CITATION: *Bourgoin v. MacEwen's Petroleum Inc. et al*., 2024 ONSC 4746
OTTAWA COURT FILE NO.: CV-20-74
DATE: 2024/08/27

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: BRIAN BOURGOIN

Plaintiff

AND

MACEWEN'S PETROLEUM INC., THE ESTATE OF JOHN MCGRATH, AND KANELLOS CONSULTING INC.

Defendants

BEFORE: Madam Justice S. Corthorn

COUNSEL: Danielle Ralph, for the plaintiff

No one appearing for the defendants

HEARD: August 15, 2024, by videoconference

ENDORSEMENT

Introduction

[1] The action relates to an oil spill, alleged to have occurred in October 2018 at property owned by the late Brian Bourgoin ("the Property"). The action was commenced in October 2020. Brian Bourgoin was still alive at that time. He passed away in December 2023.

[2] As a result of Brian Bourgoin's death, (a) Brian Bourgoin's interest in this proceeding passes to his estate ("the Estate"); (b) a representative must be appointed for the Estate, (c) the title of proceeding in this action requires amendment, and (d) the substantive text of the statement of claim requires amendment.

[3] To address the transmission of interest, from Brian Bourgoin to the Estate, the lawyers of record for the plaintiff ("the Firm") initially attempted initially to rely on r. 11.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("the *Rules*"). That rule provides for an order to continue to be granted on requisition to the registrar, "[w]here a transfer or transmission of the interest or liability of a party takes place while a proceeding is pending".

[4] The Firm filed a requisition and requested that the registrar issue an order to continue appointing a litigation administrator for the Estate. The registrar did not grant the order to continue. The registrar directed the Firm to prepare materials for a motion for an order to continue, including the appointment of a litigation administrator for the Estate. The motion came before the court on August 15, 2024.

[5] As the litigation administrator for the Estate, the Firm proposes the appointment of a lawyer from within their office. There are two issues with the relief requested:

1. Is there an executor or a litigation administrator for the Estate?

2. Is it appropriate to appoint a member of the Firm as litigation administrator?

Issue No. 1 – Is there an executor or administrator of the Estate?

[6] There is no evidence before the court as to whether Brian Bourgoin had a will and whether there is an executor or administrator of the Estate. Exhibit "A" to the supporting affidavit, from the lawyer proposed as the litigation administrator ("the Affidavit"), is a copy of an obituary for the late Brian Bourgoin. The obituary identifies that Brian Bourgoin was 49 years old when he died and that he is survived by family members. Those family members include his mother, a brother, two stepsisters, aunts, uncles, nieces, nephews, and cousins.

[7] First, I consider r. 9.02, which deals with proceedings *against* an estate for which there is no executor or administrator. Rule 9.02 provides as follows: "Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a litigation administrator to represent the estate for the purposes of the proceeding."

[8] It is clear from r. 9.02 that the appointment of a litigation administrator in a proceeding *against* an estate is not a matter within the discretion of a registrar – a motion is required.

[9] There is no similar rule specific to proceedings *by* an estate. The remedial provisions of r. 9.03 provide guidance as to when a litigation administrator, not an executor or administrator, may be appointed in a representative capacity for the estate of an individual plaintiff who passes away after an action is commenced:

- For example, r. 9.03(3) deals with proceedings commenced in the name of or against a deceased person (i.e., a person who died prior to the commencement of the proceeding). In that circumstance, the proceeding "shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the executor or administrator or a litigation administrator appointed for the purpose of the proceeding and the title of proceeding shall be amended accordingly."

- As another example, r. 9.03(4) deals with the replacement of a litigation administrator, appointed by the court, where there is an executor or administrator of the estate. Rule 9.03(4) provides that, "[w]here it appears that a deceased person for whom a litigation administrator has been appointed had an executor or administrator at the time of the appointment, the proceeding shall not be treated as a nullity, but the court may order that the proceeding be continued against the executor or administrator and the title of proceeding shall be amended accordingly."

[10] Rules 9.02, 9.03(3), and 9.03(4) make it clear that a litigation administrator is an appropriate representative for an estate only if there is no executor or administrator of the estate. Absent evidence to support a conclusion that there is no executor or administrator of the Estate, the court is not in a position to grant the relief requested on the motion now before it.

Issue No. 2 – Is it appropriate to appoint a member of the Firm as litigation administrator?

[11] The relief requested is for the appointment of a lawyer from the Firm as the litigation administrator for the Estate. The Affidavit addresses the death of Brian Bourgoin in December 2023. The Affidavit does not address the nature of the litigation or why it would be appropriate to appoint a lawyer from the Firm as the litigation administrator.

[12] On the return of the motion, counsel informed the court that the action is a subrogated claim, pursued by the late Brian Bourgoin's insurer. Included in the motion record is a copy of the statement of claim. It is not clear from the statement of claim whether the Property is residential or commercial property. The statement of claim alleges only that Brian Bourgoin owned the Property.

[13] Regardless of whether the policy of insurance under which a subrogated claim is being advanced is a residential or commercial policy, it is necessary to consider (a) who will be produced on behalf of the Estate for the purpose of examination for discovery, and (b) the evidence to be called at trial on behalf of the Estate.

[14] I start with the examination for discovery of the Estate. On the return of the motion, counsel advised the court that their intention is to produce a representative of the insurer for examination for discovery on behalf of the Estate. It appears that the Firm is of the view that the Estate could, without a court order, produce a representative of the insurer for examination for discovery by the defendants.

