SUPREME COURT OF NOVA SCOTIA

Citation: *Evans Estate (Re)*, 2018 NSSC 68

Date: 2018-03-14
Docket: K/K 13272
Registry: Kentville

The Public Trustee for the Province of Nova Scotia,
personal representative for the
Estate of Marion Lorrain Evans, Deceased

Appealing the November 10, 2017 decision of
the Registrar of Probate

Judge:	The Honourable Justice Gregory M. Warner
Heard:	March 14, 2018, in Kentville, Nova Scotia
Counsel:	Adrienne Bowers, counsel for the Public Trustee of Nova Scotia, personal representative of the Estate of Marion Evans

By the Court:

Appeal

[1] It is my intent to clean up the language, and maybe reduce some of the redundancies, for the purpose of releasing this decision as guidance to Registrars of Probate.

[2] This is an appeal, filed on January 31, 2018, from a decision of the Registrar of Probate, acting in a judicial capacity, in respect of the Closing Accounts in the Estate of Marion Lorraine Evans.

Factual Background

[3] Marion Lorraine Evans died testate on April 21, 2016. She was survived her son, who was to be the personal representative and sole heir of the estate. He died May 27, 2016, intestate, without having taken out a Grant of Probate for his mother's estate. The Public Trustee was asked to administer the estate and was appointed as personal representative.

[4] At the time of her death, Ms. Evans owned real property. There was an outstanding mortgage, which was six months in arrears. There was a squatter living in the property. The utility bills were not up to date. The Estate had no funds to pay the expenses. An agreement was reached with the mortgagee to deed the house to it in exchange for it taking no steps to obtain or seek a deficiency judgment against the Estate.

[5] After the transfer of the house, the remaining few assets left, at the time of closing, were: "Balance on Hand Before Closing", $1,545.53, and several debts. The Estate was insolvent.

[6] The Closing Statement of Accounts filed by the Public Trustee at the time of closing listed 13 debts. They were all unsecured debts. They included a small Probate Court fees, a Canada Revenue Agency (CRA/HST) debt in the amount of $8,187.45; a funeral home debt in the amount of $3,952.78; and several other debts, as listed.

[7] As is required by personal representatives seeking to close estates, both by law and by practice of the Probate Court, the personal representative sought a clearance certificate from CRA. The clearance certificate proved the debt owed to

CRA. The certificate was filed with the Probate Court and was within the knowledge of the Registrar at the time of closing.

[8] An Order on Passing Accounts was issued by the Registrar on November 10, 2017, and directed the personal representative to "dispose of and distribute the sum of $1,545.53 in accordance with the law". On the account summary page, the Registrar of Probate directed that the balance remaining of $1,545.53 be paid to the funeral home, in accordance with s. 83(3)(a) of the *Probate Act*.

[9] Upon receipt of the order and the direction on November 16th, the Public Trustee wrote to the Registrar to confirm that CRA had not been paid and as such was the highest priority creditor, notwithstanding the priorities set out in the *Probate Act*, and asked that the direction be changed. The Public Trustee provided the Registrar of Probate with the relevant section of the *Income Tax Act*, set out fully later in this decision, and the decision of the Nova Scotia Court of Appeal in *Crowther v. Attorney General of Canada*, [1959] 17 DLR (2d) 437 (NSCA) ("*Crowther*"), and the subsequent decision of Supreme Court of Canada decision in *Household Realty v Attorney General of Canada* (1979), 1 SCR 423 (SCC) ("*Household Realty*"), also a decision arising out of Nova Scotia.

[10] I was handed a few minutes ago an e-mail that is part of the Probate file sent by the Registrar on November 16th indicating that she had reviewed the legislation, and reached out to and obtained advise from other Registrars in the Province who have experience with insolvent estates to follow the s. 83(3) priorities, per s. 83(3)(a) to (d), then to pay all other debts per s. 83(3)(e).

[11] After further exchanges, the Registrar on January 4, 2018 e-mailed the Public Trustee advising that she intended that her order remain as it was.

[12] The Public Trustee communicated again to the Registrar. On January 8th, the Registrar again reiterated her position, writing that she had reviewed the case law provided, noting that it predates the relevant section of the Nova Scotia *Probate Act*; that s. 83(3)(a) was clear with regards to the payment of funeral expenses in respect of insolvent estates as a "first" priority, and that she stood by her decision.

[13] As a result, this appeal was filed.

Finding

[14] The Public Trustee seeks an order acknowledging that the CRA debt is a "first" priority against the monies remaining in the Estate, as evidenced by the clearance certificate, reversing the decision of the Registrar. For the reasons that follow, I grant the appeal.

