

Eurig Estate: Another Day, Another Tax

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PRÉCIS

En 1994, Marie Sarah Eurig, l'exécutrice de la succession de son époux, a demandé une ordonnance pour que lui soient émises des lettres d'homologation sans devoir payer les frais d'homologation requis. Elle prétendait que ces frais d'homologation étaient illégaux parce qu'ils ne constituaient pas de véritables frais, mais plutôt un impôt indirect et, par conséquent, qu'ils dépassaient la compétence constitutionnelle de la province.

Le 22 octobre 1998, la Cour suprême du Canada a jugé que le régime de frais d'homologation de l'Ontario était inconstitutionnel : le prélèvement était en fait un impôt et non pas des frais. Cependant, la cour n'était pas prête à convenir qu'il s'agissait d'un impôt « indirect ». Dans une décision déroutante, la cour a conclu que bien que le paiement de frais d'homologation était obligatoire, le paiement était versé par l'exécuteur en sa capacité de représentant. Seule la succession, et non pas les bénéficiaires, portent le fardeau de l'impôt, de sorte qu'il s'agit d'un impôt « direct ». La cour n'a pas cherché à s'écarter d'un courant jurisprudentiel bien établi selon lequel les « impôts sur les biens transmis par décès » sont des impôts indirects parce qu'ils ont été levés sur l'exécuteur qui se rembourserait à même les biens de la succession et ainsi refilerait l'impôt aux bénéficiaires.

Bien que la cour ait conclu que la province avait l'autorité de lever cet impôt, la majorité a jugé que le prélèvement était inconstitutionnel pour des raisons qui peuvent au mieux être décrites comme simplement techniques. Depuis 1950, les frais d'homologation sont levés en vertu de règlements plutôt que conformément à des mesures législatives. Cette délégation, par la législature ontarienne, du pouvoir d'imposition au lieutenant-gouverneur en conseil contrevenait à la Loi constitutionnelle de 1867, selon laquelle les projets de loi qui donnent lieu au prélèvement d'un impôt doivent émaner de la Chambre des communes.

Même si elle a jugé les frais inconstitutionnels, la Cour suprême a invoqué un recours extraordinaire et a suspendu la déclaration de nullité

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pour six mois afin de permettre à la province de régler la question. Sans égard à la suspension, la cour a ordonné que les frais d'homologation payés par Mme Eurig lui soient remboursés. La décision de la cour, même si elle a été favorable à Mme Eurig, n'est pas très utile à l'élaboration à venir d'une doctrine sur la restitution.

Confronté à un certain nombre de recours collectifs, le gouvernement de l'Ontario n'a pas perdu de temps et a tiré profit de cette occasion. Le 18 décembre 1998, le projet de loi 81 a reçu la sanction royale. La Loi de 1998 de l'impôt sur l'administration des successions, selon laquelle il a été déterminé rétroactivement que les frais d'homologation sont des impôts, était incluse en annexe au projet de loi 81.

Cet article comporte deux objectifs. Premièrement, il identifie un fondement de politique servant à la qualification d'une charge à titre d'impôt plutôt que comme frais. Deuxièmement, il comprend des commentaires détaillés sur la décision de la Cour suprême dans l'affaire *Eurig*, ainsi qu'une analyse de la réaction immédiate de la législature provinciale à ce jugement.

ABSTRACT

In 1994, Marie Sarah Eurig, the executor of her late husband's estate, applied for an order that she be issued letters probate without the payment of the requisite probate fee. She contended that the probate fee was not lawful because it was not a true fee but an indirect tax and therefore was beyond the province's constitutional competence.

On October 22, 1998, the Supreme Court of Canada held that Ontario's probate fee regime was unconstitutional: the levy was a tax and not a fee. However, the court was not prepared to accept that the tax was "indirect." In a puzzling decision, the court concluded that although the payment of probate fees was compulsory, the payment was made by the executor in his or her representative capacity. The estate alone—not the beneficiaries—bears the burden of the tax, which makes the tax "direct." The court made little attempt to distinguish a significant body of case law to the effect that "estate taxes" were indirect because they were imposed on the executor, who would indemnify himself or herself out of the assets of the estate and thereby pass the tax on to the beneficiaries.

Although the court concluded unanimously that the province had the authority to levy such a tax, the majority found the probate levy unconstitutional for reasons that can best be described as merely technical. Since 1950, probate fees had been imposed by regulation rather than legislation. This delegation by the Ontario legislature of taxing authority to the lieutenant governor in council violated the Constitution Act, 1867, which mandates that bills that impose any tax must originate in the House of Commons.

Despite the finding of unconstitutionality, the Supreme Court invoked an extraordinary remedy and suspended the declaration of invalidity for a period of six months to enable the province to address the issue.

Regardless of the suspension, the court ordered that the probate fee paid by Mrs. Eurig be refunded. Although it produced a favourable result for Mrs. Eurig, the decision to grant the refund does little to assist in the future establishment of a doctrine for the law of restitution.

Faced with a number of class action lawsuits, the Ontario government wasted little time in taking advantage of this opportunity. On December 18, 1998, Bill 81 received royal assent. Included as a schedule to Bill 81 was the Estate Administration Tax Act, 1998, which retroactively established probate fees as taxes.

The purpose of this article is twofold. First, it identifies a policy basis for characterizing a charge as a tax rather than a fee. Second, it provides a detailed comment on the Supreme Court's decision in *Eurig* and analyzes the provincial legislature's immediate response to that decision.

SETTING THE STAGE

"The purpose of the income tax is to raise revenue to finance government spending. This is, of course, the purpose of every tax."¹ In contrast, the purpose of a fee is to defray the costs of a service.² It is an accepted principle of law that for a charge to be properly classified as a fee, the revenue collected must not be intended to reach the coffers of government.³ Although this distinction between a tax and a fee seems clear in theory, it is much less so in practice. One could point to many examples of overlap and confusion in classifying a levy as a fee or a tax. However, one of the most common reasons for the blurring of distinctions between a fee and a tax is the strong desire of governments to avoid openly imposing new taxes.⁴ If "the art of taxation, consists in so plucking the goose to obtain the largest amount of feathers with the least possible amount of hissing,"⁵ then one of the easiest ways to practise this art is to disguise a tax as a fee.

The distinction between a fee and a tax has recently undergone close scrutiny by the Canadian judiciary in characterizing the Ontario government's probate regime. Probate is a court procedure used to obtain

¹Peter W. Hogg and Joanne E. Magee, *Principles of Canadian Income Tax Law*, 2d ed. (Scarborough, Ont.: Carswell, 1997), 35.

²*Allard Contractors v. Coquitlam*, [1993] 4 SCR 371, and *812069 Ontario v. Bramalea* (1990), 13 RPR (2d) 7, at 17 (Ont. Gen. Div.).

³G.V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2d ed., Canadian Tax Paper no. 65 (Toronto: Canadian Tax Foundation, 1981); see also *Allard*, supra footnote 2.

⁴"Governments have a penchant for concealing taxes and promising to repeal them. They generally satisfy the former by calling them by other names and using non-taxing verbs." V. Krishna, "A Tax by Any Other Name Is Still a Tax," *The Lawyers Weekly*, February 12, 1999.

⁵Jean-Baptiste Colbert, treasurer to King Louis XIV.

certification that the proper person has been appointed executor and that the deceased's last will and testament and any codicils are registered and proved.⁶ In *Eurig Estate*,⁷ the executor⁸ of an estate challenged the constitutionality and legality of the probate fee regime in Ontario, which was introduced by the first Parliament of Upper Canada in 1793.⁹ Despite their long history, probate fees generally went unnoticed and unmentioned upon by practitioners until they were tripled in 1992.¹⁰ The increase gave estate practitioners good reason to place a greater emphasis on "probate planning."

Probate fees did not begin to attract the attention of estate planners and tax advisors until the early 1990s. Before that time (and still to this day in some provinces), they were thought of (when thought of at all) merely as an incidental cost arising in the course of the administration of an estate. They were not sufficiently large to merit significant planning efforts. Things changed, at least in Ontario, when probate fees increased dramatically in 1992. Since September 1966, probate fees had been charged at the rate of \$5 for every \$1,000 of the value of the estate being administered. The 1992 amendments introduced a two-tier system in Ontario: the \$5 rate per \$1,000 was retained on the first \$50,000 of the value of the estate, and the portion of the value in excess of \$50,000 was subject to a levy of \$15 per \$1,000 of value. In effect, under the new system, probate fees payable in respect of most estates almost tripled.¹¹

⁶ "The probate of a will is a document in the prescribed form and under the seal of the proper Court in that behalf, which certifies that the will, a copy of which is thereunto annexed, was duly proved and registered in the Court, and that the administration of the property of the testator was duly committed by the Court to the executors whose name and descriptions are therein set out." Rodney Hull and Maurice C. Cullity, *Macdonell, Sheard and Hull on Probate Practice*, 3d ed. (Scarborough, Ont.: Carswell, 1981), 191.

⁷ *Eurig Estate (Re)* (1998), 165 DLR (4th) 1 (SCC), rev'g. (1997), 31 OR (3d) 777 (CA), which had aff'd. (1994), 20 OR (3d) 385 (Gen. Div.).

⁸ The generally accepted term in Ontario for an executor is now "estate trustee." Because the court decisions discussed herein tend to use the former term, I have followed their example for the purposes of this article.

⁹ An Act To Establish a Court of Probate in this Province, and also a Surrogate Court in Every District Thereof, Upper Canada, 33 Geo. III, c. 8.

¹⁰ Ontario Regulation 293/92, amended to O. Reg. 248/97 (herein referred to as "O. Reg. 293/92"), made under section 5 of the Administration of Justice Act on May 14, 1992 and filed on June 8, 1992, establishes fees in court proceedings and makes certain fees payable in estate matters. It provides in part as follows:

2(1) The following fees are payable in estate matters:

1. For a [grant of probate] . . .

i. on the first \$50,000 of the value of the estate being administered, per thousand dollars or part thereof: \$5.00

ii. on the portion of the value of the estate being administered that exceeds \$50,000, per thousand dollars or part thereof: \$15.00

¹¹ Stephen Bowman, "Ontario Probate Fees: If You Thought You Were Being Taxed, You Were Right," *Current Cases feature* (1998), vol. 46, no. 6 *Canadian Tax Journal* 1278-83, at 1278. The fee levied on each \$1,000 of estate value in excess of \$50,000 was increased from \$5 to \$15 in 1992; this was the first probate fee increase since 1966.

On October 22, 1998, the Supreme Court of Canada released its much anticipated decision in the controversial *Eurig* case. The court reversed the decision of the Ontario Court of Appeal and concluded that Ontario's probate fees were unconstitutional. The majority, consisting of Lamer CJC and L'Heureux-Dubé, Cory, Iacobucci, and Major JJ, disagreed with the findings of the Ontario Court of Appeal and the Ontario Court (General Division) and concluded that probate levies were a tax as opposed to a fee. The majority further concluded that they were direct taxes and therefore within the constitutional competence of the province pursuant to section 92(2) of the Constitution Act, 1867.¹² Nevertheless, the fees were not validly levied by the province because they were imposed by regulation and not properly authorized by the legislature.

Bastarache J, with the concurrence of Gonthier J, wrote a dissenting judgment. Bastarache J agreed with the majority that probate charges were a tax as opposed to a fee and that they were properly characterized as a direct tax; however, he disagreed with the majority on the question of enforceability. Bastarache J held that the authority to levy probate fees in Ontario had been properly delegated to the lieutenant governor in council pursuant to the provisions of section 5 of the Administration of Justice Act.¹³

Binnie J wrote a separate concurring judgment with the agreement of McLachlin J. Binnie J agreed that probate charges were a tax, albeit a direct tax, and thus made the determination of these two issues unanimous. Unlike the majority, Binnie J did not find that legislation that imposes taxation must originate in the House of Commons. However, he concurred with the majority in finding that probate fees were unconstitutional because the language of the Administration of Justice Act was insufficient to permit the imposition of taxes.

At first, the judgment handed down by the Supreme Court in *Eurig* was seen as a victory of monumental proportions for estate practitioners and overtaxed residents. "It is a fabulous decision," a journalist wrote. "It goes right across the board. These fees have just been absolute revenue grabs."¹⁴ The decision established the unconstitutional nature of probate

¹² 30 & 31 Vict., c. 3, as amended.

