# SUCCESSION DUTIES IN CANADA.

## Nature and Constitutionality.

### *Part 1: Nature of Tax.*

The phrase "succession duty" mentioned in the title of most of the provincial enactments imposing duties upon the property of deceased persons is somewhat misleading, and its use has created a more or less general impression that the nature of the tax is exactly similar in each of the provinces. A careful perusal of the statutes will show that such a conclusion is erroneous. The Province of Quebec, for example, bases the major part of its taxation upon the transmission of property on the death of the owner, thereby adopting the system of death duties which exists in France. On the other hand, the Ontario Succession Duty Act copies the definitions of the terms "succession" and "successor" contained in the English Succession Duty Act, 1853, and imposes a tax upon all property situate in Ontario and on all other property subject to succession duty upon a succession. Alberta confines its scheme of taxation to property in the province, and makes no attempt to tax the succession. It will, accordingly, be observed that the words "succession duty" have no definite legal signification apart from the provisions of the statute by which the taxation is imposed, and that the real character of a provincial death duty enactment, whatever it may be styled, depends upon its intended incidence. In the light of the judicial comment which has been made upon succession duties in Canada from time to time, the following appear to be the chief characteristics of the taxation:

1. It is, as a general rule, a tax upon property;
2. In some cases, it resembles the English probate or estate duty;
3. It is neither a debt nor a testamentary expense; and
4. It accrues and is payable at death, and is determined by the facts then existing.

#### 1. A Property Tax.

The consensus of judicial opinion is in favour of regarding most of the provincial succession duty enactments, with the possible exception of that in force in Quebec, as imposing a tax directly upon property. It is true that a majority of the judges of the Supreme Court

of Canada in *Lovitt* v. *Attorney-General of Nova Scotia*,[1] construed the Nova Scotia Succession Duty Act, 1895, as imposing an impost upon the privilege of taking or transmitting property by will or intestacy, and not as a tax upon property. It is believed, however, that in view of later decisions of the court and of the Privy Council, the judgment in question is of doubtful authority, and that it is now quite proper to characterise most of the provincial enactments on the subject of succession duties as imposing property taxation. By way of illustrating this phase of the law, the following extracts from the judgments delivered in succession duty cases may be quoted:

Alberta: "The plan of our Ordinance (Succession Duty Ordinance, Statutes of Alberta, 1903, ch. 5, 2nd Sess.) is entirely different from that (the Quebec statute). Instead of a person who has no claim to or interest in the estate being called on to pay the duties, they are payable by the executor or administrator, who is, under our law, the legal owner of all the estate, both real and personal, and whose duty it is to pay all the debts and other liabilities of the estate, not out of his own property, but out of the assets of the estate in his hands. As to duty in respect to property in the province he has no need to go to anyone to recover the duties paid, because he pays them out of the property itself, which is directly liable."[2]

British Columbia: "I have carefully examined our own Act (R. S. B. C. 1911, ch. 217), and I find that the impost is laid expressly upon the property passing under the will (or the intestacy, as the case may be) and that there is apparently a studied effort to avoid laying any legal obligation to pay the duty upon any person or persons other than the beneficiaries; and even as to them the liability to pay is inferential, or arises under order of Court made in the course of the enforcement of the charge upon the property. There seems little, if any, difference in principle between such a tax and the ordinary familiar municipal taxation of land. According to a certain school of economists a tax upon land is the most scientific form of indirect taxation, reaching ultimately and indirectly, as they claim, to all classes of society; but I have never heard of such a tax being held by any court to be other than a most obvious example of direct taxation."[3]

British Columbia: "The object of the Succession Duty Act (R. S. B. C. 1911, ch. 217) is to secure to the Crown by a charge which attaches to the whole of any estate passing upon death of a domiciled subject a fixed proportion of the entire value of the estate. The relative duty is directed to be deducted from the share of each person entitled to share the estate. Executors or administrators or trustees are

[1] 33 Can. S. C. R. 350.
[2] Harvey, C.J., *In re Cust*, 8 A. L. R. 308.
[3] Clement, J., *In re Doe*, 19 B. C. R., 536.