The Law

[15] Section 83(3) of the *Probate Act* deals with insolvent estates. Factually there is no question that this Estate is insolvent. The subsection reads:

> **(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. 2000, c. 31, s. 83.

[16] The *Probate Act*, and particularly s. 83(3), makes no mention of the status of any debt owed to Her Majesty the Queen either in right of Canada or in right of the Province of Nova Scotia.

[17] The Public Trustee referred the Registrar, and refers this court, to s. 159(1) of the *Income Tax Act*. It reads, in part:

> **Person acting for another**
>
> **159 (1)** For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,
>
> **(a)** the legal representative is jointly and severally, or solidarily, liable with the taxpayer

> **(i)** to pay each amount payable under this Act by the taxpayer at or before that time and that remains unpaid, to the extent that the legal representative is at that time in possession or control, in the capacity of legal representative, of property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate, and
>
> **…**
>
> **Certificate before distribution**
>
> **(2)** Every legal representative (other than a trustee in bankruptcy) of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a certificate from the Minister, by applying for one in prescribed form, certifying that all amounts
>
> **(a)** for which the taxpayer is or can reasonably be expected to become liable under this Act at or before the time the distribution is made, and
>
> **(b)** for the payment of which the legal representative is or can reasonably be expected to become liable in that capacity
>
> have been paid or that security for the payment thereof has been accepted by the Minister.
>
> **Personal liability**
>
> **(3)** If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,
>
> **(a)** the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;
>
> **…**

[18] The effect of s. 159 is that the legal representative is personally liable to CRA for a debt either identified on a certificate issued or for a debt, if they fail to get a certificate, to the extent that the personal representative is in possession or control of property of the deceased taxpayer. Section 159 creates a priority in favor of CRA in respect of any monies held in an insolvent estate.

[19] The Public Trustee says that the *Income Tax Act* debt, as identified in the clearance certificate filed with the Probate Court, for which the Public Trustee is

personally liable to the extent it holds, as personal representative, any assets of the estate, has priority over all other debts of the Estate despite s. 83(3) of the *Probate Act*. It relies on the doctrine of "Crown Prerogative", as applied by the Nova Scotia Court of Appeal in *Crowther* and endorsed by the Supreme Court of Canada in another case from Nova Scotia *Household Realty*. As an aside, I note that in *Household Realty* the Supreme Court of Canada referred to an 1885 decision, *The Queen v Bank of Nova Scotia* (1885), 11 SCR 1 ("*The Queen v Bank of Nova Scotia"*), as setting out the law in Canada which has not changed since 1885.

[20] *Crowther* involved the question of who was entitled to payment of insurance proceeds resulting from a car accident pursuant to the provisions of the *Nova Scotia Insurance Act*. *Household Realty* involved priority amongst creditors with claims "of equal degree"; that is, unsecured creditors after a foreclosure.

[21] In both cases the court explained and applied the common law federal Crown prerogative rules and cited, as part of their decisions, the *Nova Scotia Interpretation Act*, at that time s. 13, now s. 14.

[22] What is Crown prerogative?

[23] **Peter W. Hogg**, *Constitutional Law of Canada*, 5th Edition (Carswell, looseleaf), speaks in ch.10 about the extent to which federal and provincial laws are binding on themselves, and in ch. 16 about who has priority and when they have priority when there are inconsistent laws as between federal and provincial governments.

[24] Dealing with the first issue, Mr. Hogg writes at ch. 10.8:

> The Crown is, of course, subject to its Parliament or Legislature. So long as a legislative body acts within the limits of its powers, it is free to make its laws applicable to the Crown (or government), just as it is free to make the laws applicable to other legal persons within its jurisdiction. …
>
> … it was settled in England as early as 1561 that the Crown [the case cited was *Willion v Berkley* (1561), 75 ER 339] was bound by any statute which applied to it, and this is one of the fundamental principles of the British constitution that was received in British North America.
>
> It follows that the Crown is not immune from statutes by virtue of any rule of the constitution. <u>However, the Crown does enjoy a measure of immunity by virtue of a common law rule of statutory construction (or interpretation). The rule is that the Crown is not bound by statute except by express words or necessary</u>

> implication What this means is that general language in statute, such as "person" or "owner" or "landlord", will be interpreted as not including the Crown, unless that statute expressly states that it applies to the Crown (express words), or unless the context of the statute makes it clear beyond doubt that the Crown must be bound (necessary implication). The rule is often expressed as a "presumption" that the Crown is not bound by statute – a presumption that is rebuttal by express words or necessary implication. The rule is sometimes described as a "prerogative" of the Crown, which is also accurate, so long as it is understood that the rule is an immunity rather than a power. …
>
> The *Interpretation Act of Canada* and each Canadian province [including Nova Scotia] includes a provision that states when the Crown is bound by statute. All but two of the provisions confirm the common law rule of immunity. The provisions contemplate that the Crown may be bound by express words, but they say nothing about necessary implication. …
>
> [Comments and emphasis added by the court.]