¹³ RSO 1990, c. A.6. Section 5 of the Administration of Justice Act provides as follows:

5. The Lieutenant Governor in Council may make regulations,

(a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof . . .

(c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

¹⁴ Kirk Makin, "Billions in Probate Fees Declared Illegal," *The Globe and Mail*, October 23, 1998, quoting Peter Fallis, one of the solicitors who represented the appellant (Marie Eurig) at the Supreme Court of Canada.

fees and opened the door for an onslaught of class action suits¹⁵ to recover illegally collected fees.¹⁶ The euphoria was short-lived, however. Although the Supreme Court concluded that probate fees in their existing form were illegal, it suspended the declaration of invalidity for six months to allow the province to amend the legislation or find an alternative means of replacing the revenue base. Seizing this lifeline, the Ontario government introduced the Estate Administration Tax Act.¹⁷ That Act received royal assent on December 18, 1998 and retroactively established probate fees as taxes.¹⁸

Unfortunately, the passage of the Estate Administration Tax Act and the media attention that followed caused the public's focus to shift immediately to the retroactive nature of the new Ontario legislation. The consensus seemed to be that the majority of the Supreme Court had properly concluded that probate fees were not a fee, as counsel for the ministry had argued, but a direct tax, and therefore legal only if the bill that imposed such tax originated in the House of Commons. The Supreme Court had considered the issues, applied the law, and reached the proper conclusion; or had it?

The purpose of this article is twofold. First, it identifies a policy basis for characterizing a charge as a tax rather than a fee. This classification issue will continue to be the subject of litigation in Canada and elsewhere as governments strive to identify new ways to raise revenue. For the time being, however, Canadian jurisprudence on the matter seems to be settled.

Second, this article provides a detailed comment on the Supreme Court's decision in *Eurig* and analyzes the provincial legislature's immediate response to that decision. Certain findings of the Supreme Court and the overall legal analysis in the case are critiqued. In particular, the Supreme Court seems to have departed from the accepted jurisprudence in three respects. First, the unanimous finding that probate fees were a direct tax as opposed to an indirect tax is perplexing, especially given the historical efforts of the provincial legislatures to enact succession duty legislation that could be properly characterized as direct taxation within the competence of the

¹⁵ "Ontario alone has collected more than \$300 million from estates since 1992 when the former NDP government tripled probate fees to 1.5% for estates of more than \$50,000." James Daw, "Fee Grab on Estates Illegal Tax: Court," *The Toronto Star*, October 23, 1998. "The government is now on notice that the hundreds of millions in probate fees that it has been assessing must be given back to the estates of those who paid." *Ibid.*, quoting Malcolm Ruby, Gowlings. "Another class action suit has been launched by Toronto law firm, Harris & Harris." Linda Leatherdale, "Probate Fees Get the Axe," *The Toronto Sun*, October 28, 1998.

¹⁶ Although probate fees were first introduced in Ontario in 1793, the provision for the probate fees in statutory (as opposed to subordinate legislative) form continued until 1950.

¹⁷ SO 1998, c. 34, schedule.

¹⁸ A number of practitioners have expressed skepticism regarding the enforceability of retroactive legislation. However, the Canadian jurisprudence on the issue is well settled: retroactive legislation is valid and enforceable. See *Air Canada v. British Columbia*, *infra* footnote 144.

province.¹⁹ Second, the majority's decision to suspend the declaration of the regulation's invalidity is an extraordinary remedy that arguably was not warranted. Finally, the decision to refund the probate fee paid by Mrs. Eurig is puzzling, given that under existing Canadian law there is no general right of recovery of an ultra vires tax.²⁰

LEGISLATIVE HISTORY OF PROBATE FEES IN ONTARIO

To comprehend the implications of the Supreme Court's decision in *Eurig* and to understand the Ontario government's response to the decision, it is helpful to review briefly the legislative history of probate fees in Ontario.

In 1793, the Court of Probate and the Surrogate Courts for the districts were established in the province of Upper Canada.²¹ The fees payable by an applicant for a grant of letters probate were established as ad valorem, based on the value of the estate.²²

The Court of Probate was abolished in 1858. The jurisdiction respecting the granting of letters probate was conferred upon the Surrogate Court in each county in the province of Upper Canada. The fees payable by an applicant were continued as ad valorem of the property devolving under the will.²³

Between 1793 and 1935, the fees for a grant of letters probate were levied by the legislature. In 1935, section 72 of The Surrogate Courts Act²⁴ was amended,²⁵ and the legislature delegated to the lieutenant governor in council the authority to levy fees payable for a grant of letters probate. The amendment provided that the existing ad valorem fees were to remain in full force and effect until amended by the lieutenant governor in council.

In 1941, pursuant to an amendment to The Judicature Act,²⁶ the Rules Committee was established. It was authorized, subject to the approval of the lieutenant governor in council, to, inter alia, regulate all fees payable to the Crown in respect of proceedings in any court.²⁷ In the same year,

¹⁹ Wolfe D. Goodman, "Unlawful Taxes and the Supreme Court's Decision in *Eurig*" (February 1999), 31 *The Canadian Business Law Journal* 291-98.

²⁰ *Air Canada v. British Columbia*, infra footnote 144.

²¹ Supra footnote 9.

²² "According to value. A tax imposed on the value of property. . . . Duties are either *ad valorem* or *specific*; the former when the duty is laid in the form of a percentage on the value of the property; the latter where it is imposed as a fixed sum on each article of a class without regard to its value." *Black's Law Dictionary*, 6th ed. All provinces calculate probate fees on an ad valorem basis (except Quebec, which charges a flat fee of \$65).

²³ An Act To Amend the Law in Relation to the Jurisdiction and Procedure of the Several Surrogate Courts in Upper Canada, and To Simplify and Expedite the Proceedings in such Courts, 22 Vic. c. 93, section 48, schedule A.

²⁴ RSO 1927, c. 94.

²⁵ The Surrogate Courts Amendment Act 1935, SO 1935, c. 69, section 3.

²⁶ RSO 1937, c. 100.

²⁷ The Judicature Amendment Act 1941, SO 1941, c. 24, section 3(2).

the legislature amended The Surrogate Courts Act²⁸ to authorize the Rules Committee to levy the fees payable for a grant of letters probate, provided that the approval of the lieutenant governor in council was obtained. This delegated authority was not actually exercised by the lieutenant governor in council or the Rules Committee until 1950.²⁹

From 1950 to 1980, when the Rules Committee was granted the authority to levy probate fees with the authority of the lieutenant governor in council, the fees were ad valorem of the estate of the deceased person.³⁰ The delegated authority remained under the jurisdiction of the Rules Committee until 1980, when The Surrogate Courts Act³¹ and The Administration of Justice Act³² were amended.³³ From June 1, 1980 until December 18, 1998, when the Estate Administration Tax Act received royal assent, the lieutenant governor in council was empowered by the legislature to make regulations requiring the payment of fees in respect of proceedings in any court. The lieutenant governor in council was also authorized to prescribe the amount of such fees.³⁴

THE CHALLENGE

Marie Sarah Eurig (the appellant) was named executor in the last will and testament of her husband, Donald Valentine Eurig, who died on October 14, 1993. The net value of the estate for probate purposes was determined to be \$414,000,³⁵ and the fees for the grant of probate amounted to \$5,710.³⁶ On June 21, 1994, the appellant, through her solicitor, applied to the Ontario Court (General Division) for letters probate without tendering the prescribed probate fee.³⁷ Letters probate were denied by the court as a

²⁸ RSO 1937, c. 106.

²⁹ O. Reg. 114/50, section 89, appendix B, item 14. This was relevant for the purposes of determining the retroactive date to be included in Ontario's Estate Administration Tax Act.

³⁰ O. Reg. 114/50, section 89, appendix B, item 14; CRO 1950, Reg. 357, section 89, appendix B, item 14; RRO 1960, Reg. 551, section 89, appendix B, item 14; RRO 1960, Reg. 551, section 89(2), appendix C, item 1, as remade by O. Reg. 206/66, section 15; RRO 1970, Reg. 806, section 89(2), appendix C, item 1; and RRO 1980, Reg. 925, section 85(2), appendix C, item 1.

³¹ RSO 1970, c. 451.

³² RSO 1970, c. 6.

³³ The Administration of Justice Amendment Act, 1979, SO 1979, c. 49, sections 1 and 4 (proclaimed in force June 1, 1980).

³⁴ *Supra* footnote 13, section 5(c).

³⁵ Application for Probate for Donald Valentine Eurig filed in the Ontario Court (General Division), Guelph, Ontario.

³⁶ O. Reg. 293/92, *supra* footnote 10.

³⁷ A notice of motion was filed with the Ontario Court (General Division) for:

AN ORDER allowing the Executrix, as applicant herein, to cause an Application for Probate, in respect to the estate of her husband, the late Donald Valentine Eurig, to be filed in this Court, together with the ancillary documents, affidavits and exhibits

(The footnote is continued on the next page.)

result of the non-payment. The appellant later made the payment under protest in order to obtain letters probate.

On August 22, 1994, the appellant applied to the Ontario Court (General Division) for an order that she be issued letters probate without the payment of a probate fee, on the ground that the probate fee was not a lawful imposition, and for an order declaring that the regulation requiring the payment of such a probate fee was not lawful. On October 14, 1994, the application was dismissed without costs by the court with written reasons given by Morrison J.³⁸ On October 26, 1994, the appellant filed a notice of appeal in the Court of Appeal for Ontario.³⁹ On January 16, 1997, that court dismissed the appeal with written reasons given by Morden ACJO.⁴⁰ The appellant was granted leave to appeal the decision of the Ontario Court of Appeal to the Supreme Court of Canada.⁴¹

THE ISSUES

For ease of reference, the constitutional and non-constitutional issues considered in this case can be denoted as follows:

- 1) Is the probate charge a fee or a tax?
- 2) If the probate charge is a tax, is it an indirect tax or a direct tax?
- 3) Even if the probate fee is a direct tax, can it be levied by the lieutenant governor in council?
- 4) Should the appellant be entitled to a refund of the probate fee?

THE DECISION

Is Ontario's Probate Levy a Fee or a Tax?

The initial question that had to be answered at all three levels of court was whether the probate levy, as prescribed in section 2(1)1 of Ontario Regulation 293/92,⁴² was a tax rather than a fee. This distinction is of critical importance: a province has the power to raise revenue for provincial purposes only by means of direct taxation.⁴³ A province also has the

³⁷ Continued . . .

thereto in support thereof, without the requirement of the payment of fees which are alleged to be otherwise payable with such Application, under the authority of Clause 2(1)1 of the "Schedule of Fees," which are purported to have been established by the Lieutenant Governor in Council by *Ontario Regulation 293/92* under the provisions of section 5 of the *Administration of Justice Act*.

³⁸ *Eurig*, supra footnote 7.

³⁹ The original notice of appeal was subsequently replaced by a supplementary notice of appeal dated August 11, 1995.

⁴⁰ *Eurig*, supra footnote 7.

⁴¹ Order of the Supreme Court of Canada granting leave to appeal, July 3, 1997.

⁴² O. Reg. 293/92, supra footnote 10.

⁴³ Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1985); section 92(2) of the Constitution Act, 1867.

unhindered authority to charge a fee, whether it is direct or indirect, provided that the fee is validly enacted under a provincial head of power other than the taxing power.⁴⁴

Although the matter has often been litigated, Canadian courts have lacked consistency in distinguishing between taxes and fees. One of the main reasons for this inconsistency is the courts' tendency to interchange the terms "tax" and "fee."⁴⁵ This tendency is especially puzzling given the fact that the courts have readily adopted the test enunciated by Duff J in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*.⁴⁶

Duff J stated that a charge is properly classified as a tax if four criteria are met:

- 1) the charge is enforceable by law;
- 2) the charge is imposed under the authority of the legislature;
- 3) the charge is levied by a public body; and
- 4) the charge is intended for a public purpose.

The first, third, and fourth criteria pertain to the very nature of the charge; the second criterion involves a consideration of the manner in which the charge was imposed.⁴⁷

Enforceable by Law

The first of Duff J's criteria requires that an element of compulsion be present. In *Eurig*,⁴⁸ the appellant argued that the assets of the estate required letters probate for their transmission and distribution. The respondent contended that probate fees lacked the universal application that is characteristic of a tax.

