

**Citation:** *Gallant (Estate) v Wawanesa*, 2024 NBKB 37

**IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK**

**TRIAL DIVISION**

**JUDICIAL DISTRICT OF MONCTON**

**MC-506-2023**

**BETWEEN:**

**THE ESTATE OF THÉRÈSE GALLANT**

**PLAINTIFF**

– and –

**THE WAWANESA MUTUAL INSURANCE COMPANY**

**DEFENDANT**

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**DECISION  
(TRANSLATION)**

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**BEFORE:** Justice Maya Hamou

**DATES OF HEARING:** January 3, 2024, and February 21, 2024

**DATE OF DECISION:** February 28, 2024

**APPEARANCES:** Vincent Tremblay, counsel for the plaintiff  
Hélène Beaulieu, K.C., counsel for the defendant

[TRANSLATION]

## INTRODUCTION

1. This decision deals with a request to substitute the plaintiff in a proceeding against an insurer. More specifically, this decision addresses the context where the original plaintiff is an estate.

## FACTS

2. Thérèse Gallant owned a house located at 749 Route 133 in Boudreau West, New Brunswick (the “Property”). She passed away on April 24, 2021, and her daughter Jeanne Gallant was designated as her executrix.
3. Stéphane Gallant was the beneficiary of the Property, subject to the condition that he allows his great-uncle to reside in the house for the rest of his life.

I hereby give, devise and bequeath the house and property which I own at 749 Roue 133, Boudreau Ouest, New Brunswick, to my grandson Stéphane Gallant, with the condition that my son Alderice Gallant, can reside in the upstairs apartment for the rest of his natural life. Alderice Gallant shall be responsible for his expenses in living in the said apartment.

4. Following the death of Thérèse Gallant, the insured party named on the Wawanesa policy was identified as “Estate of Thérèse Gallant” (the “Estate”). Moreover, the Wawanesa policy named “Stéphane Gallant” as an additional insured for “contents and liability only.”
5. Around July 22, 2021, the Property was destroyed by fire.
6. On December 7, 2021, Stéphane Gallant, as an insured party, signed a representation agreement for the insured, the Estate. While I question whether the representation was authorized prior to the transfer of the Property to Stéphane Gallant, such is not the subject of this motion.
7. On October 7, 2022, the Property was transferred to Stéphane Gallant by registration of the will in the Province’s land titles system. The will had not been probated.
8. In early February 2023, Wawanesa and the insurance adjuster learned that Stéphane Gallant was not the Estate’s executor.
9. A few days later, Jeanne Gallant, executrix of the will, signed a representation agreement with the insurance adjuster on behalf of the insured, the Estate.
10. In April 2023, the Statement of Claim was filed identifying the plaintiff as being the Estate.

## Position of the parties

11. In its Notice of Motion, the Estate seeks the replacement of the plaintiff “The Estate of Thérèse Gallant” with “Stéphane Gallant” and the amendment of the style of proceeding, under Rule 5.04(2) of the *Rules of Court* of New Brunswick, N.B. Reg. 82-73 (the “Rules”).
12. Alternatively, the Estate seeks the appointment of Stéphane Gallant as litigation administrator of the Estate and the amendment of the style of proceeding under Rule 10.03(2). In the further alternative, it seeks the reconstitution of the action in a similar manner under Rule 10.03(7).
13. Wawanesa objects to the Estate’s request and specifically to the mechanism through which it is made, citing the other remedies available under Rule 16.04(c).

## ISSUES

14. Does Rule 5.04(2) allow the replacement of the plaintiff “The Estate of Thérèse Gallant” with “Stéphane Gallant”?
15. Do Rules 10.03(2) and 10.03(7) allow for the appointment of Stéphane Gallant as litigation administrator of the Estate or the reconstitution of the action in a similar manner? Is Rule 16.04(c) the appropriate mechanism in the circumstances?

## ANALYSIS

### Replacement of the plaintiff – R. 5.04(2)

16. The plaintiff requests that the plaintiff “The Estate of Thérèse Gallant” be replaced with “Stéphane Gallant” and that the style of proceeding be amended pursuant to Rule 5.04(2).

