the Court:

[1] This is a motion brought by the Economical Mutual Insurance Company of Canada to quash two subpoenas issued against their counsel, C. Patricia Mitchell.

[2] This action arises out of a motor vehicle accident which is said to have occurred between the Plaintiff, May Ocean and the Defendant, Raymond Sullivan. It is alleged that Mr. Sullivan was an uninsured motorist at the time of the collision. On December 5th, 2002, Ms. Ocean brought an action against Mr. Sullivan as well as the Economical Mutual Insurance Company. At the time, the action against Economical was for what is commonly known as a Section D claim.

[3] At the time that the Originating Notice (Action) and Statement of Claim was originally filed in December of 2002, Ms. Ocean was represented by counsel. In August of 2006 an Order was issued by Robertson, J. allowing Ms. Ocean's then counsel to withdraw as solicitor of record. Since that time Ms. Ocean has been representing herself in this proceeding.

[4] In June of 2008, Ms. Ocean applied to amend her Originating Notice (Action) and Statement of Claim to include a claim of negligence and bad faith against Economical. Her Application to amend was allowed by the Court but the hearing relating to these new claims against Economical was bifurcated from the hearing of the original action relating to the motor vehicle accident. The hearing of the motor vehicle accident claim is presently scheduled to commence on September 7th, 2010.

[5] Ms. Patricia Mitchell is counsel for Economical in relation to the motor vehicle accident claim. Her firm was retained by Economical on November 6th, 2003 to defend the original action filed by the Plaintiff. The Plaintiff has served Ms. Mitchell with two subpoenas and seeks to call Ms. Mitchell as a witness at the time of the first trial relating to the motor vehicle accident. Economical has applied to quash the subpoenas served on their solicitor. My decision this afternoon relates only to this initial trial relating to the accident.

[6] Our Civil Procedure Rules are silent on the issue of the quashing of a subpoena. In **Bowater Mersey Paper Co. Ltd. v. Nova Scotia (Minister of Finance)** (1991), 106 N.S.R. (2d) 416 (S.C.) Tidman, J. held that when

dealing with a motion to quash a subpoena the evidentiary burden is first on the issuer of the subpoena to establish a link of relevance between the proposed witness and the issues in the proceeding. The burden then shifts to the opposing party to show good cause why the subpoena should be quashed. His Lordship stated at ¶ 10:

> .....if the issuer establishes a link of relevance between the proposed witness and the issue in the proceedings, he is entitled prima facie to have a subpoena issued. The burden then shifts to the attacker to show good reason, such as oppressiveness or abuse of power, why the subpoena should be quashed.

[7] **Bowater Mersey**, *supra*, did not involve a subpoena issued to an opposing party's solicitor. In my view, the considerations before the court are different when a party seeks to subpoena the opposing party's counsel to testify at trial.

[8] In **R. v. Black**, 2002 NSSC 42, an accused in a criminal proceeding subpoenaed the Director of Public Prosecutions to testify at a hearing. The Director brought an application to quash the subpoena. Murphy, J. stated at ¶ 5:

> The relevant authorities establish that if the Subpoena is to be upheld, Mr. Black must establish on the balance of probabilities that it is likely that Mr. Herschorn can give evidence which is material or relevant to the issue before the Court, that being whether Mr. Black's rights under the *Charter of Rights* have been violated. See *R. v. Deveau*, [1995] N.S.J. No. 186 (N.S.S.C.), and *R. v. Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.). That threshold is not met in this case, and I have decided that the Subpoena should be quashed.

[9] In coming to his decision in **R. v. Black**, *supra,* Murphy, J. also noted that the prejudice to the administration of justice and the justice system which could result from having someone in Mr. Herschorn's position testify – far outweighed any possible probative value or benefit which might come from his evidence.

[10] More recently, the Ontario Court of Appeal dealt with the issue of the compellability of opposing counsel to testify in **R. v. 1504413 Ontario Ltd.**, 2008 ONCA 253. That case involved an alleged breach of a municipal regulation and the building of a deck without a building permit. The Court of Appeal stated at ¶ 13:

> There is abundant authority for the proposition that the practice of calling counsel for the opposing side to testify against his or her client is the exception and should be avoided whenever possible. When it is done, as in this case, involuntarily on the part of the counsel summonsed, it is highly undesirable and the court should be extremely wary of permitting it to happen.....