Seeking probate is not compulsory. The executor takes his authority directly from the will itself, and is not required to apply for letters probate in order to administer the estate. Probate is not the foundation of the executor's title, but only authentic evidence of it. A fee imposed upon those seeking to invoke the civil process of the courts cannot be equated to a compulsory level.⁴⁹

The respondent further argued that living persons can arrange their affairs so that there is no necessity to obtain probate; therefore, it would be a misapplication of Duff J's first criterion to conclude that probate charges were enforceable by law.

⁴⁴ *Allard*, supra footnote 2; *Home Builders' Assn. v. York Reg. Bd. of Ed.*, [1996] 2 SCR 929.

⁴⁵ *Regina v. Churchill* (1972), 29 DLR (3d) 368 (BC SC).

⁴⁶ [1931] SCR 357.

⁴⁷ The second criterion is dealt with under the heading "Was the Probate Tax Imposed Under the Authority of the Legislature?" infra.

⁴⁸ Application for probate, supra footnote 35.

⁴⁹ Factum of the respondent filed in the Supreme Court of Canada, February 9, 1998.

An affirmative or negative response to the question “Are probate levies enforceable by law?” is abstruse given that neither the *Estates Act*⁵⁰ nor any other Ontario legislation imposes a legal obligation on an executor to obtain a grant of probate.⁵¹

In concluding that a probate charge was a fee and not a tax, Morrison J at first instance wrote:

I adopt the distinction that counsel for the Ministry points out between a tax and a fee in that with a tax, it is compulsory while with a fee, it is only required to be paid where one seeks the services in respect of which it is imposed. With a tax, there is no option on the part of the payor. Probate fees, it is argued, lack the universal application that is characteristic of a tax. Counsel for the Ministry also argues that executors can administer and distribute the bequest of a deceased without applying for a grant of probate in certain cases. Further, living persons can arrange their affairs so that there is no necessity for probate.⁵²

With respect, it is difficult to see how any charge can be characterized as “enforceable by law” if Morrison J’s conclusion is adopted. One can avoid an income tax by substituting leisure for work or by establishing proper schemes to avoid the imposition of taxes; similarly, one can avoid a consumption tax by refraining from purchasing the product that attracts the tax.⁵³

The Ontario Court of Appeal agreed that it may be possible to administer an estate without the requirement to obtain probate. However, the court considered the practical necessity of probate as opposed to the legal reality.⁵⁴ Morden ACJO wrote:

I am persuaded that the fee is compulsory. While it may be possible for an executor to administer a simple estate, depending on the nature of its assets, without obtaining letters probate, normally it is of such a practical necessity that it amounts to a legal necessity. Because the fundamental legal duty of an executor is to administer the estate as efficiently and expeditiously as possible, the practical obligation is also a legal one. The

⁵⁰ RSO 1990, c. E.21, sections 32, 51, and 53. “Although there is provision in the *Estates Act*, (s. 32) to require an Applicant for a grant to make and deliver to the registrar a true statement of the total value of all the property that belonged to the deceased at the time of his or her death, the *Estates Act* does not contain any requirement whatsoever that a fee be paid for a grant of probate or letters of administration in any amount.” Agreed Statement of Facts filed in the Ontario Court (General Division), August 14, 1994. See also Rodney Hull and Ian M. Hull, *Macdonell, Sheard and Hull on Probate Practice*, 4th ed. (Scarborough, Ont.: Carswell, 1996), 185.

⁵¹ Similarly, the new Estate Administration Tax Act does not require the executor to obtain letters probate.

⁵² *Eurig*, supra footnote 7, at 393 (Gen. Div.).

⁵³ One can avoid a consumption tax, such as a tobacco tax, gasoline tax, provincial sales tax, etc., by not purchasing the product that attracts the tax. This does not alter the fact that such a tax is compulsory. See also Hogg, supra footnote 43, at 613, footnote 77.

⁵⁴ The Court of Appeal pointed out that the *Estates Act* is intended to operate in a legal context, which itself imposes a practical and a legal duty to obtain probate.

delay and expense in attempting to gather in, administer, and distribute an estate without probate would be contrary to this duty.⁵⁵

Morden ACJO then examined the US jurisprudence. In *State v. Gorman*, ad valorem probate fee legislation was successfully challenged on the ground that it imposed an unconstitutional tax. Dickinson J, speaking on behalf of the Supreme Court of Minnesota, effectively addressed the issue of compulsion in terms of estate fees:

Nor is it practically optional with executors or administrators, or those interested in the settlement of the estates of deceased persons, as to whether they will pay these exactions or not. If the law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes.

It is thus apparent that these exactions are “taxes” in the general and in the precise meaning of that word.⁵⁶

On the evidence presented in *Eurig*, it is difficult not to concur with the Ontario Court of Appeal’s finding that the payment of probate fees is compulsory. However, the court’s finding that a correlation must exist between the legal duty to administer an estate in an efficient and expeditious manner and the obligation to obtain probate is not so apparent. The court concluded that the delay and expense incurred in attempting to administer an estate without probate would be contrary to the legal duty imposed on an executor, and therefore a practical compulsion existed. Despite this, no evidence was presented to suggest that an estate could not be administered efficiently and expeditiously without letters probate.

Generally, an executor will abstain from securing letters probate in two situations. The first involves simple estates in which administration is resolved in a very expedient fashion. In such cases it is common for the executor to be the only beneficiary, and therefore it is unlikely that the lack of letters probate will result in undue delay or expense. (In fact, the opposite is usually true.) The second situation involves very complex estates in which significant planning has been undertaken prior to the testator’s death in order to avoid the requirement to obtain probate. In such cases the extensive preplanning generally guarantees the executor’s ability to administer the estate promptly and efficiently.⁵⁷

⁵⁵ *Eurig*, supra footnote 7, at 791 (CA). See also *McCargar v. McKinnon* (1868), 15 GR 361 (Ch. D.), which sets out the legal obligation of an executor to deal with the estate promptly and diligently.

⁵⁶ 41 NW 948 (Minn. SC 1889), at 949-50.

⁵⁷ One of the best examples of this is the case of *Granovsky Estate v. Ontario* (1998), 156 DLR (4th) 557 (Ont. Gen. Div.). The testator prepared two wills. The primary will dealt with the assets that would require probate prior to distribution. The secondary will included the assets that would not require probate as a prerequisite for distribution. The
(The footnote is continued on the next page.)

The Court of Appeal was probably justified in regarding probate as a practical and legal necessity, since the law imposes the requirement that an executor must have probate to prove his or her title when an estate matter is before the court. Furthermore, it is a well-recognized principle of law that letters probate are the only evidence of an executor's title that a court will receive, even in a case where the defendant is willing to concede that the executor has title without evidence of probate.⁵⁸

The Supreme Court unanimously agreed that probate charges were compulsory and therefore enforceable by law. However, it added very little to the legal analysis.⁵⁹ In the majority of cases involving the administration of estates, an executor is legally obliged to obtain probate in order to comply with his or her legal duties, and for this reason alone the payment of probate levies must be seen as compulsory.⁶⁰ The mere fact that no specific legislation enforces such a requirement is not indicative of a lack of compulsion. Furthermore, the personal choice of the executor, even in the case of a professional executor, whether or not to obtain letters probate should not be seen as denotative of the voluntary nature of probate.

Levied by a Public Body

Probate fees are levied in Ontario by the Ontario Court (General Division); there was no debate as to the applicability of the third criterion of the *Lawson* test.⁶¹

⁵⁷ Continued . . .

preparation of the secondary will and the intricate estate planning essentially ensured the prompt and effective distribution of the estate without the necessity to obtain probate. The Ontario Court (General Division) concluded that the secondary will did not need to be admitted to probate. An appeal was abandoned in April 1999.

⁵⁸ *In re Crowhurst Park*, [1974] 1 WLR 583 (Ch. D.).

⁵⁹ The Supreme Court of Canada did reference Margaret E. Rintoul, *The Solicitor's Guide to Estate Practice in Ontario*, 2d ed. (Markham, Ont.: Butterworths, 1990), 35-36, wherein protection for the executor and administrative efficiency are identified as practical and legal reasons that frequently compel an executor to obtain probate. The fact that in some instances probate may be avoided does not lessen the fact that in Ontario letters probate are the rule in virtually all estate affairs.

⁶⁰ "Although probate is not the foundation of the executor's title, but only the authentic evidence of it, that authentication is nonetheless a practical and legal necessity in most cases." *Eurig*, supra footnote 7, at 1 (SCC).

⁶¹ With respect to this third criterion, the Ontario Court (General Division) was asked to determine whether the requisite probate payment as calculated under the regulation was a denial of natural justice and therefore a contravention of the Canadian Charter of Rights and Freedoms. The appellant contended that the imposition of unreasonable charges for access to justice violated the constitutional right to obtain justice freely and without purchase. The origin of this basic constitutional right can be traced to the Magna Carta (as translated in J.C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1965); see also William McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (Glasgow: Maclehose, 1905), and W.F. Swindler, *Magna Carta: Legend and Legacy* (Indianapolis: Bobbs-Merrill, 1965)). Evidence of this general prohibition against unreasonable charges for

(The footnote is continued on the next page.)

Intended for Public Purpose

Even if a charge is compulsory, is imposed under the authority of the legislature, and is levied by a public body, it still may not be a tax. The fourth criterion in the *Lawson* test requires that the charge be intended for a public purpose in order to qualify as a tax. Unfortunately, Duff J's test has become so widely accepted that the courts no longer take the time to actually consider the wording in the case. Duff J, writing for the majority of the Supreme Court, set out the four criteria as follows:

That they are taxes, I have no doubt. In the first place they are enforceable by law. Under s. 13 they can be sued for, and a certificate under the hand of the chairman of the Committee is *prima facie* evidence that the amount stated is due; and the failure of a shipper to comply with an order to pay such a levy would appear to be an offence under the Act by s. 15. Then they are imposed under the authority of the legislature. They are imposed by a public body. . . . *The levy is also made for a public purpose. When such compulsory, not to say dictatorial, powers are vested in such a body by the legislature, the purposes for which they are given are conclusively presumed to be public purposes.*⁶²

When Duff J's comments are read in their complete and proper context, "it is difficult to see how any charge purportedly made as a fee by a public body could escape being regarded as a tax under the definition in *Lawson*."⁶³ In *Shannon v. Lower Mainland Dairy Products Board*,⁶⁴ the Privy Council expressed concern with respect to the narrow view taken by Duff J in relation to the provincial powers enumerated under section 92(9) of the Constitution Act, 1867. Although the Supreme Court and the Ontario Court of Appeal in *Eurig* made limited reference to *Shannon*, both levels of court were prepared to consider Duff J's fourth criterion in a broader context. Both courts concurred with the general proposition that for a probate charge to be characterized as a fee rather than a tax, the purpose of probate could not be the raising of revenue. The justification for this contention is readily apparent in recent jurisprudence.

⁶¹ Continued . . .

access to justice is also abundantly prevalent in US jurisprudence. (See *Malin v. La Moure County*, 145 NW 582 (N. Dak. SC 1914) (Bruce J); see also *Gorman*, supra footnote 56.) The appellant did not pursue this line of argument at either the Court of Appeal or the Supreme Court of Canada.

⁶² *Lawson*, supra footnote 46, at 363 (emphasis added).

⁶³ Goodman, supra footnote 19, at 292. Despite this comment, the Court of Appeal found it easy enough to conclude that the fee was not a tax according to the definition in *Lawson*.

⁶⁴ [1938] AC 708 (PC). In *Shannon*, the Privy Council was asked to consider whether a provincial licence fee required pursuant to the Natural Products Marketing (British Columbia) Act was unconstitutional. Lord Atkin delivered the judgment, reversing the decision of the British Columbia Court of Appeal and concluding that the provincial licence fee in question was *intra vires* the province. In overturning the lower court's decision, Lord Atkin concluded that the licence itself merely involved a permission to trade and was part of the scheme of the regulation. Because the regulation as enacted was found to be valid, the fee for carrying it out was likewise valid even though ultimately it forms part of revenue.

