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## A Tax By Any Other Name

In the January 1993 issue of Current Affairs, the writer canvassed various issues relating to simple estate planning. In that article it was noted that, "...the Provincial Government in Ontario has recently tripled the applicable percentage of that province's probate fee (i.e. to 1.5% of estate value), thereby blurring the distinction between user fees and taxation. One can easily see that in these times of the evermore vigilant search by the government for new sources of revenue, this magnitude of fee increase may soon arrive in British Columbia." The prophetic nature of that statement was born out in 1996, when the provincial probate fee was increased from .5% of the value of the estate to .6% of the estate value between \$25,000.00 and \$50,000.00 and 1.4% on the balance of estate value. This increase often results in a probate fee of thousands of dollars: an amount far exceeding the court's cost in issuing the Grant of Probate.

## The Judicial Journey

On that note, the Supreme Court of Canada handed down a majority decision on October 22, 1998 in the case of *Eurig v The Registrar of the Ontario Court (General Division) and The Attorney General for Ontario*.

The Attorneys General for Quebec, British Columbia and Alberta were also parties to this action, having been given intervener status.

In this case, Marie Sarah Eurig, as executor of her late husband's estate, refused to pay the applicable probate fee of \$5,710.00, in contravention of section 5 of the Ontario *Administration of Justice Act*, resulting in the Registrar's refusal to issue the Grant of Probate. Mrs. Eurig applied to the Ontario Court (General Division) for an order declaring that the fee was in fact a tax and therefore invalid. In short, she lost at the General Division. Morrison J. asserted that, as between a fee and a tax, a tax is compulsory, while a fee is only required to be paid where one seeks the services for where it is imposed. In finding that the executor can administer and distribute the estate assets without applying for a Grant of Probate, Morrison J. concluded that the probate fee was indeed a fee.

Not being satisfied with this result, Mrs. Eurig moved on to the Ontario Court of Appeal where Morden A.C.J.O. held that, not only is the charge for probate a fee and not a tax, he went further to state that it is not a revenue generating device enacted for a purpose beyond the scope of the Ontario *Administration of Justice Act*.

Again, not happy with the result achieved, Mrs. Eurig pushed on.

## Eurig v Ontario (1998)

Mrs. Eurig sought leave to appeal to the Supreme Court of Canada and, during the months of April through October of 1998, the Supreme Court of Canada reviewed the decision of the lower court in finding that the probate fee was not a tax. In this regard, counsel for Mrs. Eurig cited the case of *Lawson v Interior Tree Fruit and Vegetable Committee of Direction, [1931]*, where Duff J., writing for the majority, concluded that the particular levy in question was a tax because it was;

- Enforceable by law
- Imposed under the authority of the legislature;
- Levied by a public body; and,
- Intended for a public purpose.

The Supreme Court of Canada, in examining these four criteria, concluded that the probate fee is a levy enforceable by law. Major J., writing for the majority at the Supreme Court of Canada, stated that "A practical compulsion usually exists for the executor to obtain probate in order to comply with his or her legal obligations...the Grant of Probate is a practical and legal necessity in most cases". The court also found that the fee was levied by a public body and that it was

intended for a public purpose. With regard to this latter point, the evidence before the court showed that the probate fee did not “accidentally” provide a surplus for general revenue, but rather was intended for that very purpose.

The court found that another factor existed, that generally distinguishes a fee from a tax. Relying on the case of *Allard Contractors Ltd. v Coquitlam (District) [1993]*, the Court found that a nexus must exist between the quantum (i.e. the amount) charged and the cost of the service provided, in order for the levy to be considered constitutionally valid. In *Allard*, Iacobucci J. wrote: “A surplus itself is not a problem so long as the [government body] made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme.”

Fortunately for Mrs. Eurig, the court stated that “...the probate levy varies directly with the value of the estate. The result is an absence of a nexus between the levy and the cost of the service, which indicated that the levy is a tax and not a fee”.

Accordingly, the majority decision in Eurig stated that, “having determined that the probate levy is enforceable by law, is levied by a public body, is intended for a public purpose, and that no nexus exists between the amount of the levy and the cost of the service for granting probate, the compelling conclusion is that the probate levy, as presently enforced, is a tax.

The court then went into an esoteric constitutional question of whether the probate levy is a direct or indirect tax pursuant to *The Constitution Act 1867* and *The Constitution Act 1982*. This

analysis lead the Justices of the Supreme Court of Canada to conclude, based on rather technical arguments, that the probate levy, pursuant to Ontario regulation 2934/92, is in substance a direct tax, which has not been imposed in accordance with the requirement of Section 53 of *The Constitution Act 1867*. Thus the regulation is invalid and of no force or effect.

The Supreme Court of Canada concluded that it was appropriate to provide that the declaration of invalidity applicable to the Ontario regulation would be suspended for a six month period to enable the Province of Ontario and, presumably the Provinces of Quebec, British Columbia and Alberta, to take whatever steps are necessary to remedy the constitutionally invalid regulations.

Moreover, the Supreme Court of Canada, showing an encouraging degree of evenhandedness, stated that while there is a general rule against recovery of taxes paid under unconstitutional statutes, the court in this instance ordered the Registrar of the Ontario Court (General Division) to refund the \$5,710.00 which had been paid by Mrs. Eurig during this process, in order to effect the conclusion of her husband’s estate.

### Conclusion

**A** number of immediate questions arise from the Eurig decision of the Supreme Court of Canada. Firstly, is there scope for a class action remedy against the respective government bodies of the Provinces of Ontario, Quebec, British Columbia and Alberta, for levying a probate fee which, in substance, is a constitutionally invalid tax?

Moreover, what actions will the Attorney General of Ontario and indeed the Ontario government take to remedying the constitutionally invalid regulation? Will such remedy apply retroactively and, will there be an adjustment in the rate of the probate fee? Finally, what action will the Government and the Attorneys General of Quebec, British Columbia and Alberta take in order to remedy the *prima facie* invalid legislation or regulations of those provinces?

As an editorial matter, it is likely that the Government and Attorneys General for the Province of Ontario, Quebec, British Columbia and Alberta, will take such action that is necessary to confirm that the probate fee is now a “probate tax” and will take any and all actions to make such amending legislation applicable on a retroactive basis. Should this be the case, our advice to clients remains unchanged. Consider the options of gifting assets to specific individuals while you are still alive or, establish an *intro vivos* trust and settle property on that trust prior to your death. The result of such action is to ensure that the assets do not form part of your estate and therefore are not subject to probate tax.

In addition to these methods of limiting the application of the probate tax, charitable giving and holding property in joint tenancy may also be implemented to ensure that assets pass outside of the estate. While the particular circumstances will vary for all of our clients, some or all of these options may be available to you. Please contact Paul S. O. Barbeau at 688-4900 or at [barbeau@msn.com](mailto:barbeau@msn.com) if you are interested in further information regarding limiting the probate tax exposure of your estate.