[25] Only in the *Interpretation Act* of British Columbia, since copied by Prince Edward Island, is there an express provision in the *Interpretation Act* that the Crown is bound by statutes unless the statute "otherwise specifically provides". In other words, in all other jurisdictions of Canada, including Nova Scotia, Crown prerogative is preserved.

[26] Section 14 of the *Nova Scotia Interpretation Act reads*:

> **Binding of Crown**
>
> 14 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby.

[27] This provision is clear and has been interpreted on several occasions in Nova Scotia, and elsewhere. It means that s. 83(3) of the Probate Act affects Crown prerogative.

[28] Continuing with Chapter 10: "The desirability of abolishing the Crown's presumption of immunity from statute has not been lost on the courts".

[29] Mr. Hogg goes on to deal with a case decided by then-Chief Justice Dickson, *R v Eldorado Nuclear* [1983] 2 SCR 551, to explain some of the reasons why, in some circumstances, the Crown should be bound by laws when it is acting other than as a government, usual in the context of commercial enterprises. Mr. Hogg

then goes on to identify six classes of statutes that have been found to be exempt from immunity, and they include British Columbia and PEI, where the *Interpretation Act* specifically provides that the Crown is bound by its laws.

[30] On the scope of the presumption or prerogative, Mr. Hogg writes at 10.9:

> Within Canada … the Crown is represented by a federal government and ten provincial governments. In this federal context, what is the scope of the presumption that the Crown is not bound by statutes except by express words or necessary implication? …
>
> A wide view of the immunity rule would exempt the Crown in all its capacities from any legislation that did not bind the Crown by express words or necessary implication. A narrow view of the immunity rule would exempt only the Crown in right of the legislating government. [i.e. provincial government and respective provincial legislation or federal] … However, the weight of modern authority is firmly on the side of the wide view.
>
> [Comments added by the court during the decision that are not included in the original citation.]

[31] In the footnote for that statement, there is reference to four Supreme Court of Canada decisions from 1918 (*Gauthier v. the King*, (1918) 56 SCR 176, ("*Gauthier*"), to a 2004 decision that arose out of Nova Scotia (*Nova Scotia Power v Canada* [2004] 3 SCR 53).

[32] Still in Chapter 10.9:

> There is no doubt that the federal Parliament may adopt by reference the laws of a province and make them applicable to the federal Crown. What is in doubt is the extent to which the laws of a province may be made binding upon the federal Crown by their own force, that is to say, without any adoption by the federal Parliament. In *Gauthier* ... the question was whether the federal Crown was bound by the Ontario's *Arbitration Act*.

[33] In *Gauthier*, the applicable statute, by its terms, expressly applied to Her Majesty. Despite that - an express reference that the statute bound Her Majesty, the Supreme Court of Canada held otherwise.

[34] That scenario is not the scenario in this case because here there is no reference in the probate legislation to debts owed to Her Majesty the Queen.

[35] In contrast to the enforceability of provincial legislation upon the federal government, Mr. Hogg writes: "In contrast to the reluctance to hold that provincial laws bind the federal Crown, the courts have shown no hesitation in holding that federal laws apply to the provincial Crown."

[36] Also relevant to this question, as a separate basis for granting the appeal, is the principle of paramountcy as described in ch. 16 of Hogg's text. It deals with the priority between inconsistent federal laws and provincial laws.

[37] The relevance of this topic arises out of the fact that in this matter the Registrar stated on three occasions that the court was strictly applying the priorities in s. 83(3) of the Nova Scotia *Probate Act* and not the case law, the federal *Income Tax Act* nor the priorities identified in federal legislation.