In *Home Builders' Assn.*, the Ontario Divisional Court stated:

The distinction between "taxation" and "charge" is that the latter is money collected to defray the cost of specific services rather than to raise revenue for general purposes.⁶⁵

Similarly, Professor Hogg, in writing about regulatory charges, states:

These charges too are not necessarily taxes, and if they are not they need not be direct. They are not taxes if they can be supported as regulatory charges imposed under one of the province's regulatory powers. . . . These can be supported as regulatory charges if they are taken in payment for a specific governmental service, and if they bear a reasonable relation to the cost of providing the service—whether it be the issue of a license . . . the provision of a bridge, or the supply of water. These charges are not taxes because their purpose is to defray expenses, not to raise revenue.⁶⁶

Despite the concurrence of the Court of Appeal and the Supreme Court in the general prohibition set out above, a consensus as to the revenue-raising purpose of probate fees was not reached.

In determining whether or not a probate levy is a revenue-generating device and therefore properly classified as a tax, the Court of Appeal considered the respondent's submission:

[I]f payment for probate fees is compulsory, the government is entitled to raise probate fees to the extent of meeting the costs of the administration of justice in Ontario or, something less, the costs of court administration.⁶⁷

The Court of Appeal agreed that the costs and workload connected with the processing of an application for letters probate usually did not vary with respect to the differences in the value of the estate. However, the ad valorem nature of the fees caused the fee to increase in direct proportion to the value of the estate. It was clear that the evidence failed to disclose any correlation between the amount charged for the granting of letters probate and the cost of providing that service. The agreed statement of facts submitted by both the respondent and the appellant showed that there is no relationship between the value of the estate for which letters probate are sought and the cost of issuing the document.⁶⁸ The Court of Appeal agreed. However, the court was prepared to accept a broader interpretation of the purpose of the Administration of Justice Act, and concluded that although the fee charged would not directly coincide with the cost of the service provided, the total fees collected, in combination, were intended to defray, at least in part, court costs. Morden ACJO wrote:

Further, the nature of court administration operations in the Ontario Court (General Division), for which O. Reg. 293/92 provides for fees of various

⁶⁵ *Ont. Home Builders' Assn. v. York Bd. of Ed.* (1993), 13 OR (3d) 493, at 505 (Ont. Gen. Div.).

⁶⁶ Hogg, *supra* footnote 43, at 613.

⁶⁷ Factum of the respondent filed in the Ontario Court of Appeal, May 2, 1996.

⁶⁸ Agreed statement of facts dated August 14, 1994.

kinds and amounts is such that it would be impossible to determine, even in a general way, what the costs of administering grants of probate would be and what the costs relating to other proceedings and matters would be. . . .

Considerations of this kind indicate that there can be no balkanization, for accounting purposes, of court operations according to subject-matter of proceedings. . . . What is intended is that the combined effect of the fees provided for will defray, at least in part, the costs of the administration of justice generally in the court in question. Each fee is to be a contribution to defraying the costs of the court providing the service.⁶⁹

Morden ACJO then concluded:

In my view, the impugned legislation is squarely founded on the head of power other than the taxation power. Section 5(c) of the *Administration of Justice Act* and the regulation in question are, in pith and substance, legislation in relation to s. 92(14) of the *Constitution Act, 1867*, specifically, in relation to the maintenance of the Ontario Court (General Division) and not legislation aimed at raising a revenue under s. 92(2). The primary and real purpose of the legislation is, in return for a service provided in the General Division, to defray, at least in part, the costs of this court.⁷⁰

The Ontario Court of Appeal's conclusion that probate charges were not maintained for general revenue-raising purposes is difficult to justify on the basis of the jurisprudence. If accepted, this conclusion will, for all intents and purposes, dissolve any distinction that exists between a fee and a tax.

If such broad fields of governmental responsibility as the administration of justice, or the administration of the courts, or the administration of the General Division, can be characterized as a "regulatory scheme," then the distinction between fees and taxes is effectively erased. The effect of this kind of characterization is that an impost intended to augment the general revenues of government (i.e. a tax) can be labeled as a fee, and must be upheld as such.⁷¹

It is obvious that the non-probate services of the Ontario court system provided no greater benefit to the appellant than they did to any other member of the community at large. Similarly, how can one accept the argument that the probate fees, which were used in part to defray court costs, bestowed a benefit solely on the individual who made the application rather than on the public at large?⁷²

Not surprisingly, the Supreme Court unanimously concluded that the income generated by probate fees was intended for the very purpose of providing a surplus for general revenue. The Supreme Court was not

⁶⁹ *Eurig*, supra footnote 7, at 789-90 (CA).

⁷⁰ *Ibid.*, at 795-96.

⁷¹ Factum of the appellant filed in the Supreme Court of Canada, December 23, 1997. The fact that only the individual who bears the cost of the service receives the benefit of the service is indicative of a fee.

⁷² For a similar analysis, see *AG Can. v. Registrar of Titles*, [1934], 4 DLR 764 (BC CA), and *812069*, supra footnote 2, at 17.

prepared to adopt the Ontario Court of Appeal's position that the use of probate fees to assist in offsetting the overall costs of Ontario's court system was sufficient justification for classifying probate levies as fees. Major J concluded:

The probate levy also meets the fourth *Lawson* criterion for a tax as the proceeds were intended for a public purpose. . . .

Those conclusions are supported by the evidence before this Court which showed that probate fees do not "incidentally" provide a surplus for general revenue, but rather are intended for that very purpose.⁷³

In reaching this conclusion, the Supreme Court considered comments made by the Ontario Law Reform Commission in 1991 in its report on the administration of estates. In that report, the commission noted the absence of any relationship between probate fees and the costs of issuing letters probate. The commission stated that it is difficult to discern a principled justification for ad valorem probate fees, and that "[t]he only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue."⁷⁴

Although there is a significant body of US jurisprudence that would have supported the finding that ad valorem charges on estates requiring

⁷³ *Eurig*, supra footnote 7, at 11 (SCC).

⁷⁴ Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (Toronto: Queen's Printer, 1991), 286:

Proceedings under the *Estates Act* are subject to a special schedule of fees, which formerly applied to the surrogate courts. This schedule differs from the schedule applicable to other proceedings in the Ontario Court (General Division), including other proceedings involving estates. The former schedule provides for a sliding scale, so that the fees payable increase with the value of the estate being administered. By contrast, fees for other proceedings in the Ontario Court (General Division) bear no relation to the value of the claim or property in issue.

It is difficult to discern a principled justification for the schedule of fees applicable to matters within the purview of the *Estates Act*. In granting probate or administration to a personal representative, the effort required on the part of the court does not increase with the value of the estate. Indeed, a very valuable estate may simply consist of insurance proceeds or real property that is owned jointly by husband and wife. Proceedings in the Ontario Court (General Division) involve widely disparate amounts and a range of complexity of issues. Yet neither factor affects the amount of court fees payable by litigants.

The only rationale for the graduated fee schedule appears to be that it has been regarded as a suitable vehicle for raising revenue. While this is certainly understandable on a pragmatic level, we are of the view that it is inappropriate to single out certain uses of our court system in this manner. Court fees should be established in a consistent manner for those who consume this public service, especially for matters coming before the same court. We therefore recommend that Appendix C to the rules governing proceedings under the *Estates Act* should be amended so that fees in relation to matters comprehended by the *Estates Act* are set in the same manner as for other proceedings brought in the Ontario Court (General Division).

Despite this report, recent case law accepts that ad valorem levies may be a fee rather than a tax, but only where there is a direct connection between value and cost; see *Allard*, supra footnote 2, and *Home Builders' Assn.*, supra footnote 44.

probate are taxes, the Supreme Court did not cite any of these decisions.⁷⁵ In *Fatjo v. Pfister*, the Supreme Court of California was asked to determine the constitutionality of a “probate fee.” The fee amounted to \$1 for every \$1,000 of estate value. In concluding that the probate levy was a tax, Beatty CJ stated:

The *ad valorem* charge for filing the inventory is in no sense a fee or compensation for the services of the officer, which are the same, as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion.⁷⁶

Similarly, in *Berryman v. Bowers* the Supreme Court of Arizona found legislation that imposed a graduated schedule of probate fees to be a taxing statute:

[The legislation], to the extent that it undertakes to require the payment of fees to the clerk on the value of the estate to be administered and not upon the services, is therefore a tax statute and not a statute fixing fees to compensate for services rendered.⁷⁷

After having concluded that the probate levy also met the fourth *Lawson* criterion because the proceeds were intended for a public purpose, the Supreme Court in *Eurig* proceeded to discuss the existence of a nexus between the quantum of the charge and the cost of the related service provided. Major J addressed this issue immediately after concluding that probate charges were intended for a public purpose, which might appear to suggest that he was proposing that a fifth criterion be added to Duff J’s famous *Lawson* test. However, the consideration of nexus between the quantum of the charge and the cost of the related service is really part of Duff J’s fourth criterion, and is merely ancillary to the determination whether a charge is in fact intended for a public purpose.

⁷⁵ The highest courts of 12 states have found *ad valorem* charges on estates requiring probate to be taxes and not fees. There is no constitutional prohibition in the United States against the imposition of indirect taxes at the state level; however, most of the state constitutions prohibit the levying of taxes. Probate fees were found to be taxes and struck down for violating the taxing prohibition in the state constitution in 10 of the 12 following US cases: *Gorman*, supra footnote 56; *State v. Mann*, 45 NW 526 (Wisc. SC 1890); *Fatjo v. Pfister*, 48 P. 1012 (Cal. SC 1897); *State v. Case*, 81 P. 554 (Wash. SC 1905); *Cook County v. Fairbank*, 78 NE 895 (Ill. SC 1906); *Hauser v. Miller*, 94 P. 197 (Mont. SC 1908); *Malin v. La Moure County*, supra footnote 61; *Berryman v. Bowers*, 250 P. 361 (Ariz. SC 1926); *Chapman v. Ada County*, 284 P. 259 (Idaho SC 1930); *Smith v. Carbon County*, 63 P. 2d 259 (Utah SC 1936); *Anderson v. Page*, 37 SE 2d 289 (S. Carol. SC 1946); and *In Re Zoller’s Estate*, 171 A. 2d 375 (Del. SC 1961). It should be pointed out that recent American cases have held that *ad valorem* probate charges are fees and not taxes: see *Blade v. Finley*, 445 NE 2d 1240 (Ill. App. 1983); *Foreman v. Treasurer of the County of Oakland*, 226 NW 3d 67 (Mich. CA 1974); and *Hanson v. Griffiths*, 124 NYS 2d 473 (SC 1953). See also J.R. Kemper, “Validity of Statutes Imposing a Graduated Probate Fee Based Upon Value of Estate,” 76 ALR 3d 1117-33, at 1119-20.

⁷⁶ Supra footnote 75, at 1013.

⁷⁷ *Ibid.*, at 362.

In both *Allard* and *Home Builders' Assn.*, the fee imposed on the payer bore some relationship to the value of the benefit or the cost of the service provided by the government in return for the fee. In applying this "matching principle," Major J cited Iacobucci J:

A surplus itself is not a problem so long as the municipalities made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme.⁷⁸

The Supreme Court was prepared to accept the fact that the probate fees paid by the appellant might not have been in direct proportion to the cost of the probate service provided. However, a reasonable nexus between the quantum charged and the cost of the service must be present.⁷⁹ To this extent Major J wrote:

In determining whether that nexus exists, courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice. The evidence in this appeal fails to disclose any correlation between the amount charged for grants of letters probate and the cost of providing that service. The Agreed Statement of Facts clearly shows that the procedures involved in granting letters do not vary with the value of the estate. Although the cost of granting letters probate bears no relation to the value of an estate, the probate levy varies directly with the value of the estate. The result is the absence of a nexus between the levy and the cost of the service, which indicates that the levy is a tax and not a fee.⁸⁰

The appellant paid \$5,710, the probate fee required, to have the court certify her as the executor under the will.⁸¹ The appellant maintained that the probate fee bore no relationship to the value of the benefit. If the appellant had applied for probate in 1991 instead of 1994, the fee would have been \$2,070 instead of \$5,710.⁸² It was clear from the documentary evidence filed by the attorney general that the virtual tripling of probate fees in 1992 was not based on an estimate of an increase in the actual cost of providing a service, but rather on an increase in the costs of court administration in general.⁸³ In my opinion, there is no reason, other than

⁷⁸ *Allard*, supra footnote 2, at 411.

⁷⁹ The fact that a charge need not be in direct proportion to the cost of the service provided reaffirms that a charge established ad valorem may still be considered a fee as opposed to a tax, provided that a reasonable nexus exists between the quantum charged and the cost of the service being provided. See *Allard*, supra footnote 2.