empowered to sell the property of the deceased, whether realty or personalty, in order to provide funds for payment of the duty, in the same manner 'as they may be enabled by law to do for the payment of debts of the testator.' As a condition precedent to any grant of letters probate or letters of administration, the court having jurisdiction must require: (1) Payment of the whole amount of the duty; or (2) The making by the applicant with surety or sureties of a bond such as is here in question. Such bond, however, is defeasible by due payment of the duty to which the property coming to the hands of the applicant or applicants may be found liable."[4]

Manitoba: "The Act (4 & 5 Edw. VII., ch. 45) directly imposes the tax upon the estate, or, rather, upon the persons entitled thereto. The executor is utilised as the agent to collect from those entitled to the estate the duties and to pay the same to the treasury."[5]

New Brunswick: "But is the tax imposed on the succession or on the property itself? The statute (R. S. Vol. 1, ch. 17) says (section 5) that 'property . . . passing by will or intestacy . . . shall be subject to a succession duty,' and it distinctly declares this duty to be payable where the property which 'passes' is that of a non-domiciled decedent, whether it be movable or immovable. This latter fact would seem to raise a most serious, if not an insuperable obstacle to construing this statute as imposing a duty on the succession itself.[6]

"But it is said that we are bound by the decision of this court in *Lovitt* v. *Attorney-General of Nova Scotia,*[7] to hold that the duty is imposed on the succession and not on the property. The Nova Scotia statute there under consideration declared 'subject to a succession duty,' *all property situate or being within the Province of Nova Scotia and any interest therein or income therefrom, whether the deceased person owning or entitled thereto last dwelt within the said province or not.*

"If the word 'dwelt' as here used, means 'resided' as distinguished from 'was domiciled,' this statute may be construed as applicable only in the cases of domiciled decedents and therefore clearly distinguishable from the New Brunswick Act, but if 'dwelt,' as used in the Nova Scotia Act, means 'domiciled,' the two Acts appear not to be distinguishable in substance, and in that case this court was probably committed by the decision in the 33rd volume to the view that the duty imposed by these Acts is a tax on the succession.

[4] Sir Henry Duke in *Rex* v. *United States Fidelity and Guaranty Company,* (1923) 3 W. W. R., 295.
[5] Cameron, J.A., *In re Muir Estate,* 24 Man. L. R., 310.
[6] *Winans* v. *Attorney-General,* (1910) A. C. 27, at pages 32 *et seq.*, 39 *et seq.*
[7] 33 Can. S. C. R., 350.

. . . But for this decision, . . . I would have been of the opinion expressed in that case by Mr. Justice Mills that, although the occasion of the tax is the passing or succession and it is called a succession duty, yet it is upon the property and not upon the succession that it is fastened.

"It may be questionable how far we should deem ourselves bound, if it be not distinguishable, to follow the decision of the majority of this court in *Lovitt* v. *Attorney-General of Nova Scotia*,[8] in view of the opinions since expressed in the House of Lords in *Winans* v *Attorney-General*,[9] as to the scope of succession duties proper and the property upon which they are imposable. . . .

"Because the statute appears to me in terms to impose what it calls a succession duty, not upon the succession, but, by reason of the succession, upon the property itself and also because, viewed as a tax on the succession, it would, in the case of movable property of non-domiciled decedents be *ultra vires*, unless bound by *Lovitt* v. *Attorney-General of Nova Scotia*,[10] to hold otherwise, I conclude that the duty is a tax upon the property itself."[11]

New Brunswick: "Although called a succession duty, the tax here in question was laid on the corpus of the property, and the statute (R. S. Vol. 1, ch. 17) made its payment a term of the grant of ancillary probate . . . . It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator."[12]

New Brunswick: "The Succession Duty Act, being chapter 17 of the Consolidated Statutes, 1903, undoubtedly in its terms is wide enough to cover all property owned by the testator, whether in the Province of New Brunswick, or out of it, save and except property in the United Kingdom of Great Britain and Ireland. . . .