[11] The Court stated further at ¶ 16 and ¶ 17:

> **Whether as a matter of custom or policy, issuing a summons to counsel for the opposite party to testify against his or her client is virtually unheard of and should not be done absent the most exceptional circumstances.**
>
> At a minimum, such circumstances would require a showing of high materiality and necessity (assuming that the proposed evidence is otherwise admissible). Although not exhaustive, necessity in this context will involve considerations such as the importance of the issue for which the testimony is sought, the degree of controversy surrounding the issue, the availability of other witnesses to give the evidence or other means by which it may be accomplished (such as the filing of an agreed statement of fact), the potential disruption of the trial process and the overall integrity of the administration of justice.
>
> [Emphasis added]

[12] I am satisfied that these comments by the Ontario Court of Appeal are applicable whether a subpoena has been issued in a criminal or a civil case. The danger of interfering with the solicitor/client relationship and the risk that solicitor/client privilege may be breached exists whether the proceeding is criminal or civil in nature.

[13] That is not to suggest that lawyers are not compellable as witnesses. In **Laboratoires Servier v. Apotex Inc.**, 2008 FC 321 Snider, J. stated at ¶ 26:

> .....Apotex cited no jurisprudence where lawyers had been successfully made the subject of subpoenas. With one exception (*Zarzour,* discussed below), all of the subpoenas in those cases were quashed. This, of course, does not mean that lawyers can never be required to testify in respect of matters where they acted as legal advisors. However, in my view, it highlights the care that should be taken by the Court before a subpoena is issued that could profoundly affect the special relationship between a lawyer and client. ***Only in the clearest of cases should subpoenas be permitted that would require a lawyer to testify in respect of matters where he or she was providing advice to a client*.**
>
> [Emphasis added]

[14] The Court in **Laboratoires**, *supra*, was dealing with a civil action.

[15] I turn now to the case before me. The Plaintiff gives many reasons for wanting to call opposing counsel to testify at the trial relating to the motor vehicle accident. These reasons focus on two main areas: (1) the Plaintiff's discovery examinations and (2) the conduct of Economical and their counsel in the handling of this claim.

[16] In relation to the Plaintiff's discoveries – Ms. Ocean wants Economical's counsel to testify as to how distraught the Plaintiff apparently was when giving her discovery evidence. Further, the Plaintiff does not believe that the discovery transcripts properly reflect everything that was said at the

discoveries and she wants to call the opposing solicitor to testify as to what was said during the discovery examinations.

[17] In relation to the second area, the Plaintiff suggests that Economical's treatment of her after the accident and throughout the course of this proceeding has been "abusive" and "atrocious" and has exacerbated the injuries that the Plaintiff says that she suffered as a result of this collision including the post traumatic stress disorder that she says she suffered as a result of the accident. She is critical of the conduct of both Economical and its solicitor and wants Ms. Mitchell called to the stand so that she can "account" for her actions.

[18] Economical submits, *inter alia*, that Ms. Mitchell does not have any evidence to give that is relevant and necessary to the proceeding and that much of the evidence that Ms. Ocean seeks to obtain from Ms. Mitchell would be protected by solicitor/client privilege. It further submits that the subpoenas are oppressive and if they are allowed to stand Ms. Mitchell will be forced to withdraw as counsel after years of working on this file and Economical will be required to engage a new solicitor and will be denied counsel of their choice.

[19] I have considered the materials filed and the arguments made in relation to this motion and I am not satisfied that the proposed witness has evidence to give that is highly material and necessary (**R. v. 1504413 Ontario Ltd.**, *supra*.) Based on the materials that I have before me, I am not satisfied that the evidence that Ms. Mitchell could give concerning the discovery examinations of the Plaintiff is highly material to the matters at issue in the motor vehicle accident claim. More importantly, there were a number of other people in attendance at the Plaintiff's discovery examinations that can provide testimony concerning the Plaintiff's demeanor (to the extent that it is relevant) and what was said at the discoveries including the Plaintiff herself, the court reporter and the Plaintiff's own solicitor who was representing her at the time. Accordingly, it is not necessary for Ms. Mitchell to testify in order to present this evidence.

[20] While the Defendant's conduct in relation to this claim may be relevant in the event that it exacerbated the Plaintiff's injuries arising from the accident, I am not satisfied that the evidence that Ms. Mitchell could give in this regard is highly material and necessary. If relevant, Ms. Ocean herself can testify

as to Economical's treatment of her after the accident. It is not necessary for her to call opposing counsel to the stand in order to obtain this evidence.

[21] In light of my conclusion that Ms. Mitchell does not have evidence to give that is highly material and necessary there is no need for me to go on and consider whether there are other reasons (such as a breach of solicitor/client privilege) to quash the subpoenas. The Defendant, Economical's motion to quash the subpoenas directed to their solicitor is granted.

Deborah K. Smith
Associate Chief Justice