⁸⁰ *Eurig*, supra footnote 7, at 12 (SCC).

⁸¹ It was not disputed that the purpose of probate is to obtain certification that the proper person has been appointed estate trustee and that the last will and testament and any codicils are registered and proved. See *Probate Practice*, 3d ed., supra footnote 6.

⁸² Before 1992, the probate levy was calculated at \$5 per \$1,000 of estate value. The probate fee on an estate valued at \$414,000 would have been \$2,070.

⁸³ "The change in probate fees in 1992 was part of a comprehensive overhaul of all charges made by provincial court offices, which charges were increased virtually across the board." (The footnote is continued on the next page.)

the raising of general revenue, to require an individual who makes an uncontested application for probate to finance the Ontario court system.

Although it is clear in Canadian law that a fee cannot provide a surplus for general revenue, the precise correlation between the amount charged for a service and the cost of providing that service will no doubt continue to be the subject of debate. Despite a lack of precision in determining the proper correlation between the quantum of the charge and the cost of providing the service, the *Eurig* decision goes a long way toward codifying the judiciary's position on the distinction between taxes and fees.

Direct or Indirect Tax

Having determined that probate fees were a tax as opposed to a fee, the Supreme Court considered whether or not the newly characterized tax was a direct tax or an indirect tax. Although the determination of this issue received relatively little judicial analysis, the conclusion that probate fees were a direct tax was of great significance in that it permitted the Ontario government to easily rectify the situation.

As mentioned above, the distinction between a direct tax and an indirect tax is critical in determining whether the power to levy the charge falls within the competence of the provincial legislature.⁸⁴ Although the constitutional issues that *Eurig* invoked are not the primary focus of this article, it is important to summarize the division of powers that exists in Canada with respect to taxation.

Pursuant to the Constitution Act, 1867, both the federal and the provincial governments have general powers over taxation. Section 91(3) gives the federal government jurisdiction for "The raising of Money by any Mode or System of Taxation."⁸⁵ Provincial governments, however, are limited by section 92(2) to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."⁸⁶ The reference to direct taxation in section 92(2) precludes the levying of an indirect tax by a province.⁸⁷ Despite this seemingly rigid division of powers, the Supreme Court has held that provincial governments are within their constitutional rights to levy indirect taxes, provided that such levies are ancillary to a

⁸³ Continued . . .

board to reflect inflation and the increased costs of courts administration." Affidavit of Josh Handlarski, sworn September 2, 1994. Mr. Handlarski was a senior policy and planning officer with the Program Development Branch of the Courts Administration Division for Ontario.

⁸⁴ See W.P.M. Kennedy and D.C. Wells, *The Law of the Taxing Power in Canada* (Toronto: University of Toronto Press, 1931); La Forest, *supra* footnote 3; Albert S. Abel, *Laskin's Canadian Constitutional Law*, 4th ed., rev. (Scarborough, Ont.: Carswell, 1975), chapter 12; and Joseph Eliot Magnet, "The Constitutional Distribution of Taxation Powers in Canada" (1978), 10 *Ottawa Law Review* 473-534.

⁸⁵ Constitution Act, 1867, section 91(3).

⁸⁶ *Ibid.*, section 92(2).

⁸⁷ La Forest, *supra* footnote 3, at 56-57.

valid regulatory scheme.⁸⁸ Section 92(9) of the Constitution Act, 1867, for example, grants the provinces the power to make laws in relation to “Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.”⁸⁹ The courts have concluded that such an indirect tax is not a contravention of the Constitution Act, 1867, provided that the “legislative provision was in pith and substance an exercise of that power, i.e. where, to use the phrase in some of the cases, it was ‘the dominant or most important characteristic of the challenged law.’”⁹⁰ In other words, a provincial government cannot levy an indirect tax merely by establishing a regulatory scheme. To be *intra vires* the province, the scheme must be consistent with the purpose of the legislation, and the charges ancillary or adhesive thereto. Finally, the scheme must be validly enacted pursuant to a provincial head of power other than section 92(2).⁹¹

In *Eurig*, the respondent argued that probate fees were validly enacted pursuant to section 92(14):

It is submitted, that the enactment of the probate fees in issue in this case is squarely founded on s. 92(14) of the *Constitution Act, 1867*, as being required for the “maintenance” of the provincial court of civil jurisdiction. Put another way, the “pith and substance” or “primary purpose” of these probate fees is the administration of justice in the province. Being founded in s. 92(14) the probate fees are not subject to the limitation in s. 92(2) that they must be direct in their incidence.⁹²

⁸⁸ *Home Builders' Assn.*, supra footnote 44, at 978-79, and *Allard*, supra footnote 2, at 398-405.

⁸⁹ “Section 92(9) is not explicitly limited to the raising of a revenue by direct means, which invites the question: to what extent, if at all, does s. 92(9) enlarge s. 92(2) by authorizing indirect taxation in the form of licence fees? There have been considerable, but inconclusive, judicial dicta on this point. La Forest’s careful study of the cases leads him to the conclusion that s. 92(9) authorizes indirect licence fees only if they are directed to defraying the expense of an otherwise valid regulatory scheme. It may be objected that the provinces have this power anyway, as an incident to the regulatory scheme, and so this interpretation leaves s. 92(9) with no independent force of its own. But it does seem to be the better view, because of the overriding implication of sections 91 and 92 that the power to levy indirect taxation should be reserved to Parliament.” Hogg, supra footnote 43, at 603.

⁹⁰ *Home Builders' Assn.*, supra footnote 44, at 1008, per La Forest J; see also *Friends of the Oldman River v. Canada*, [1992] 1 SCR 3, at 62, and *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004.

⁹¹ A regulatory scheme could be validly enacted pursuant to the Constitution Act, 1867 section 92(9), “Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes,” section 92(13), “Property and Civil Rights in the Province,” section 92(14), “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts,” and section 92(16), “Generally all Matters of a merely local or private Nature in the Province.”

⁹² Factum of the intervenor, the Attorney General of British Columbia, filed in the Supreme Court of Canada, 8.

Despite this submission, the Supreme Court was not prepared to consider whether probate fees, even if indirect, could be *intra vires* the province as ancillary to a valid regulatory scheme. In dismissing this consideration, Major J wrote:

[T]here is no need to consider whether it would survive as an indirect tax on the basis that it was ancillary to a valid regulatory scheme. Such a result in any event is doubtful on the facts.⁹³

The Supreme Court did not address the contention that probate fees ought to be classified as a tax on persons, property, or transactions within the province, which would have validated the tax as a direct tax. The court's disinclination to consider this proposition is somewhat perplexing given the Privy Council's decision in *Rex v. Lovitt*.⁹⁴ In *Lovitt*, the testator had been domiciled in Nova Scotia, but died owning deposit receipts issued by a branch of the Bank of British North America in New Brunswick. The Privy Council concluded that the succession duty claimed by New Brunswick was a direct tax and therefore constitutional: the tax was a direct burden on the property. Similarly, in *Attorney General for British Columbia v. Esquimalt and Nanaimo Ry. Co.*,⁹⁵ the Privy Council upheld the validity of a British Columbia tax on timber cut on lands within the province as a direct tax, despite the argument that the tax would normally be passed on to purchasers of the lumber. In both cases, the Privy Council seemed to steer away from the economic effect of the tax in question and instead focused on the property that was the subject of the tax. It is important to point out, however, that in both *Lovitt* and *Nanaimo* the property was situated in the province that sought to levy the tax, whereas Ontario's probate fees are levied regardless of the situs of the estate property.⁹⁶

Although the Supreme Court in *Eurig* was not prepared to accept the tax as *intra vires* the province by virtue of either of the submissions noted above, neither was it prepared to characterize probate fees as indirect taxation.

The terms "direct taxation" and "indirect taxation" were first considered by the Privy Council in *Attorney General for Quebec v. Reed*,⁹⁷ wherein John Stuart Mill's classic formulation of the distinction between direct and indirect taxes was first quoted:

⁹³ *Eurig*, supra footnote 7, at 13 (SCC).

⁹⁴ [1912] AC 212 (PC).

⁹⁵ [1950] AC 87 (PC), rev'g. [1948] SCR 403.

⁹⁶ See also *AG BC v. Canada Trust Co.*, [1980] 2 SCR 466; *Covert et al. v. Minister of Finance (NS)*, [1980] 2 SCR 774; *Air Canada v. British Columbia*, infra footnote 144; *Air Canada v. Ontario (Minister of Revenue)* (1995), 22 OR (3d) 611 (Gen. Div.); *Air Canada v. Minister of Revenue and Attorney General of Ontario* (unreported decision of the Ontario Court of Appeal dated March 8, 1996); *The Minister of Finance of British Columbia v. The Royal Trust Co.*, [1920] 61 SCR 127; and *Alworth v. Min. of Finance*, [1978] 1 SCR 447.

⁹⁷ (1884), 10 App. Cas. 141 (PC).

A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.⁹⁸

Mill's definition was affirmed by the Privy Council in *Bank of Toronto v. Lambe*,⁹⁹ wherein Lord Hobhouse stated:

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question . . . because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.¹⁰⁰

In addition to the above, a second approach—the “categories test”—was considered by the Privy Council in an appeal from the Supreme Court of Canada in *City of Halifax v. Fairbanks' Estate*.¹⁰¹ In that case, the Supreme Court had relied upon Mill's definition to conclude that the tax imposed by the city of Halifax on the estate of John P. Fairbanks was void as not being “direct taxation” within the meaning of section 92(2). In reversing the decision of the Supreme Court and concluding that the tax in dispute was a direct tax, the Privy Council looked to whether the tax fit within one of the categories that were traditionally seen as direct or indirect. Viscount Cave LC stated:

What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.¹⁰²

⁹⁸ J.S. Mill, *Principles of Political Economy*, book V, chapter 2. See also *Allard*, supra footnote 2; *Home Builders' Assn.*, supra footnote 44; and *La Forest*, supra footnote 3.

⁹⁹ (1887), 12 App. Cas. 575 (PC). In *Lambe*, a Quebec statute imposed a tax on every bank that did business in the province; the tax varied according to the paid-up capital of the bank. The Privy Council concluded that the tax was a direct tax as that term was defined by Mill.

¹⁰⁰ *Ibid.*, at 582-83.

¹⁰¹ [1928] AC 117, at 124-25 (PC).

¹⁰² *Ibid.*, at 125.

Although the categories test was never abandoned,¹⁰³ “when the . . . test again appeared to become too restrictive and served neither of the underlying but competing constitutional policies of providing the provinces adequate scope to raise revenue while preserving the essential structure of the federation, the Privy Council returned to Mill’s formula.”¹⁰⁴ Generally, Mill’s definition is the one used by Canadian courts today.

In applying Mill’s definition to the *Eurig* case, Major J wrote:

[T]he tax would be indirect if the executor was personally liable for payment of probate fees, as the intention would clearly be that the executor would recover payment from the beneficiaries of the estate. However, the legislation does not make the executor personally liable for the fees. Payment is made by the executor only in his or her representative capacity. As a result, this case is readily distinguishable from *Cotton v. The King* . . . where the succession duty was intended to be paid by one person and recouped from another. Here, as the amount is paid out of the estate by the executor in his or her representative capacity with the intention that the estate should bear the burden of the tax, the probate fees fall within Mill’s definition of direct tax. The probate levy does not fall within the more expansive definition of an “indirect tax” in *Allard Contractors per Iacobucci J.* at p. 396.¹⁰⁵

The extract quoted above represents the extent of the Supreme Court’s analysis; the Ontario Court of Appeal did not consider the issue. The Supreme Court made little attempt to differentiate a series of cases wherein the Privy Council had concluded that “estate taxes” were indirect because they were imposed on the executor of the estate, who would indemnify himself or herself out of the assets of the estate, thereby passing the tax on to the beneficiaries.¹⁰⁶ As a result of this line of cases, the federal Parliament levied estate taxes and the provinces levied succession duties.¹⁰⁷ In *Cotton*, the Privy Council considered the constitutionality of a provincial death tax that was imposed on the executor of an estate. The Privy Council overturned the Supreme Court’s decision by concluding that the

¹⁰³ The categories approach still prevails when the direct or indirect nature of land taxes is considered.

¹⁰⁴ *Home Builders’ Assn.*, supra footnote 44, at 1043.