The tax, it will be seen, is directly on the property, it is not on an individual."[13]

Nova Scotia: "Succession to an inheritance, it is true, may be taxed as a privilege and notwithstanding the property is already taxed, but it ought to be clear and explicit that the legislature intended the burden. . . . But it is said that this tax is not a tax upon the

[8] 33 Can. S. C. R., 350.
[9] (1910) A. C., 27.
[10] 33 Can. S. C. R., 350.
[11] Anglin, J., in *Rex* v. *Lovitt*, 43 S. C. R., 106.
[12] Lord Robson, in *Rex* v. *Lovitt*, (1912) 1 A. C., 212.
[13] McLeod, C.J., in *Receiver-General of New Brunswick* v. *Rosborough*, (1915) 43 N. B. R., 258.

bonds, but a tax upon their transmission. The statute (Nova Scotia Succession Duty Act, 1895) declares otherwise. The distinction may have served the purpose of enabling the courts in the United States to surmount a constitutional difficulty, but it has no applicability here. . . . This succession duty is a tax imposed for provincial purposes to provide a fund for defraying in part the care of the insane, by a succession duty on certain estates. It is not a charge for the privilege of transmission, but a charge upon the estate, and declared to be so in express words.[14]

Ontario: "The distinctive feature of the succession duty legislation (R. S. O. ch. 24) is to impose the payment of the duty as a primary charge upon and out of the corpus of the estate by the personal representative before the assets are distributed."[15]

Ontario: "There is in England a definite meaning attached to the expression 'legacy duty,' but in Ontario there is only the one inheritance tax. The statute (9 Edw. VII., ch. 12) calls this 'succession duty.' It is a duty imposed upon all property devolving upon death, and it is a tax which has to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate."[16]

The character of Quebec Succession Duty legislation differs considerably from that in force in most of the other provinces. In the case of property locally situated within the province, Quebec taxes the property itself. In all other cases, the transmission of property is the subject-matter of the tax. The statutes in force in Quebec are 4 Geo. V. ch. 9, 4 Geo. V. ch. 10, 4 Geo. V. ch. 11, and 12 Geo. V. ch. 90.

4 Geo. V. ch. 9, provides by Article 1375, that all property, movable or immovable, the ownership, usufruct, or enjoyment whereof, is transmitted owing to death, shall be liable to certain taxes calculated upon the value of the transmitted property. Article 1376 says that the word "property" includes all property movable or immovable actually situate within the province and that whether the deceased is domiciled within or without, or the transmission took place within or without, an exemption is given by Article 1380 to a notary, executor, trustee or administrator from personal liability for the duties imposed. This, as will be seen, does not affect moveable property outside the province; but by 4 Geo. V. ch. 10, it is expressly provided by Article 1387B that:—"All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death, shall be liable to the

[14] Mills, J., in *Lovitt* v. *Attorney-General for Nova Scotia*, 33 Can. S. C. R., 350.
[15] Boyd, C., in *Attorney-General* v. *Newman*, 31 O. R., 340.
[16] Middleton, J., *In re Gwynne*, 22 O. W. R., 405.

following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned." By Article 1387G, it is provided that the person to whom as heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, movable property outside the province is transmitted, is personally liable for the duties in respect of such properties, and no more.

The statute 4 Geo. V. ch. 11, after reference to the mistake in the case of *The King* v. *Cotton,* and a series of recitals which make it obvious that the purpose of the Act is as far as possible to remedy the provisions of former statutes which had led to the decisions, enacted that—

"The intent and meaning of all the acts of the Legislature imposing succession duties was, and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government direct, and without having recourse against any other person, a tax calculated upon the value of the property so transferred."

By 12 Geo. V. ch. 90, "An Act respecting the seizin of certain beneficiaries" a tax in the nature of a probate or estate duty was imposed on the transmission of the property of domiciled decedents, where such property is locally situated outside of the province and is transmitted to non-resident beneficiaries.

### 2. Probate or Estate Duties.

Certain of the provincial enactments, although entitled as succession duty Acts, make provision for the collection of duties analogous to the English probate or estate duties. The observations of Sir Arthur Hobhouse in reference to the Colonial statute dealt with in *Blackwood* v. *The Queen* (1882), 8 A. C. 82, could be applied with equal force to certain of the provincial succession duty enactments in force in Canada. His Lordship says, *inter alia*—"The statute under discussion does not make any such distinction as the English law has made between probate and legacy duties. It imposes a single duty on the property of deceased persons. That duty resembles our probate duty in being made a condition of the issue of the probate, and in being taken from the estate while it is yet in bulk and before the process of administration begins. In other respects, notably by reason of its incidence on real estate, and of its being chargeable against every legatee, and of the difference in its rate according to the relation of the successor to the deceased, it more resembles our legacy or succession duties. The one term or the other will seem more appropriate to the statute according to the point from which it is approached or the operation it is called upon to perform."