(2) At any stage of a proceeding the court may grant leave to add, delete or **substitute a party** or to correct the name of a party and **such leave shall be given, on such terms as may be just, unless prejudice will result which cannot be compensated for by costs or an adjournment.**

[Emphasis added]

17. The plaintiff relies on statutory condition 3 of section 127 of the *Insurance Act*, RSNB 1973, c. I-12, which states that the insurer shall be liable for loss or damage occurring after the change of title.

Change of Interest

3. The insurer shall be liable for loss or damage occurring after an authorized assignment under the *Bankruptcy Act* or **change of title by succession**, by operation of law, or **by death**.

[Emphasis added]

18. The plaintiff relies on the principles of interpretation of Rule 1.03(1) and (2), i.e., to secure the just, least expensive, and most expeditious determination of the proceeding on its merits.

#### 1.03 Interpretation

(1) Except where a contrary intention appears, the *Interpretation Act* and the interpretation section of the *Judicature Act* apply to these rules.

(2) These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.

19. In the Supreme Court of Canada decision *Ladouceur v Howarth*, [1974] SCR 1111, the plaintiff identified the wrong person as defendant, a typical example of a misnomer. The Court allowed the amendment, noting the general principle that the court should allow the amendment where the opposite party has not been misled or substantially injured by the error.

20. In *Dabrowski Estate v York Structural Steel Ltd. et al.* (1995), 161 NBR (2d) 305, the New Brunswick Court of Appeal upheld a motion judge's decision to substitute a defendant for another party despite the expiration of the limitation period. Despite not being able to invoke the limitation period, the defendant was, *inter alia*, aware of the specific claim being made against it, since the two companies had the same address and the same directors.

21. The defendant relies on the recent decision in court file BM-26-2019, where Justice Robichaud held that the executor can be removed only in certain circumstances. The defendant also cited *Black v Gladstone Estate*, 2005 NBQB 244, in support of the argument that courts are reluctant to interfere and remove an executor. I note that the issue in this case is not the removal or replacement of an executor, but rather the substitution of the Estate with another party.

22. In this case, Thérèse Gallant died in April 2021, the Property was destroyed in July 2021 and was transferred to Stéphane Gallant through the registration of the will in the Province's land titles system in October 2022, and the claim was filed identifying the Estate as plaintiff in April 2023.

23. Statutory condition 3 of section 127 of the *Insurance Act* came into play twice in this case: on the transfer as a result of death and on the transfer by succession.

24. The loss occurred after the title of Thérèse Gallant was vested in the Estate due to her death, pursuant to subsection 3(1) of the *Devolution of Estates Act*, RSNB 1973, c. D-9.

Devolution of real and personal property

3(1) All **real** and personal property that is vested in any person, without a right in another person to take by survivorship, shall **on his death, notwithstanding any testamentary disposition**, devolve upon and become **vested in his personal representative** from time to time as trustee for the persons entitled thereto, and subject to the payment of his debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, shall be administered, dealt with and distributed as if it were personal property not so disposed of.

[Emphasis added]

25. Subsequently, the transfer of title from the Estate to Stéphane Gallant took place “by succession,” under section 18 of the *Devolution of Estates Act*.

18 Notwithstanding anything contained in this *Act*, if a will is recorded in a Registry Office as provided by section 25 of the *Registry Act* the **recording of the will has the effect of vesting any real estate devised by the will in the person to whom it is devised**, to the extent of the interest so devised therein, but such real estate is subject to the provisions of the *Probate Court Act*.