[38] In Chapter 16, and I am going to abstract excerpts from a fairly long chapter, Mr. Hogg writes:

> Every legal system has to have a rule to reconcile conflicts between inconsistent laws. …
>
> In Canada, … conflict between a statute of the federal Parliament and a statute of a provincial Legislature is bound to occur from time to time because federal and provincial laws are applicable in the same territory, and by virtue of the double aspect and pith and substance (incidental effect) doctrines may be applicable to the same facts. …
>
> The rule that has been adopted by the courts is the doctrine of "federal paramountcy": where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails. A similar rule has been adopted in the United States and Australia, and apparently by all modern federal constitutions. The doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid, and (2) inconsistent. …
>
> … For laws which directly regulate conduct, an express contradiction occurs when it is impossible for a person to obey both laws: …

[39] In this case, s. 83(3) of the *Probate Act* is silent with regards to federal crown debts or their priority. On a plain reading of s. 83(3) alone, federal crown debts fall under subsection (e), and are lower in priority than s. 83(3)(a) to (d), of which (a) lists funeral expenses.

[40] At 16.3, Mr. Hogg describes the matrix in this case:

> The decided cases offer only a few examples of impossibility of dual compliance. Where there are insufficient assets to pay a person's debts, it is impossible to comply with a federal law stipulating the order of priority of payment and a provincial law stipulating a different order of priority.

[41] He concluded that where it is impossible to comply with the federal law stipulating an order of priority for payment of debts and the provincial law stipulating a different priority, paramountcy applies and the federal law takes priority.

[42] This has been so, as I indicated earlier, since an 1885 decision of the Supreme Court of Canada, *The Queen v Bank of Nova Scotia*. Mr. Hogg cites in Footnote 20, three other decisions to the same effect with regards to debt priority: *Royal Bank of Canada v LaRue* [1928] AC 187, *Re Bozanich* [1942] SCR 130, and *Attorney General of Ontario v Policy-holders of Wentworth Insurance* [1969] SCR 779.

[43] Mr. Hogg also notes a second circumstance in which paramountcy applies:

> Canadian courts also accept a second case of inconsistency, namely, where a provincial law would frustrate the purpose of a federal law. Where there are overlapping federal and provincial laws, and it is possible to comply with both laws, but the effect of the provincial law would be to frustrate the purpose of the federal law, that is also a case of inconsistency.

Interpretation Act

[44] I indicated earlier that s. 14 of the *Interpretation Act* of Nova Scotia provides that no enactment of Nova Scotia "is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner unless it is expressly stated therein that Her Majesty is bound thereby."

[45] There have been several decisions on this issue. *WestlawNext Canada* indexed three pages of cases where s. 14 of the *Interpretation Act* was considered.

[46] One of the more recent decisions is *The Attorney General of Nova Scotia v Rosamond Luke*, 2017 NSSC 120, decided by my colleague Justice Wright on April 21, 2017. The factual circumstance in that case was that the province sued a student for repayment of a student loan. It did so after ten years of unsuccessful attempts to collect. The defence was that s. 2 of the *Limitation of Actions Act* set a limitation of six years for suing on a debt; the time had expired, and it was therefore too late for the Crown to sue.

[47] One of three issues that Justice Wright dealt with was whether the *Statutes of Limitations Act* was binding upon the Province of Nova Scotia and prevented it from suing for the student loan. Justice Wright held that the limitation period did not apply.

[48] Beginning at paragraph 16, Justice Wright wrote:

> [16] The only limitation period to be considered therefore is to be found in s.2(1)(e) of the *Limitation of Actions Act*, RSNS 1989, c.258. That section generally limits the commencement of all actions grounded upon any lending or contract to a period within six years after the cause of action arose. The plaintiff claims immunity from this limitation period based on the common law presumption of Crown immunity from such statutes, the codification of that common law principle in s.14 of the *Interpretation Act*, RSNS 1989, c.235 and the supporting case law.
>
> [17] A concise statement of this common law rule is set out in *Liability of the Crown*, 3rd ed. (Carswell) authored by Peter Hogg and Patrick Monahan. I adopt the following passage from page 71of that text:
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> > The common law rule is that statutes of limitations do not bind the Crown. This means that if the Crown commences proceedings outside the applicable limitation period, the defendant is not permitted to plead the statute of limitation. It is said that time does not run against the Crown; but this maxim is simply an application of the common law presumption that statutes do not bind the Crown. Most of the early statutes of limitation did not bind the Crown by express words or necessary implication.

[49] In addition to the Nova Scotia case, there is a case directly on point from New Brunswick - *Re Sourour Estate*, 1986 CarswellNB 217 ("*Sourour*"). It involved an application to pass the accounts of an insolvent estate. One of the issues on the closing was whether the accounts - excluding accounts having priority pursuant to the *Probate Courts Act*, were properly paid in light of the outstanding claim of the Crown in the name of Revenue Canada.