The resemblance of the tax to the English probate or estate duty has been emphasized in certain of the provincial courts and by the Privy Council. By way of illustration, reference may be made to the following comments made by the judiciary in regard to the legislation on succession duties enacted by the Provinces of New Brunswick, Ontario and Saskatchewan:—

New Brunswick: "These provisions shew that the Act (R. S. vol. 1, ch. 17), under consideration assimilates the tax to the probate duty."[17].

Ontario: "It seems plain that in the case of property vesting in executors or administrators the duty demandable under the Act (R. S. O., ch. 24), is to be paid to the province by the executor or administrator and not by the person or persons ultimately succeeding to the property, and in this respect it resembles estate duty rather than legacy or succession duties as imposed by the English Acts. By the statute it is made the duty of the executor or administrator to collect or retain the duty, and he is inhibited from delivering any property subject to duty to any person without collecting the amount. Provision is made for collection from other persons under some circumstances, but this does not displace the primary claim against the personal representative where the property comes to him as such under a will or letters of administration.

"Reading all the provisions of the Act together, I think the duty payable under it is a duty on the estate of a deceased person, that is, a duty on the collection or distribution of an estate passing on a person's death, and in this respect on the same footing as probate or estate duty."[18]

Saskatchewan: "We had no probate duty payable out of the estate prior to The Succession Duty Act, and therefore our succession duty is not in substitution of a prior duty which had to be paid before the executors could probate the will. The reasons for the Clemow case do not apply here. . . .

"Our Act (Chap. 38, R. S. Sask., 1909), does not make this tax an estate duty, but a succession duty. By the Act the duty is paid by the devisee. Our succession duty — particularly on a contingent interest in real estate—is not payable before probate issues, and therefore this tax is more like the estate tax in England on real estate, and as that tax was decided in *Re Sharman* ((1901), 2 Ch. 280), to not be a testamentary expense, I am of the opinion that neither is the tax in this case a testamentary expense."[19]

[17] Lord Robson, in *Rex* v. *Lovitt*, (1912) 1 A. C., 212.
[18] Moss, J.A., in *Attorney-General* v. *Newman*, 1 Ont. L. R., 511.
[19] Newlands, J.A., *In re Galbraith Estate*, 12 Sask. L. R., 359.

### 3. Not a Debt nor a Testamentary Expense.

Testamentary expenses do not include succession duties. Such duties are neither debts of the deceased nor testamentary expenses.

In *Re Bolster*,[20] a testator made numerous specific legacies and gave the residue of his estate to persons other than the specific legatees. He directed his executors to pay his just debts and funeral and testamentary expenses. It was held that succession duties do not come with the description either of a debt or part of the testamentary expenses; and that the specific legacies, not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees.

In *Re Elizabeth Watkins, deceased*,[21] it was held that the succession duty payable under The Succession Duty Act (R. S. B. C., 1897, c. 175), in respect of the real estate of a deceased person, did not form part of the testamentary expenses of the deceased.

In *Re Galbraith Estate*,[22] the Saskatchewan Court of Appeal held similarly that testamentary expenses do not include succession duty.

### 4. Tax Accrues at Death.

One of the most important principles underlying succession duty taxation in Canada and elsewhere is that the tax accrues at the death of the owner of the property subject thereto, and that all matters in relation to the taxation are determined by the facts then existing. The application of this principle involves results of a far reaching character, among which may be mentioned the following, namely:—

(1) Valuations of property for succession duty purposes are the values existing at the death of the owner;

(2) The rates of taxation applicable to the property of a deceased person are the rates in force at the time of the death, in the absence of clear statutory provision to the contrary;

(3) Succession duty legislation cannot be given a retroactive construction (except in matters of procedure), unless the terms of the enactment clearly admit of such a construction.

#### (1) Valuations.

The value of the property "passing on the death" of the owner is one of the two principal factors governing the rates and amount

[20] *Re Bolster*, (1905) 10 O. L. R. 591; *Re Holland* (1902), 3 O. L. R. 406; *Manning* v. *Robinson*, 29 Ont. R. 483; *Re Watkins*, 12 B. C. R., 97.
[21] 12 B. C. R., 97.
[22] (1919) 2 W. W. R., 193.

of succession duty applicable, the other being the relationship, if any, of the beneficiaries to the decedent. The value for purposes of duty is the value at death, and accordingly depreciation after death is not a good ground for claiming a revision or reduction of the duty.

