

PROBATE COURT OF NOVA SCOTIA

Citation: Boutilier Estate v. Capital One Bank, 2011 NSSC 439

Date: 20111206

Docket: Hfx No. 344682

Probate No. 57737

Registry: Halifax

Between:

The Estate of Charles Arnold Boutilier

Applicant

and

Capital One Bank, Bank of Montreal Mosaik, TD Canada Trust Visa,
RBC Royal Bank Visa, Rogers Wireless, Barbara Ann Boutilier, Scott
Boutilier, Darryl Boutilier, Lorraine Butler and Deborah McIsaac

Respondents

Judge: The Honourable Justice C. Richard Coughlan

Heard: April 28, 2011 (in Chambers), in Halifax, Nova Scotia

**Final Written
Submission:** November 10, 2011

Written Decision: December 6, 2011

Counsel: Paul B. Miller, for the Estate of Charles Arnold Boutilier

Coughlan, J.:

[1] Charles Arnold Boutilier, late of Halifax, Nova Scotia, died testate on August 27, 2009. A grant of probate was issued to Debbie McIsaac, referred to in Mr. Boutilier's will as Deborah McIsaac. An inventory was filed March 12, 2010, showing real property - a one thirteenth share in property at Long Lake, valued at \$569.23 based on assessment of \$7,400.00, bank accounts of \$18,891.52, Canada Pension Plan death benefit of \$2,500.00, Department of National Defence death benefit of \$5,000.00, a 2003 Chevrolet Cavalier valued at \$3,000.00, household items valued at \$500.00 and miscellaneous assets valued at \$1,165.25. The inventory showed a total estate value of \$31,626.00.

[2] Notice to creditors of the Estate was published in the Royal Gazette for a period of six months, commencing with the issue of October 21, 2009.

[3] A notice of application for an order to determine the debts of creditors of the Estate, the amounts owed, if any, to the creditors and the priorities, if any, of the creditors was filed February 28, 2011.

[4] Deborah McIsaac, the personal representative of the Estate, filed an affidavit in support of the application. In the affidavit, Ms. McIsaac states:

4. The facts on which this application is based are:

....

c) The following are the list of creditors and estimated amounts owing to each based on information provided to me by the said creditors or their representative:

i)	Capital Bank One	\$9,537.12
ii)	Bank of Montreal Mosaik	3,687.24
iii)	TD Canada Trust Visa	11,339.54
iv)	RBC Royal Bank Visa	22,217.32
v)	Rogers Wireless	664.66
vi)	Barbara <u>Ann</u> Boutilier	<u>30,000.00</u>

Total creditor claims: \$77,445.88

I am attaching as Exhibit 2 to this affidavit statements received from all of the creditors, except Ann Boutilier. I am attaching as Exhibit 3 to this affidavit a copy of the Corollary Relief Judgment issued in the divorce between Charles Arnold Boutilier and Barbara Ann Boutilier, which, in paragraph 23, identifies her claim for \$30,000.00 against the Estate.

d) The present bank balances of the Estate are:

i)	Royal Bank	\$8,883.40
ii)	Canadian Imperial Bank of Commerce:	<u>13,719.23</u>
	Total monies on hand:	\$22,602.63

I am attaching as Exhibit 4 to this affidavit copies of the Estate bank balances to date.

[5] On April 20, 2011, the Royal Bank of Canada filed a claim against Mr. Boutilier's Estate with the Registrar of Probate, claiming the sum of \$21,424.28. Subsequent to the hearing, the Royal Bank of Canada withdrew its claim.

[6] On April 27, 2011, an affidavit of Vincent Castiglione, an account manager for the Bank of Montreal, deposed to the same day, was filed with the Registrar of Probate in which Mr. Castiglione states there was a balance due on Mr. Boutilier's Bank of Montreal Mosaik Mastercard account of \$5,482.29 as of April 27, 2011. In an affidavit dated April 29, 2011, Mr. Paul B. Miller, proctor of the Estate of Charles Arnold Boutilier, deposed:

I had communications with Jonathan J. Saumier, Solicitor for Bank of Montreal Mosaik on April 27th, 2011. Mr. Saumier left a voice mail message on April 27th, 2011 indicating he would be filing an affidavit from a deponent representing the Bank of Montreal putting forth its claim in this matter. I responded with a voice mail message to Mr. Saumier indicating that we reserved the right to cross examine any deponent and he should see that such deponent was available at the hearing from (sic) cross-examination. I later on April 27th, 2011 received a letter and the unfiled Affidavit of Vincent Castiglione from Mr. Saumier. Mr. Saumier indicated that "we do not intend to appear in this matter". I wrote back to Mr. Saumier later on April 27th, 2011 and indicated "we therefore put you on notice that we will be objecting to the admission of your client's affidavit if we do not have your deponent available for cross-examination to be able to determine the validity of its claim". This letter was sent by fax on April 27th, 2011 to Mr.

