Date: 20070523

Docket: T-875-06

Citation: 2007 FC 548

Vancouver, British Columbia, May 23, 2007

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

Respondent

REASONS FOR ORDER AND ORDER

[1] By motion in writing, the Appellant, Her Majesty the Queen in Right of Canada, as represented by the Attorney General of Canada (the Crown), seeks an extension of time for filing proof of service of the Notice of Appeal, as well as directions regarding the naming of the proper respondent to the appeal. The Crown also requests a suspension of the filing deadlines under Part 6 of the *Federal Courts Rules* (*FCR*) pending disposition of this motion.

[2] The Administrator of the Ship-source Oil Pollution Fund (Administrator), who is named as the sole respondent in the appeal, does not oppose the Crown's motion to extend the time for filing proof of service of the Notice of Appeal. He takes issue, however, with the Crown's request for directions in light of the existing procedure to identify the proper respondent set out in the *FCR*.

[3] I am satisfied that the motion for extension of time should be granted in light of the explanation provided by the Crown for the relatively short delay. As for the request for directions, for the reasons that follow, I conclude that none should be provided.

Analysis

[4] Section 87(2) of the *Marine Liability Act* (*ML Act*) provides that a claimant may, within 60 days after receiving an offer of compensation from the Administrator, or a notification that the Administrator has disallowed the claim, appeal the adequacy of the offer or the disallowance of the claim to the Admiralty Court (defined under section 2 of the *ML Act* as the Federal Court).

[5] The present appeal concerns the adequacy of the offer of compensation made by the Administrator, wherein he offered $20,000.00 in compensation for the Crown's claim of $223,543.88. One of the grounds for appeal is that the Administrator failed to provide any notice to the Crown of his intention to rely on certain material that was allegedly never provided to the Crown.

[6] The Crown named the Administrator as the Respondent and served him with the Notice of Appeal. However, the Administrator refused to file a Notice of Appearance, taking the position that he was wrongly named as the Respondent in this appeal, and that the identification of the proper respondent is a matter specifically provided for in Rule 338.

[7] Rule 338 sets out the persons to be included as respondents to an appeal, and reads as follows:

338. (1) Unless the Court orders otherwise, an appellant shall include as a respondent in an appeal (a) every party in the first instance who is adverse in interest to the appellant in the appeal; (b) any other person required to be named as a party by an Act of Parliament pursuant to which the appeal is brought; and (c) where there are no persons that are included under paragraph (a) or (b), the Attorney General of Canada. (2) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent in an appeal, the Court may substitute another person or body, including a tribunal whose order is being appealed, as a respondent in the place of the Attorney General of Canada.	338. (1) Sauf ordonnance contraire de la Cour, l'appelant désigne les personnes suivantes à titre d'intimés dans l'appel : a) toute personne qui était une partie dans la première instance et qui a dans l'appel des intérêts opposés aux siens; b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale qui autorise l'appel; c) si les alinéas a) et b) ne s'appliquent pas, le procureur général du Canada. (2) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre d'intimé ou n'est pas disposé à le faire, désigner en remplacement une autre personne ou entité, y compris l'office fédéral dont l'ordonnance fait l'objet de l'appel.

[8] In summary, Rule 338(1) provides that a notice of appeal must name every party in the first instance who is adverse in interest to the appellant in the appeal, or any other person required to be named by statute as a respondent. In the event there are no such parties or persons, the Attorney General of Canada must be named as the default respondent. Where, however, the Attorney General is unwilling or unable to act, the Court may appoint a substitute, including the tribunal which made the decision, as a respondent on motion brought pursuant to Rule 338(2).

[9] The Administrator contends that the Crown is attempting, by this motion, to short-circuit the process set out in the *FCR* by naming the Administrator as Respondent. The Administrator maintains that there is no party who is adverse in interest to the Crown in this appeal. Further, the *Marine Liability Act* does not require any other person to be named as a party.

[10] The Administrator submits that, in the circumstances, Rule 338(1)(c) stipulates that the appropriate respondent in this appeal is the Attorney General of Canada. According to the Administrator, the Crown should be seeking to amend the Notice of Appeal to name the Attorney General of Canada as Respondent. The Amended Notice of Appeal would then have to be served on the Attorney General of Canada and on the Administrator in accordance with Rule 339. The Attorney General would then have to file a Notice of Appearance as Respondent on the appeal and decide, as Respondent, whether or not to proceed with an application to substitute another person or body as respondent.

[11] The Administrator's approach is rather technocratic. I see no useful purpose in requiring the Crown to sue itself and to go through the cumbersome procedure prescribed by Rule 338, particularly since the Rule does not appear to contemplate the possibility that the Crown could be an appellant.

[12] In any event, the Administrator's arguments are based on the assumption that he is not a person included under paragraph (a) or (b) of Rule 338. The Crown does not share that view.

[13] The correct identification of the respondent who is required to be served with a notice of appeal is the responsibility of the appellant or his solicitor: *Indian Manufacturing Ltd. et al v. Lo et al.* (1996) 199 N.R. 114 (F.C.A.). The general rule is that an appellant is free to choose the responding party.

[14] Once a notice of application has been served upon a respondent, the respondent, if it should choose to defend, must serve and file a notice of appearance. A respondent who does not deliver a notice of appearance is not entitled to receive notice of any step in the proceeding or other document. Nor is the respondent able to file material, examine a witness, cross-examine on an affidavit, or be heard at the hearing except with the leave of the judge.

[15] If the Crown's decision to name the Administrator as respondent proves to be incorrect, it may be without a remedy. However, there is no obligation on the Crown, at this stage of the proceeding, to establish that it has named the correct respondent, or on the Court to confirm the Crown's position.

[16] Rather, the onus was on the Administrator to establish that he was improperly joined. On the basis of the material before me, it appears that the Administrator is independent from the Crown when performing his duties under Part 6 of the *MLA*, and that he can arguably be viewed as adverse in interest to the Crown in his role as guardian of the Ship-source Oil Pollution Fund.

[17] In the circumstances, I am not satisfied that the Administrator was misjoined as Respondent. The appeal can therefore proceed with the parties as currently named.

ORDER

THIS COURT ORDERS that

1. The Appellant is granted an extension of time to June 1, 2007 to file proof of service of the Notice of Appeal.

2. The Respondent shall serve and file a Notice of Appearance within 10 days of the date of this Order.

3. The time for taking subsequent steps under Part 6 of the *Federal Courts Rules* is extended to run from the date of service of the Respondent's Notice of Appearance, or the expiration of the time for doing so, whichever is earlier.

4. There shall be no order as to costs of this motion.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-875-06
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ORDER:	LAFRENIÈRE P.
DATED:	May 23, 2007

WRITTEN REPRESENTATIONS BY:

Lorne Lachance	FOR THE APPLICANT/APPELLANT
David F. McEwen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice Canada Vancouver, BC	FOR THE APPLICANT/APPELLANT
Alexander Holburn Beaudin & Lang LLP Vancouver, BC	FOR THE DEFENDANTS