The practical application of this principle has occasionally worked serious hardship, and particularly so in cases where property passes at a time when more or less fictitious values obtain. It has been suggested that in such cases the several provincial Governments might consider the wisdom of remitting the whole or part of the taxation imposed. Thus, in *Rex* v. *United States Fidelity Company,*[23] Gregory, J., of the Supreme Court of British Columbia, in giving judgment in favour of the Crown, suggests that the amount of the duty might nevertheless be reduced by the Crown as an act of grace and bounty. Referring to the serious depreciation in the value of the property taxed in that case, he says: "The property to-day is practically valueless—it has, as a matter of fact, largely been sold for taxes. . . . There had been a most unprecedented boom in real estate shortly prior to the death of Mrs. Quagliotti during which absolutely unheard of values were put upon real estate in every part of the City of Victoria."

The principle that valuations of property for death duty purposes must be determined by the facts existing at the death of the owner, is applied in England and in the United States of America as well as in Canada.

In *Wishart et al.* v. *Lord Advocate,*[24] it was held that executors, who had on 6th March, 1878, valued £2,400 City of Glasgow Bank stock for Inventory Duty at £5,738, its then selling price, could not afterwards say that it was of no value because in October of the same year the bank went into liquidation.

*Matter of Penfold.*[25] The tax was imposed on the value at death and no deduction was allowed notwithstanding the executor was forced to sell stocks at a loss during administration, which caused a shrinkage of nearly one-fourth of the estate. "It is by statute due and payable at the time of the transfer, that is, at the death of the decedent. It accrues at that time and the amount of the tax is not affected by any increase or decrease in the clear market value of the estate between the date of the decedent's death and its subsequent distribution among beneficiaries or transferees under the will."

*Matter of Meyer.*[26]—An equity of redemption was valued at $8,000 for inheritance tax purposes, but was subsequently lost through mortgage foreclosure proceedings.

[23] (1921) 2 W. W. R., 697.
[24] (1880) 8 S. S. C., 4th series, 74; 18 S. L. R., 62.
[25] 216 N. Y. 163; 110 N. E., 497. [26] 209 N. Y. 386; 103 N. E., 713.

Although injustice sometimes results from the application of the rule that values must be determined as at the time of death, it should be remembered that it is a rule which works both ways, and that the Crown is absolutely precluded from claiming any additional duty by reason of any increase in the value of property after the death of the owner.

(2) Rates of Taxation.

The statutory provision that succession duty accrues at death involves as a logical consequence the doctrine that the determination of the rates of taxation applicable must be according to the law in force at that time. The decision *In re Lee*,[27] amply illustrates this doctrine. This was an appeal by the executors of Arthur Brindley Lee from an order made by Winchester, Judge of the Surrogate Court of the County of York, Ontario. The deceased died on June 24th, 1904, and the gross value of his estate was over $200,000, but the net value, after deducting debts, encumbrances and charges, was under $100,000. It was held that the estate was liable to a succession duty at the rate of 5 per cent. on the net value, under R. S. O. 1897, ch. 24, as amended by 1 Edw. VII., ch. 8, sec. 3, and that the later statute, 5 Edw. VII., ch. 6, under which the duty would be only 2 per cent., could not be given a retrospective operation, while the statute, 7 Edw. VII., ch. 10, notwithstanding sec. 2 thereof, did not apply to the case or affect the matter. Per Garrow, J.A.: "The duty is a debt owing to the Crown as of the date of the death of the testator. . . . The debt as of the date of the death, it will be admitted, ought not to be subsequently increased by mere construction, and an argument against its increase by construction ought to be equally potent to prevent its decrease, except upon explicit language."

(3) Retroactivity.

A retroactive construction of a succession duty enactment is improper (except in certain matters such as procedure), unless the terms of the Act clearly authorize such a construction. *In re Lee*,[28] *Attorney-General* v. *Parker*.[29]

S. Quigg.

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[27] 18 Ont. L. R., 550.
[28] 18 Ont L. R. 550.
[29] 31 N. S. R., 202; Maxwell on Statutes, 4th Ed., p. 321.

(*To be continued.*)