[50] In *Sourour*, the court did not reverse the debts already paid, but with regards to what remained to be distributed, the court stated, beginning at para 15:

> 15 The next issue concerns the payment of certain accounts by the applicant out of the assets of the estate prior, and in preference to, the debt owed to the Minister and indeed a debt owed to Royal Bank Visa in the amount outstanding … of $686.28.

16 The debt claimed the Minister … was $73,478.56.

[51] Beginning at paragraph 24, Justice Creaghan wrote:

> 24 Although it is not necessary for me to decide the question of the right of the Crown as represented by the Minister to receive payment of its claim prior to payment of the claims of the other creditors with respect to payments already made, the issue remains as between the Minister and the Royal Bank Visa as to the distribution between them of the balance of the of the funds in the estate and now available for distribution.
>
> 25 It is clear that the assets are to be distributed on a *pari passu* basis without any reference to priority without prejudice to "any rights of the Crown."
>
> 26 Section 64(1) of *Probate Courts Act*, … specifically sets out claims to which the assets of the estate shall be applied in priority in payment. Claims of the Crown are not included. The Crown as claimant has not put forward any statutory right upon which it relies as a basis for a right to priority in payment. Rather the Crown relies on well worn principles of common law to support its contention, *R v Bank of Nova Scotia* (1885), 11 SCR 1.
>
> 27 The question of the Crown's right to priority is a large one and a thorough examination is realistically beyond the scope of this decision. The House of Lords affirmed the Supreme Court of Canada's decision in an early New Brunswick case involving the Crown and unsecured creditors of a bank holding that the Receiver General of the Province was entitled to payment in full over the depositors and simple contract creditors of the bank.
>
> …
>
> 30 In the instant case however, we are concerned with a claim by the Crown for income tax rather than a debt arising out of commercial transaction and on the basis of the authorities that have come to my attention, I find that the Crown's common law prerogative must prevail. …
>
> 31 Accordingly, on the further distribution of the estate the claim by the Minister must be satisfied in full before payment is made on the outstanding claims of Royal Bank Visa.

[52] The most commonly relied on Atlantic Canada text on probate law is a text by Ray Adlington, **Atlantic Canada Estate Administration Manual**. Chapter 5.23 of that Manual, under the heading: Insolvent Estates (Not Enough Assets to Pay All Creditors), reads in part:

> The priority of Canada Revenue Agency for unpaid taxes arises not by provincial Probate statute, but from the paramountcy of federal legislation. It is superior to the claims of all other unsecured creditors.

[53] This court noted earlier that there even exists a question, where provincial legislation does incorporate reference to the federal Crown, as to whether the provincial legislation overrides the federal paramountcy principle. On that point, in **Widdifield on Executors and Trustees**, the writers note:

> While s. 50 specifically refers to debts of the Crown amongst those that are to be ranked equally upon a deficiency of estate assets, it is unclear whether the federal Crown is bound by provincial statute, or whether it is entitled to payment of its claim in priority to other creditors of an estate.

[54] In other words, because of the principle of paramountcy it is unclear whether express provincial legislation overrides federal paramountcy.

[55] In this case, s. 14 of the Nova Scotia *Interpretation Act* is silent. The issue described in Widdinfield does not apply.

[56] It is absolutely clear, and has been since 1561 in England and 1885 in Canada, that in the circumstances like this case, where s. 83(3) of the Nova Scotia *Probate Act* is silent with regards to the priorities affecting debts of the Crown, that debts of the Crown are not subject to the priorities in the *Probate Act*.

[57] Separate from the matter of statutory interpretation, the principle of paramountcy also provides a second basis for finding that the federal legislation regarding income taxes, and priority to payment of a federal debt, as identified in s. 159 of the *Income Tax Act*, takes priority over the unsecured debts enumerated in s. 83(3).

[58] In this particular case, the Court of Probate has been provided with the clearance certificate identifying the CRA debt. The court is obligated to honour the priority to the federal debt identified in the clearance certificate.

[59] To the extent that there may be a view that only s. 83(3) of the *Probate Act* applies to debt priorities of insolvent estates, it is misconceived and is wrong in law.

[60] Payment on the CRA debt takes priority to payment on the funeral debt.

Costs

[61] As discussed during submissions, I am not prepared to make the requested order for costs against the Department of Justice for two reasons:

1. The Registrar was acting judicially as a court and, if the Registrar is wrong, the appellant does not get costs against the “lower court”; and

2. in any event, there was no notice provided to whoever it is that may be responsible for those costs.

Warner, J.