¹⁰⁵ *Eurig*, supra footnote 7, at 12-13 (SCC).

¹⁰⁶ *Cotton v. Rex*, [1914] AC 177 (PC); *Burland v. The King*, [1922] 1 AC 215 (PC); and *Provincial Treasurer of Alberta v. Kerr*, [1933] AC 710 (PC). Major J did make reference to *Cotton*, suggesting that the case at bar was readily distinguishable because the executor is not personally liable for payment of the probate fee. With respect, this conclusion is simply incorrect.

¹⁰⁷ “After the repeal in 1971 of the federal estate and gift taxes, there was an initial rush by the provinces to enter the field. Ontario, Quebec and British Columbia were already levying succession duties and gift taxes, and they were quickly joined by all the other provinces except Alberta. . . . The attraction of becoming a tax haven like Alberta led all the Atlantic provinces to repeal their new taxes in 1973 and 1974. British Columbia, Manitoba and Saskatchewan repealed their taxes in 1977, Ontario did so in 1979, and Quebec followed in 1985.” Hogg and Magee, supra footnote 1, at 147.

taxation was not “direct taxation” and therefore was ultra vires the province of Quebec.

Indeed, the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear but to obtain from other persons. . . . It is an instance of pure taxation, in which the payment is obtained from persons not intended to bear it within the meaning of the accepted definition above referred to, and their Lordships are therefore compelled to hold that the taxation is not “direct taxation,” and that the enactment is therefore ultra vires on the part of the Provincial Government.¹⁰⁸

The Supreme Court did not cite the decision of the Alberta appellate division in *AG Alta. v. Pearce*.¹⁰⁹ In that case the court was asked to determine whether a succession duty could extend to property that had been given away by the deceased prior to death. The court held that the succession duty could extend to such property, but that the requirement for the executor to pay the duty was unconstitutional.

The collection of the duty in such a case must come either from the property itself or by personal action against the donees. The withholding of probate under such circumstances is nothing more or less than an attempt to force payment of a tax from an executrix who is under no legal obligation to pay and to that extent is attempting to do indirectly what cannot under the law be done directly. To require payment from the executor is to impose an indirect tax which is beyond provincial legislative authority.¹¹⁰

What makes the Supreme Court’s decision in *Eurig* so perplexing is the court’s failure to address what an estate is and how it actually bears the burden of a tax. Furthermore, it is difficult to reconcile the court’s finding that the payment of probate fees is compulsory with Major J’s comments that the executor is not personally liable for the payment of the probate fee. In concluding that the payment of probate fees was compulsory, the court acknowledged that if the executor did not pay the prescribed fee, letters probate would not be issued and the executor would risk personal liability for not properly discharging his or her administrative duties.¹¹¹ The proper conclusion must be that payment of the probate fee is required. The only person who is in a legal position to discharge the responsibility for payment is the executor. Although it is accurate to conclude that the

¹⁰⁸ *Cotton*, supra footnote 106, at 195. See also *Burland and Provincial Treasurer of Alberta*, supra footnote 106.

¹⁰⁹ [1932] 1 DLR 587 (Alta. AD).

¹¹⁰ *Ibid.*, at 594.

¹¹¹ I do not believe there is any difference between the personal liability of an executor who fails to discharge an income tax liability and an executor who fails to obtain letters probate. Income taxes, which are to be borne by the estate, must be paid by the executor. Although such income taxes are paid in a representative capacity by the executor, the executor remains personally liable if a tax liability is not discharged before the distribution of the estate.

executor pays in his or her representative capacity,¹¹² it must be on behalf of the residuary beneficiaries. The executor will pay the fee either directly from the estate's assets or personally (and later seek reimbursement from the estate).¹¹³ In either case, the overall value of the estate, and thus the distribution to the residuary beneficiaries, will be reduced by the amount of the fee. It is difficult, then, to see how the estate bears the burden of this probate fee as stated by the Supreme Court. Furthermore, it is difficult to imagine a clearer example of an indirect tax.

In addition to the matters raised above, one must consider the efforts of the provincial legislatures over many decades to enact succession duty legislation that could be justified as direct taxation within the province and on property within the province.¹¹⁴ Could the provinces have achieved the same result simply by imposing succession duties on estates and requiring them to be paid by executors only in their representative capacity? If so, could the provinces have validly imposed estate taxes (as the federal Estate Tax Act did)¹¹⁵ rather than a set of individual taxes levied on each successor in the province and each item of property in the province, based on the amount inherited by each successor?¹¹⁶

Although there is no doubt that the task of distinguishing between a direct tax and an indirect tax is more difficult today than it would have been in 1867,¹¹⁷ a distinction must still exist. It is imperative that the judiciary consider and apply this distinction in a consistent manner. In unanimously concluding that probate fees were a direct tax and therefore within the competence of the provincial legislature, the court seems to have departed from accepted jurisprudence. This, combined with the court's

¹¹² Section 2(8) of the Estate Administration Tax Act specifies that the tax is payable by the estate representative in his, her, or its representative capacity. The language was directly taken from Major J's decision. However, the subsection does not state that the tax is paid on behalf of the estate. Does this mean that even the Ontario legislature was not prepared to accept the court's conclusion that the executor pays the probate fee in his or her representative capacity on behalf of the estate?

¹¹³ Conversations with a number of financial institutions suggest that the overwhelming majority of the institutions will permit a withdrawal of estate funds, prior to the granting of letters probate, in order to pay the requisite probate fee.

¹¹⁴ Goodman, *supra* footnote 19, at 295. A succession duty (or inheritance tax) is levied on each beneficiary's inheritance and is paid by the beneficiary. See Hogg and Magee, *supra* footnote 1; see also J. Harvey Perry, *Taxes, Tariffs, and Subsidies: A History of Canadian Fiscal Development* (Toronto: University of Toronto Press, 1955).

¹¹⁵ RSC 1970, c. E-9.

¹¹⁶ Goodman, *supra* footnote 19, at 295.

¹¹⁷ "The original rationale for the distinction was that the provinces should be prevented from embarking on ambitious expenditures. It was thought the best way to do this was by subjecting the legislatures to the political resistance encountered in levying direct taxation. By archaic political economy, direct taxation was thought to be more perceived. It provided, therefore, for greater scrutiny of the actions of the legislature by the electorate." Magnet, *supra* footnote 84, at 487.

cursoriness in connection with the constitutional question, inevitably creates in the reader a sense of incompleteness.

Was the Probate Tax Imposed Under the Authority of the Legislature?

Once the court concluded that probate fees were a tax, albeit a direct tax, it then considered the second *Lawson* criterion: whether the implementation of the probate tax violated section 53 or 54 of the Constitution Act, 1867. On behalf of the majority, Major J stated:

While the Ontario legislature has the authority to implement a direct tax, it must do so in accordance with the requirements set out in the Constitution. Section 53 of the *Constitution Act, 1867* mandates that bills for imposing any tax shall originate in the House of Commons. By virtue of s. 90 of the *Constitution Act, 1867*, s. 53 is rendered applicable to the provinces. Thus, all provincial bills for the imposition of any tax must originate in the legislature. . . .

[T]he probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. . . . Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 802/94 (previously O. Reg. 293/92) unconstitutional. . . .

Regardless of whether s. 53 was complied with, or even if s. 53 is considered redundant at the provincial level, the probate levy is not enforceable as it was not authorized by s. 5 of the *Administration of Justice Act*. . . .

While [section 5] authorize[s] the Lieutenant Governor in Council to impose fees, [it does] not constitute an express delegation of *taxing* authority. . . . [T]he Act clearly does not authorize the imposition of a tax, albeit direct.¹¹⁸

Major J concluded:

Section 52(1) of the *Constitution Act, 1982* provides that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The probate fee levied by O. Reg. 293/92 is in substance a direct tax which has not been imposed in accordance with the requirements of s. 53 of the *Constitution Act, 1867*. Thus the regulation is invalid and of no force or effect.¹¹⁹

Section 45 of the Constitution Act, 1982,¹²⁰ grants each province the discretion to make laws that have the effect of amending the province's

¹¹⁸ *Eurig*, supra footnote 7, at 13-16 (SCC). In making this finding, the majority of the Supreme Court gave a broader meaning to section 53 and concluded "that s. 53 continues to be binding upon the provinces . . . by the fact that the applicability of s. 53 to the provinces was not removed when the Constitution was amended in 1982, even though bicameral legislatures had ceased to exist at the provincial level by that time." *Ibid.*, at 14.

¹¹⁹ *Ibid.*, at 17.

¹²⁰ Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11.

constitution; by virtue of section 52(1), any provincial legislation that amends the constitution of the province must do so expressly.¹²¹

The majority of the Supreme Court found that no provisions in the Administration of Justice Act purported to amend the constitutional requirement for imposing tax legislation as set out in section 53 of the Constitution Act, 1867. Major J wrote:

The only power conferred by s. 5 of the Act was to make regulations regarding the payment of fees, not the imposition of taxes. Yet the probate fees in this instance are in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature. While the Legislature of Ontario may well be competent to establish probate taxes under the terms of the *Administration of Justice Act*, s. 53 requires that they do so explicitly. Since s. 53 was not expressly amended, the province was obliged to abide by its terms. Its failure to do so renders the probate tax imposed under O. Reg. 802/94 (previously O. Reg. 293/92) unconstitutional.¹²²

Surprisingly, it was the determination of the second criterion in *Lawson* that led to disagreement among the nine Supreme Court justices. In a dissenting judgment, Bastarache J, with the concurrence of Gonthier J, did not agree “that the probate fee was invalid on the ground that it was imposed by a body other than the legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54 of the *Constitution Act, 1867*).”¹²³ Bastarache J further disagreed with the majority’s conclusion that the probate fees were not authorized under section 5 of the Administration of Justice Act. He concluded that it was legal for the government to delegate this taxing authority to the lieutenant governor in council because the government was merely granting the lieutenant governor the power to “provide for the details of the tax through regulation.”

The powers of a provincial legislature cannot be limited except by the Constitution. The province of Ontario authorized the Lieutenant Governor in Council, through s. 5 of the *Administration of Justice Act*, to implement a direct tax in respect of court proceedings. The Lieutenant Governor in Council validly prescribed the amount for this tax and the method of payment

¹²¹ Joan Small, “Money Bills and the Use of the Royal Recommendations in Canada: Practice Versus Principle?” (1995), vol. 27, no. 1 *Ottawa Law Review* 33-58, at 50.

¹²² *Eurig*, supra footnote 7, at 15 (SCC). Section 5 of the Administration of Justice Act, supra footnote 13, reads as follows:

5. The Lieutenant Governor in Council may make regulations,

(a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts thereof;

(b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts thereof;

(c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts thereof.

¹²³ *Eurig*, supra footnote 7, at 19.

through the taxing of applications for letters probate pursuant to Regulation 293/92.¹²⁴

Although Binnie and McLachlin JJ concurred with the result of the majority, they reached this determination for different reasons. Binnie J, writing the decision on behalf of himself and McLachlin J, disagreed with Major J's conclusion that the probate tax imposed pursuant to the regulation was unconstitutional by virtue of non-compliance with section 53 of the Constitution Act, 1867.

The legislative power of the province is sovereign except as limited by the Constitution itself, including limitations flowing from the federal-provincial division of powers, and the *Canadian Charter of Rights and Freedoms*. In the absence of a constitutional prohibition, the legislature has power to authorize a tax structure of its own choosing, and for which it will be politically accountable, including a tax to be prescribed by the Lieutenant Governor in Council. I do not construe s. 53 of the *Constitution Act, 1867* as constituting such a prohibition.¹²⁵

Binnie J concluded that the language in section 5 of the Administration of Justice Act was not sufficiently broad to allow the Ontario legislature to delegate to the lieutenant governor in council the power to prescribe an escalating ad valorem probate tax; thus, the delegation was unconstitutional.

The Declaration of Invalidity

The majority of the Supreme Court of Canada concluded that pursuant to section 52(1) of the Constitution Act, 1982, the regulation that authorized probate fees in Ontario was unconstitutional because it was not imposed in accordance with the requirements of section 53 of the Constitution Act, 1867. Having identified the inconsistency of the legislation, the majority then had to consider the suitability of any potential remedial measures. A number of appropriate options are available to the judiciary when dealing with legislative inconsistencies, such as striking down, severance, or reading in.¹²⁶ In *Eurig*, the question of constitutional validity turned on the overall examination of the pith and substance of the legislation in question, rather than on an examination of the effects of particular portions of the legislation pertaining to an individual's rights. As a result, the majority's only remedial option was to strike down the legislation; severance or reading in was inapplicable. Once the court concluded that the probate

¹²⁴ *Ibid.*, at 22, per Bastarache J.