Saumier and I have a fax verification that it was sent successfully to his fax number.

[7] No one appeared at the hearing on behalf of the Bank of Montreal.

[8] Although given notice of the hearing, Capital Bank One, TD Canada Trust Visa and Rogers Wireless did not appear at the hearing to prove their claims.

[9] In her affidavit, Deborah McIsaac states the Estate of Charles Arnold Boutilier is insolvent in that the known debts exceed the proceeds of the Estate. While the notice of application filed in February, 2011 does not ask for an order declaring the estate to be insolvent, the proctor of the Estate at the hearing on April 28, 2011, when asked what order he was seeking, stated he was seeking an order pursuant to Regulation 51 of the *Probate Act*, S.N.S. 2000, c. 31, which deals with applications for an order declaring an estate insolvent. The evidence shows the Estate is insolvent and I am prepared to grant an order declaring the Estate of Charles Arnold Boutilier insolvent.

[10] Section 83(3) of the *Probate Act*, *supra*, sets out the priorities in distributing an insolvent estate as follows:

Powers of court and priorities

83 (3) On the settlement of an insolvent estate the assets of the estate shall be distributed in the following order of priorities to those persons who have rendered their accounts, duly attested, in the following priority:

- (a) first - in payment of funeral expenses, including a headstone, to the extent such expenses appear reasonable;
- (b) second - in payment of probate taxes and court fees;
- (c) third - in payment of the personal representative's commission and legal fees, on an equal footing;
- (d) fourth - in payment of reasonable medical expenses incurred during the last thirty days of the deceased's life, on an equal footing;
- (e) fifth - in payment of all other debts.

[11] Charles Arnold Boutilier was married to Barbara Ann Boutilier. They divorced by divorce judgment issued January 26, 1993. They executed a separation agreement and minutes of settlement which was incorporated in a corollary relief judgment issued January 26, 1993. The minutes of settlement contained the following clause concerning a supplementary death benefit to which Mr. Boutilier was entitled:

The husband covenants and agrees to continue to name the wife, irrevocably, as the sole beneficiary of his Supplementary Death Benefit (presently having a face amount of approximately thirty thousand dollars (\$30,000.00)) and will provide the wife, upon request, with proof that the benefit is being maintained and that she continues to be named as the sole beneficiary. In the event that the husband fails to comply with this paragraph and dies, the wife shall be entitled to judgment against the estate of her husband in an amount equal to the Supplementary Death Benefit that the wife would have received but for the husband's non-compliance and in any case such judgment shall not be less than thirty thousand dollars (\$30,000.00).

[12] Mr. Boutilier did not name Barbara Ann Boutilier as beneficiary of the supplementary death benefit. By the time of his death, the supplementary death benefit had a value of \$5,000.00, which was paid to Mr. Boutilier's estate. Ms. Boutilier did not take action against Mr. Boutilier's estate. She has not obtained a judgment. On April 14, 2011, Barbara Ann Boutilier filed an affidavit deposed to April 13, 2011 with the Registrar of Probate in which she requests:

I am requesting from this Honourable Court an Order that I am entitled to not only the \$5,000.00 which was paid to the Estate from the Department of Defence regarding this Supplementary Death Benefit, but also a priority judgment for an additional \$25,000.00 against the Estate in compliance with the attached Corollary Relief Judgment. The Corollary Relief Judgment was issued long before the debts were incurred to the other creditors of this Estate.

[13] Ms. Boutilier has a claim against Mr. Boutilier's estate pursuant to the corollary relief judgment for \$30,000.00 which states "the wife shall be entitled to a judgment against the estate of the husband ... and in any case such judgment shall not be less than thirty thousand dollars (\$30,000.00)". Barbara Ann Boutilier is a creditor of the estate. Ms. Boutilier did not retain counsel. Her son spoke on her behalf at the hearing of the application. She did not file a claim in the prescribed form. She did notify the estate of her claim by filing her affidavit on April 14, 2011 within the time prescribed by s. 63(1) of the *Probate Act, supra*.

[14] On the facts, I find the estate of Charles Arnold Boutilier owes a debt in the amount of \$30,000.00 to Barbara Ann Boutilier. No other creditor of the estate has proved its claim.

[15] The Estate of Charles Arnold Boutilier will be distributed in accordance with s. 83(3) of the *Probate Act, supra*.

Coughlan, J.