[Emphasis added]

26. That said, at the time of the loss, the Estate included Stéphane Gallant’s right of possession of the Property, as well as Alderice Gallant’s life interest in the Property, which provided that he could reside there for the rest of his natural life. Stéphane Gallant’s right of possession of the Property was encumbered by Alderice Gallant’s condition (or rather his interest) for life. Essentially, all of Thérèse Gallant’s interests were transferred to the Estate and then to Stéphane Gallant.
27. In this case, the lawyer’s email in the Record on Motion stated that the executrix no longer wished to act in the action on behalf of the Estate, as she had no financial interest in the matter, the interest having been transferred to Stéphane Gallant. Stéphane Gallant, who is the beneficiary of the insurable interest by operation of statutory condition 3 of section 127 of the *Insurance Act*, has stated that he wishes to proceed with the litigation.
28. The insurance company was at all times aware of the interest subject to the action. It is Thérèse Gallant’s interest, which vested in the Estate and was later transferred by succession to Stéphane Gallant, which is at issue. We are talking about the same interest, which, by

operation of statutory condition 3 of section 127 of the *Insurance Act*, passes from one person to another. To claim that it is a different right of action or a different interest is to split hairs.

29. Therefore, the replacement of the plaintiff “Estate of Thérèse Gallant” with “Stéphane Gallant” and the amendment of the style of proceeding is fair and equitable in the circumstances.
30. Should the Court err on this issue, the other arguments adduced by the plaintiff and the defendant are addressed in the following sections.

### **Appointment of a litigation administrator (R. 10.03(2)) or reconstitution of the action in a similar manner (R. 10.03(7))**

31. Alternatively to its main claim, the plaintiff seeks the appointment of Stéphane Gallant as litigation administrator of the Estate under Rule 10.03(2) or the reconstitution of the action in a similar manner under Rule 10.03(7).
32. Rule 10.03(2) allows a proceeding to be commenced BY or AGAINST the personal representative or AGAINST a litigation administrator. However, rule 10.03(2) does not in itself allow for the appointment of a litigation administrator to commence a proceeding. Rule 10.03(2) does not apply in this case.

#### Proceedings Commenced by or Against the Estate

10.03(2) A proceeding commenced by or against the estate of a deceased person by naming *the estate of A.B., Deceased*, or *the personal representative of A.B., Deceased* or by any similar style of proceeding, or any proceeding where the wrong person is named as the personal representative, shall not be treated as a nullity and the court may order that the proceeding be continued **by or against the proper personal representative of the deceased or against a litigation administrator appointed for the purpose of the proceeding**, and the style of proceeding shall be amended accordingly.

[Emphasis added]

33. As for rule 10.03(7), it refers specifically to proceedings improperly constituted by or against a deceased person, in other words, the misidentification of the deceased or his or her estate. In this case, the proceeding was not improperly constituted in the name of the Estate, but rather a different person was identified in the pleadings. Therefore, Rule 10.03(7) does not apply.

#### General Power

10.03(7) A proceeding by or against a deceased person or his estate shall not be treated as a nullity because it was not properly constituted, but may be reconstituted by the court by analogy to the provisions of this rule, and this rule shall not be construed to limit in any way the generality of Rule 2.02.

### **Replacement of an executor or administrator (R. 16.04(c))**

34. The defendant argues that the remedy sought by the plaintiff is incorrect, citing the other remedies available, for example under Rule 16.04(c). The filing of an application under Rule 16.04(c) allows for the replacement of the executor or administrator.

#### 16.04 By Notice of Application

Subject to Rule 16.041, when an *Act* or rule authorizes an application or motion to the court without requiring the institution of an action, a Notice of Application (Form 16D) may be used and, in addition thereto, a proceeding may be so commenced where the relief claimed is

[...]

(c) for the removal or replacement of one or more executors, administrators or trustees, or for fixing their compensation,

[...]

35. As mentioned above, the plaintiff is not seeking to replace the executor. If that were the case, it is possible that the mechanism provided for in Rule 16.04(c) would be applicable. Additionally, the litigation administrator cannot be appointed to continue the action under Rule 10.03(2).

### **DISPOSITION**

36. The motion is granted. The plaintiff, the “Estate of Thérèse Gallant,” may amend its pleading to substitute “Stéphane Gallant” as plaintiff and may amend the style of proceeding accordingly.

37. The plaintiff is entitled to costs in the amount of \$1,500 payable by the defendant, The Wawanesa Mutual Insurance Company.

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Justice Maya Hamou  
Court of King's Bench of New Brunswick