[15] Rule 31.03(1) is the rule of general application for examinations for discovery: "A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8)." A representative of the insurer is not a party to the action. To proceed as counsel suggests the Firm intends to proceed, the Estate requires an order granting it leave to produce a representative of the insurer for examination for discovery by the defendants.

[16] There is no evidence as to whether the damages claimed represent only the amount paid by the insurer to Brian Bourgoin in satisfaction of his claim, arising from the oil spill, under the subject policy. Do the damages claimed include amounts for which Brian Bourgoin was personally out of pocket, despite whatever the coverage available under the subject policy of insurance? If a portion of the damages claimed is personal to Brian Bourgoin, and now the Estate, how will that portion of the damages be addressed on the proposed examination for discovery of a representative of the insurer?

[17] Similarly, how will any damages claimed that were personal to Brian Bourgoin and are now personal to the Estate be addressed at trial?

[18] Counsel did not provide any case law in support of their stated intention to produce, without a court order, a representative of the insurer for examination for discovery by the defendants. In preparing this endorsement, the court identified decisions which address when it may be appropriate to produce a representative of a subrogated insurer as the individual to be examined on behalf of the party in whose name a subrogated claim is being advanced. Those decisions include *Brown and Resnick v. Stead and Anstey*, [1972] 3 O.R. 668-671 (Co. Ct.) and *Consumers Glass Co. Ltd. et al. v. Farrell Lines Inc. et al.* (1982), 39 O.R. (2d) 696, 30 C.P.C. 293 (H.C.J.).

[19] From those decisions, the following factors emerge as relevant to a request for an order permitting a party to produce an insurer representative for examination for discovery in the context of a subrogated claim:

- Did the insurer advancing the subrogated claim pay the nominate party in full for their losses?
- What percentage of the nominate party's losses did the insurer not pay?
- What terms in the subject policy of insurance are relevant to the pursuit of a subrogated claim and the rights, if any, of the insured person in the carriage of that claim?
- To what extent are each of the insurer and the nominate party providing instructions to counsel?

[20] *Brown and Resnick* and *Consumers Glass* were both decided under the predecessor to the *Rules of Civil Procedure* – specifically, former Rule 333. Former rule 333(1) read as follows: "Where an action is prosecuted or defended for the immediate benefit of a person or a corporation, such person or any officer or servant of such corporation may without order be examined for discovery."

[21] Rule 31.03(8) of the *Rules* is the current version of former rule 333(1). Rule 31.03(8) is titled "Nominal Party". It stipulates that, "[w]here an action is brought or defended for the immediate benefit of a person who is not a party, the person may be examined in addition to the party bringing or defending the action."

[22] I emphasize that an examination of the person for whose immediate benefit a proceeding is brought (i.e., the insurer in the matter before this court) is "in addition to" an examination of the party themselves. In the matter before this court, even if a representative of the insurer is produced for examination by the defendants – on the consent of the defendants or with a court order – that examination is secondary to an examination of a representative of the Estate.

[23] The issue of who will be examined on behalf of the Estate is not before the court on this motion. The extent to which the claims advanced were personal to Brian Bourgoin and are now personal to the Estate may, however, be relevant to the appointment of a litigation administrator (i.e., if in fact there is no executor or administrator of the Estate) and who is capable, on an examination, of providing meaningful evidence on behalf of the Estate.

[24] Turning to another factor, has the Firm considered Section 5.2 of the Law Society of Ontario Rules of Professional Conduct? That section states that "A lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or (b) the matter is purely formal or uncontroverted."

[25] The Firm may wish to consider the decision in *Urquhart v. Allen Estate*, [1999] O.J. No. 4816 (S.C.J.), at paras. 27-28. By citing that decision alone, the court does not suggest that there are no other decisions relevant to the issue. The court refers to the *Urquhart* decision solely to identify the principles relevant to the issue of counsel as witness.

[26] The motion before the court does not contemplate amendments to the substantive text of the statement of claim. Given the transmission of interest, the substantive text of the statement of claim requires amendment. I will review that issue briefly in anticipation of the Firm bringing another motion for an order to an an individual to represent the Estate and for leave to amend the title of proceeding.

Amending the Statement of Claim

[27] The motion record includes a copy of the statement of claim. The allegations made therein refer to Brian Bourgoin as "the Plaintiff", including in relation to his ownership of the subject property and the damages suffered. Without amendments to the originating process, "the Plaintiff" will mean the individual acting in a representative capacity on behalf of the Estate. It is therefore necessary to amend the statement of claim to accurately set out the allegations in support of the claims made.

[28] For the sake of efficiency and cost-effectiveness, it makes sense for the parties and the court to address amending the statement of claim on the same motion on which the court determines the request for an order for the appointment of a representative of the Estate and for leave to amend the title of proceeding.

Disposition

[29] For the reasons given, the court dismisses the motion. The motion is dismissed without prejudice to the plaintiff bringing the motion again (a) on a complete record, and (b) for all of the relief required at this stage of the proceeding (i.e., including leave to amend the statement of claim).

[30] The motion record shall include a copy of this endorsement and a copy of a draft amended statement of claim.

[31] If the relief requested on the further motion includes the appointment of a lawyer from the Firm as the litigation administrator for the Estate, then a factum must also be served and filed.

[32] The plaintiff is not successful on the motion; there shall be no costs of the motion.

Date: August 27, 2024

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Madam Justice S. Corthorn

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Defendants

ENDORSEMENT

Madam Justice Sylvia Corthorn

Released: August 27, 2024