¹²⁵ *Ibid.*

¹²⁶ Carol Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness," in Robert J. Sharpe, ed., *Charter Litigation* (Markham, Ont.: Butterworths, 1987), 233-306; see also Evan H. Caminker, "A Norm-Based Remedial Model for Underinclusive Statutes" (May 1986), 95 *Yale Law Journal* 1185-1209; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] AC 503 (PC); and Nitya Duclos and Kent Roach, "Constitutional Remedies as 'Constitutional Hints': A Comment on R. v. Schachter" (1991), vol. 36, no. 1 *McGill Law Journal* 1-38.

legislation should be struck down, its final step was to determine whether the declaration of invalidity should be temporarily suspended.¹²⁷

The respondent submitted:

[I]f this Honourable Court should declare that the probate fees made payable pursuant to section 2(1) para. 1 of O. Reg. 293/92 [are] unconstitutional, it is respectfully required that this declaration of invalidity should be suspended for a year as it will have financial consequences on the ability to provide public services in the jurisdiction of Ontario and the government may wish to explore alternate methods of either obtaining funds or adjusting services.¹²⁸

Possibly realizing the practical difficulty of declaring probate fees unconstitutional while simultaneously inviting the provincial government to mount a suitable response, the Supreme Court suspended the declaration of invalidity for a period of six months:

An immediate declaration of invalidity would deprive the province of the revenue derived from probate fees, with no opportunity to remedy the legislation or find alternative sources of funding. Probate fees have a lengthy history in Ontario, and the revenue derived therefrom is substantial. For example, the evidence presented to this Court indicated that in 1993 and 1994, probate fees collected in Ontario totaled \$51.8 million and \$52.6 million, respectively. This revenue is used to defray the costs of court administration in the province. An immediate deprivation of this source of revenue would likely have harmful consequences for the administration of justice in the province. The declaration of invalidity is therefore suspended for a period of six months to enable the province to address the issue.¹²⁹

Although such a suspension is clearly within the powers of the judiciary, it must be viewed as an extraordinary remedy. A delayed declaration of invalidity is a serious matter: it allows a state of affairs that violates standards embodied in the constitution to persist for a time.¹³⁰

Unfortunately, apart from Major J's statement set out above, the court made no attempt to either apply or distinguish previous jurisprudence that considered the application of this remedy in significantly greater detail. The fact that the Supreme Court did not make reference to the leading Canadian case, *Schachter v. Canada*,¹³¹ adds to the confusion with respect to the issue of suspension.¹³² The absence of legal analysis is also odd

¹²⁷ "A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void." Lamer CJC, speaking on behalf of the majority of the Supreme Court of Canada in *Schachter*, *infra* footnote 131, at 715.

¹²⁸ Respondent's factum, *supra* footnote 49, at 37.

¹²⁹ *Eurig*, *supra* footnote 7, at 17 (SCC).

¹³⁰ *Schachter v. Canada*, *infra* footnote 131.

¹³¹ [1992] 2 SCR 679.

¹³² It is odd that Major J did not reference the *Schachter* case, given that Lamer CJC, who wrote the judgment in *Schachter*, sat in concurrence with Major J in *Eurig*.

given the recent proliferation of Canadian case law in which declarations of invalidity have been sought, and given the significant commentary on remedial discretion.¹³³

Lamer CJC, speaking on behalf of the majority of the Supreme Court in *Schachter*, established three criteria that warrant the suspension of a declaration of invalidity even in cases where the court has concluded that the legislation in question should be struck down:

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option if:

A. striking down the legislation without enacting something in its place would pose a danger to the public [*R v. Swain*, [1991] 1 SCR 933];

B. striking down the legislation without enacting something in its place would threaten the rule of law [*Re Manitoba Language Rights*, [1985] 1 SCR 721]; or

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefiting the individual whose rights have been violated.¹³⁴

In *Eurig*, the Supreme Court could not have cited the first or third criterion, as set out by Lamer CJC in *Schachter*, in order to justify the suspension of the declaration of invalidity. Therefore, the court was prepared either to accept the fact that striking down the legislation without enacting something in its place would threaten the rule of law, or to create a fourth criterion that would warrant a suspension.

In the light of previous jurisprudence, it is difficult to see how the deprivation of the province's probate revenue¹³⁵ could be considered a

¹³³ Duclos and Roach, *supra* footnote 126: Reuben Hasson, "What's Your Favourite Right? The Charter and Income Maintenance Legislation" (Fall 1989), 5 *Journal of Law and Social Policy* 1-34; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989), 255; H.J. Glasbeek, "A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality" (1989), 9 *Windsor Year Book of Access to Justice* 293-352; Ruth Bader Ginsburg, "Some Thoughts on Judicial Authority To Repair Unconstitutional Legislation" (1979), 28 *Cleveland State Law Review* 301-24; and Dale Gibson, "Non-Destructive Charter Responses to Legislative Inequalities" (1989), vol. 27, no. 2 *Alberta Law Review* 181-90.

¹³⁴ *Schachter*, *supra* footnote 131, at 715-16. See also *AG NS v. Phillips* (1986), 34 DLR (4th) 633 (NS SC).

¹³⁵ The evidence presented in *Eurig* indicated that in 1994 probate fees collected in Ontario totalled \$52.6 million. Therefore, as a result of the six-month suspension, Ontario would effectively be able to continue to collect probate fees of approximately \$26.3 million. A loss of \$26.3 million in fee revenue is inconsequential, especially given the deficit incurred in administering the judicial system. "The last available published accounts for the administration of justice are for the fiscal period 1992-1993. Total expenditures for (The footnote is continued on the next page.)

threat to the rule of law and thus warrant the need for a suspension of invalidity.¹³⁶ However, despite the seemingly narrow nature of his criteria as enunciated in *Schachter*, Lamer CJC was quick to also point out that “the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.”¹³⁷ Lamer CJC’s comment can be seen as an attempt to avoid the future rigid application of the *Schachter* criteria. This is evidenced in the post-*Schachter* decisions, including *Eurig*. It is apparent that the courts are not prepared to accept a rigid and narrow test in determining which factors warrant the grant of a suspension of a declaration of invalidity; instead, they will opt for a much more liberal determination on a case-by-case basis in order to ensure that the legislature is given time to rectify legislative inconsistencies with the least disruption to the economic framework of society.

Should we now consider economic loss to be a threat to the rule of law, or perhaps a new fourth criterion to warrant the suspension of a declaration of invalidity? No matter how this question is ultimately answered, it is now apparent that the Canadian judiciary is prepared to accept that a suspension of a declaration of invalidity will be warranted in cases where the government will suffer adverse economic repercussions.¹³⁸

The Refund

Although an in-depth review of the constitutional and statutory principles underlying the recovery of illegally collected taxes, fees, and charges is beyond the scope of this article, a general overview of restitutionary principles is appropriate. Despite the plethora of recent decisions predicated on claims to recover illegally collected levies, restitutionary claims

¹³⁵ Continued . . .

that period were court administration costs of 252.2 million and crown legal services of 94.4 million for a total of 346.6 million. Total revenue for that period was fee charges of 124.4 million and court fines of 147.5 million for a total of 271.9 million.” (Affidavit of Josh Handlarski, sworn September 2, 1994.)

¹³⁶ Two leading Canadian cases examined the “threat to the rule of law” as a consideration that would warrant the suspension of a declaration of invalidity; see *Re Manitoba Language Rights*, [1985] 1 SCR 721, and *Re Provincial Court Judges*, [1998] 1 SCR 3. *Re Manitoba Language Rights* considered the constitutionality of statutes and regulations enacted pursuant to section 23 of the Manitoba Act 1870. The Supreme Court declared the statutes and regulations unconstitutional because they were drafted only in English. However, to avoid threatening the rule of law in Manitoba, the Supreme Court suspended the declaration of invalidity to allow Manitoba’s provincial legislature time to enact bilingual provincial legislation. *Re Provincial Court Judges* considered the constitutionality of schemes for remuneration of provincial court judges in Prince Edward Island, Manitoba, and Alberta. The Supreme Court declared the legislation unconstitutional and once again agreed to suspend the declaration of invalidity to allow the provincial governments time to comply with constitutional requirements and ensure that the orderly administration of justice was not disrupted.

¹³⁷ *Schachter*, supra footnote 131, at 719.

¹³⁸ The actual or perceived quantum of the economic loss necessary or appropriate to justify the suspension of a declaration of invalidity must be addressed on a case-by-case basis.

involving governments remain rare. Furthermore, decades of discussion in Canada,¹³⁹ other Commonwealth countries,¹⁴⁰ and the United States¹⁴¹ have done little to enunciate a clear general right to recovery.¹⁴² Although a number of recent judicial decisions have dealt with restitutionary claims for illegal levies, this difficult area remains far from settled.

Traditionally, Canadian courts have been more receptive than their Commonwealth counterparts to principles of restitution and recovery of ultra vires taxes.¹⁴³ However, this penchant toward restitution has been significantly stalled as a result of the Supreme Court's decision in *Air Canada v. British Columbia*.¹⁴⁴ In that case, the Supreme Court split 5-4: the majority held that the plaintiff could not recover taxes collected by the government through ultra vires legislation. Despite this conclusion, both La Forest J, writing for the majority, and Wilson J, writing for the minority, addressed the question whether ultra vires taxes are generally recoverable. Although obiter, the remarks of the majority represent the current Canadian law.

¹³⁹ Ronald D. Collins, "Restitution from Government Officials" (July 1984), 29 *McGill Law Journal* 407-38; B. McKenna, "Mistake of Law Between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid" (Fall 1979), 37 *University of Toronto Faculty of Law Review* 223-35; Bradley Crawford, "Restitution: Mistake of Law and Practical Compulsion (1967), vol. 17, no. 2 *University of Toronto Law Journal* 344-54; and John D. McCamus, "Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: Ignorantia Juris in the Supreme Court of Canada" (1983), vol. 17, no. 1 *University of British Columbia Law Review* 233-74.

¹⁴⁰ United Kingdom, Law Commission, *Restitution: Mistakes of Law and Ultra Vires Public Authorities Receipts and Payments* (London: HMSO, 1994); Paul M. Perell, "Restitutionary Claims Against Government" (February 1995), 17 *The Advocates' Quarterly* 71-79; Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989); Peter Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights," in P.D. Finn, ed., *Essays on Restitution* (Sydney: Law Book, 1990), 164-205; and Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution*, 4th ed. (London: Sweet & Maxwell, 1993).

¹⁴¹ George E. Palmer, *The Law of Restitution* (Boston: Little Brown, 1978); "Sales and Use Tax," 68 Am. Jur. 2d section 270; "State and Local Taxation," 72 Am. Jur. 2d section 1074; and American Law Institute, *Restatement of the Law: Restitution* (St. Paul, Minn.: American Law Institute, 1937).

¹⁴² Much of this confusion is due to the Supreme Court's apparent willingness to embrace the "passing on" defence (see *Air Canada v. British Columbia*, infra footnote 144). For an excellent review of the "passing on" defence, see Paul Mitchell, "Restitution, 'Passing On,' and the Recovery of Unlawfully Demanded Taxes: Why Air Canada Doesn't Fly" (Winter 1995), 53 *University of Toronto Faculty of Law Review* 130-79.

¹⁴³ See *George (Porky) Jacobs Enterprises Ltd. v. City of Regina*, [1964] SCR 326; *Eadie v. Township of Brantford*, [1967] SCR 573; and *Amax Potash Ltd. etc.*, [1977] 2 SCR 576.

¹⁴⁴ [1989] 1 SCR 1161. The plaintiffs in *Air Canada* attempted to argue that a BC gasoline sales tax was ultra vires the government of British Columbia because it sought to tax gasoline that was ultimately used outside the province. Thus, it was not a direct tax "within the Province in order to the raising of a Revenue for Provincial Purposes," which is the only type of tax provinces can levy under section 92(2) of the Constitution Act, 1867. See also *Canadian Pacific Airlines v. British Columbia*, [1989] 1 SCR 1133.

La Forest J held for the majority that the courts should, in general, block recovery of *ultra vires* taxes: "All in all, I have become persuaded that the rule should be against recovery of *ultra vires* taxes, at least in the case of unconstitutional statutes."¹⁴⁵ La Forest J offered two reasons for this denial of restitution. First, the plaintiff would be unjustly enriched if it were permitted to recover the funds, having passed on the cost of the taxes to its customers. Second, and more important for the purposes of this article, La Forest J felt that recovery, in general, should be denied where the restitution of the tax would disrupt government finances. The latter reason seems to indicate that recovery in *Eurig* should have been prohibited, especially in light of Major J's decision to suspend the declaration of invalidity for the purpose of preventing a deprivation of provincial revenue.

In a strong dissent in *Air Canada*, Wilson J was prepared to accept that there should be a *prima facie* right to recovery of taxes paid under an *ultra vires* piece of legislation, regardless of any financial disruption:

Based on the foregoing reasoning I conclude that payments made under a statute subsequently found to be unconstitutional should be recoverable and I cannot, with respect, accept my colleague's proposition that the principle should be reversed for policy reasons in the cases of payments to governmental bodies.¹⁴⁶

Support for Wilson J's minority position is found in restitutionary principles of unjust enrichment, which tend to support a general right to recover taxes levied pursuant to *ultra vires* legislation.¹⁴⁷

Although English courts have traditionally been slower than Canadian courts to recognize the principle of unjust enrichment, recent cases have put them more in line with Wilson J's *Air Canada* dissent. The leading English case, *Woolwich Building Society v. IRC*, established a *prima facie* right to recover taxes illegally collected "as a matter of common justice."¹⁴⁸ Similarly, in *Cmr. of Revenue v. Royal Insurance*,¹⁴⁹ the Australian

¹⁴⁵ *Air Canada*, supra footnote 144, at 1206.

¹⁴⁶ *Ibid.*, at 1215. See also *Amax*, supra footnote 143, at 590, wherein Dickson J stated: "To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens." Wilson J also considered Professor Hogg's comments on *Amax*: "Where a tax has been paid to government under a statute subsequently held to be unconstitutional, can the tax be recovered by the taxpayer? In principle, the answer should be yes. The government's right to the tax was destroyed by the holding of unconstitutionality, and the tax should be refunded to the taxpayer." Hogg, supra footnote 43, at 349.

¹⁴⁷ As stated in *Pettkus v. Becker*, [1980] 2 SCR 834, three main elements must be present for unjust enrichment to exist. They are (1) a benefit to the defendant; (2) a corresponding deprivation to the plaintiff; and (3) no juridical reason for the defendant's retention of the benefit.

¹⁴⁸ [1993] AC 70, at 172 (HL).

¹⁴⁹ (1995), 69 ALJR 51 (HC).

High Court reaffirmed its willingness to allow for recovery of illegally or mistakenly paid taxes.¹⁵⁰

The majority of the court in *Eurig*, though unprepared to deprive the province of a substantial source of revenue, appeared eager to find a way to refund the probate fee paid by the appellant. Major J did not consider the Commonwealth jurisprudence in order to assist in establishing a right of recovery for the appellant; however, he did consider briefly the Supreme Court's decision in *Air Canada*. In addressing the rule developed by La Forest J that unconstitutional taxes cannot generally be recovered, Major J seems to have focused on the exception that arises when the relationship between the state and a particular taxpayer that results in the collection of the tax is unjust or oppressive. La Forest J, in *Air Canada*, described the exception to the denial of recovery as follows:

Exceptions may exist where the relationship between the state and a particular taxpayer results in the collection of tax which would be unjust or oppressive in the circumstances. The present case does not, however, call for a departure from the general rule. The tax, though unconstitutional, raised an issue bordering on the technical. Had the statute been enacted in proper form there would have been no difficulty in exacting the tax as actually imposed. Nor was there any compulsion. Payment under an *ultra vires* statute does not constitute "compulsion." Before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment. Finally, the fact that the province may have been in a better position to determine that the statute was unconstitutional does not affect the rule. The policy reasons underlying it remain.¹⁵¹

Major J, on behalf of the majority in *Eurig*, highlighted this exception to the general rule barring recovery:

Even if this Court were to adopt the rule articulated by La Forest J., it would not prevent recovery by the appellant in this case. An exception has been recognized where taxes are paid under compulsion or protest. . . . Here, the appellant has challenged the validity of the regulation imposing the probate fee from the outset. She paid the fee in order to fulfil her legal obligations as executor of the estate only after the Ontario Court (General Division) held that the regulation was legally valid. Had the proper decision been rendered at first instance, the appellant would not have paid the fee. It would therefore be inequitable to deny recovery at this stage.¹⁵²

Accordingly, the Supreme Court ordered a refund to Mrs. Eurig of \$5,710, a result difficult to justify given the technical nature of the court's decision to invalidate the regulation that imposed probate fees. Furthermore, Major J did not explain how granting a refund to the appellant was

¹⁵⁰ See also *Mason v. New South Wales* (1959), 102 CLR 108 (HC), in which the Australian High Court specifically rejected the defence of "disruption of government finances."

¹⁵¹ *Supra* footnote 144, at 1166-67 (headnote).

¹⁵² *Eurig*, *supra* footnote 7, at 18 (SCC).

consistent with the suspension of the declaration of invalidity; nor did he attempt to differentiate between the appellant's protest and the protest of numerous other executors.¹⁵³ Unfortunately, the decision in *Eurig* does little to assist in the establishment of a doctrine for the law of restitution.

THE RESPONSE: ONTARIO'S ESTATE ADMINISTRATION TAX ACT

The Ontario government was quick to take advantage of the Supreme Court's suspension of the declaration of invalidity for a period of six months. On November 23, 1998, the government introduced Bill 81 to enact its probate fees as taxes.¹⁵⁴ So that no previously collected moneys would be lost, the government included in the legislation a section entitled "Transition,"¹⁵⁵ which ensured the constitutionality of the previously collected fees.¹⁵⁶

Section 7(2) of the Estate Administration Tax Act specifically exempts the estate of Donald Valentine Eurig from the estate administration tax. "Interestingly, no such relief is provided for other estates that may have commenced actions or paid under protest."¹⁵⁷

¹⁵³ For a number of years, especially since the tripling of probate fees in 1992, estate practitioners have recommended that executors, when paying the requisite probate fee, write on the face of the cheque that the fee is being paid under "protest." Wilson J, in her dissenting judgment in *Air Canada*, supra footnote 144, at 1214, considered whether a payment was made under "practical compulsion" or "under protest": "It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obliged to pay. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make this payment 'under protest.'"

¹⁵⁴ The Estate Administration Tax Act, 1998 (supra footnote 17) imposes an estate administration tax to replace the existing probate fee. Ironically, the act introduced a new tax in Ontario four days after the Ontario government first tabled Bill 99, the Balanced Budget and Taxpayer Protection Act, 1998, which would have required voter approval prior to the introduction of any new taxes. (Bill 99 died when the legislature was prorogued; most recently, Bill 7, the Taxpayer Protection and Balanced Budget Act, 1999, was reintroduced in the current session.)

¹⁵⁵ Section 7 of the Estate Administration Tax Act provides:

7(1) This section applies with respect to estates for which an estate certificate was issued after May 14, 1950 and before the day on which the *Tax Credits and Revenue Protection Act, 1998* receives Royal Assent . . .

7(3) Amounts paid before the *Tax Credits and Revenue Protection Act, 1998* receives Royal Assent as fees for the issuance of an estate certificate under the *Administration of Justice Act* or under the *Surrogate Courts Act* for an estate shall be applied to discharge the estate's liability for tax under this Act.

¹⁵⁶ An argument could be advanced that although the province of Ontario retroactively rendered the collection of probate fees legal, it is still under an obligation to pay interest on moneys had and received to the estates that previously paid probate fees under the illegal legislation. This would be an interesting case for an "unjust enrichment" argument.

¹⁵⁷ Bowman, supra footnote 11, at 1283.

If the Supreme Court had concluded that the tax was an indirect tax and therefore ultra vires the province, remedying the problem would have been much more difficult. Although in theory the Ontario government could have rectified this problem by reintroducing a succession duty in Ontario, that stratagem is not without its practical pitfalls. Professor Hogg cites two reasons for Ontario's reluctance to initiate this alternative.¹⁵⁸ First, the province has an aversion to imposing new taxes. Second, and more important, succession duties are not generally attractive for three reasons:

- the legislation to impose them effectively, without violating constitutional prohibitions on indirect taxation and taxation outside the province, is complicated to draft;
- the complexity of the legislation makes the taxes costly to administer in relation to the revenue raised; and
- the taxes lead to an avoidance industry, which often includes the shifting of assets out of the province.

Unfortunately, although the decision in *Eurig* was a victory for those who challenged the probate fee regime, the failure to persuade the Supreme Court of Canada of the indirectness of the tax made the outcome easily remediable.

LIFE AFTER EURIG

What can be expected to follow the *Eurig* decision and the introduction of the Estate Administration Tax Act? Obviously, similar challenges will be mounted in other provinces.

Certainly the decision raises the spectre of widespread applications for recovery of probate fees previously paid. . . . On November 9, 1998, the Law Society of British Columbia issued a notice to the profession referring to the *Eurig* decision, noting that the probate fee system in British Columbia is similar to the Ontario system, and suggesting that probate fees be paid under protest.¹⁵⁹

Other provincial governments with similar probate regimes not only kept a watchful eye on the proceedings in *Eurig* but have undoubtedly ordered their own copies of the Estate Administration Tax Act to ascertain the next steps to be taken. Similarly, one may expect challenges pertaining to the application and effect of other legislation.¹⁶⁰ Practitioners across Canada

¹⁵⁸ Professor Hogg cited these two reasons at a presentation sponsored by the Society of Trust and Estate Practitioners, Toronto Board of Trade, November 25, 1998.

¹⁵⁹ Bowman, *supra* footnote 11, at 1282.

¹⁶⁰ See, for example, *Urban Outdoor Trans Ad v. Scarborough (City)* (1999), 43 OR (3d) 673 (SCJ). The applicant contended that a recently imposed annual fee for third-party signs was ultra vires the province because it was an indirect tax. The court closely considered the Supreme Court's decision in *Eurig* and concluded that the annual fee was a fee
(The footnote is continued on the next page.)

will be scouring the legislation in their own provinces to determine which licence fees, transfer fees, registration fees, etc. might be rendered unconstitutional and illegal.

Yet another response—one with serious implications for the future of “probate planning”—may come in the form of “anti-avoidance” measures to curb aggressive planning. Since the fees tripled in 1992, probate planning has become prevalent, sophisticated, and in some cases quite novel.¹⁶¹ Although there is no question that many estates have paid significant fees to the Ontario and other provincial governments to obtain letters probate, one would be naïve not to think that a significant portion of the wealth transferred from one generation to the next has escaped probate fees in some manner. Now that we are attempting to aid our clients in avoiding the imposition of a “tax” as opposed to a “fee,” how will Ontario respond? The answer to this question will inevitably colour our views of the overall correctness of the *Eurig* decision. The battle with respect to probate fees may have been won, but the war may inevitably be lost.

¹⁶⁰ Continued . . .

and not a tax. The funds raised from the annual fees imposed under the bylaw were directed in their entirety to the administrative costs of the sign section of the city. They did not go into the city's general revenues.

¹⁶¹ The following example illustrates a novel approach previously used to reduce the overall effect of probate fees. Assume that an individual has a T-bill with a face value of \$1,000,000. Pursuant to the provisions of the individual's will, the T-bill is to be equally divided among 20 beneficiaries. The current provincial legislation would result in a probate fee of \$14,500 being levied upon the individual's death. To reduce the probate fee, the individual prepares separate simple wills to deal with the disposition of the T-bill in increments of \$50,000 (that is, 20 separate wills). The existing probate legislation charges a fee of \$5 per \$1,000 of value on the first \$50,000 of estate value, and a fee of \$15 per \$1,000 on the estate value in excess of \$50,000. The effect of the multiple wills is to create a separate probate fee for each will. Because the estate value for each will is \$50,000, the probate fee applied to each probate would be \$250. The overall probate fee payable would therefore be \$5,000 rather than \$14,500. The result is a \$9,500 saving with, arguably, a low cost of implementation.