

# The Probater

## Special Edition

### *Re Eurig Estate*, WHERE DO WE GO NOW?

On October 22, 1998 the Supreme Court of Canada released their decision in the *Re Eurig Estate*.

Speaking for the majority, Mr. Justice Major held that the probate fees being charged in Ontario were an indirect tax and not a fee and therefore unconstitutional.

Justice Major reviewed the judicial history of the *Re Eurig Estate* case and referred to the fact that at the Ontario Court (General Division) level Morrison J. held that the difference between a fee and a tax is that a tax is compulsory, while a fee is only required to be paid where one seeks the services for which it is imposed. In finding that the charge for probate is a fee and not a tax, Justice Morrison held that probate fees lack the universal application characteristic of a tax.

At the Ontario Court of Appeal, Morden A.C.J.O. held that the probate fee system was properly authorized by s. 5(c) of the *Administration of Justice Act* and was not a revenue generating device. Furthermore, he held that the charge for a probate is a fee and not a tax on the basis that a tax is a levy which is enforceable by law, imposed by the authority of the legislature by a public body and made for public purpose. Morden A.C.J.O. held that the charge for probate did not meet all of the requirements of a tax.

At the Supreme Court of Canada, Major J. stated that the probate fee was in fact a tax and not a levy or fee because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

In finding that the probate fee was in fact a tax, Major J., first identified the nature of the probate levy and then the manner in which the levy was imposed.

One of the considerations of the majority decision was that a factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid. As long as a reasonable connection could be shown between the costs of the service provided and the amount charged, the court would be satisfied that this criteria was met. Major J. stated that the evidence in the appeal failed to disclose any correlation between the amount charged for the grants of Letters Probate and the cost of providing that service.

In the majority decision, Major J. went on to analyze whether or not the probate levy was a direct or indirect tax. This issue was of great concern to the court as the Ontario Legislature has the authority to implement a direct tax but not an indirect tax, but it must do so in accordance with requirements set out in the constitution. Furthermore, the basic purpose s. 53 of the *Constitution Act*, 1867 mandates the principle that taxation powers cannot arise incidentally in delegated legislation.

In essence, on behalf of the majority, Major J made it clear that the probate fees were unconstitutional on the basis that the levy was in fact a direct tax and that it was invalid on the ground that it was imposed by a body other than the Legislature of Ontario.

## **WHERE DO WE GO FROM HERE?**

Major J. recognized the importance of the revenue derived from probate fees and the declaration of invalidity was suspended for a period of six months to enable the province to address the issue. It appears that a new method of obtaining probate fees will be addressed by the Government of Ontario after some period of deliberation. It would seem to be a legitimate concern that the government has is whether or not they wish to bring in a retroactive direct tax on death. This must be determined by the government. This concern will no doubt have to be weighed against the substantial revenue

that is being generated through probate fees.

As to the current status of paying probate fees, inquiries with the Estates Office in Toronto confirm that they are only accepting applications for probate with the payment of probate fees and it is anticipated that they will only be issuing Certificates of Appointment on the basis that the fees are to be paid.

The Ontario Government has six months to deal with the situation; however, it is strongly recommended that if you are making an application, you should accompany the application with a letter confirming that you are paying the probate fees under protest and that in view of the *Re Eurig* decision you expect full reimbursement of such fees.

A further development comes from a class action lawsuit that has been brought against the Government of Ontario claiming damages for the wrongful past payment of probate fees.

As for the executrix of the *Eurig Estate*, Major J. held that she was entitled to a refund of the fee paid by her. He also went on to recognize the difficulty that a massive administrative problem that such a refund system would impose and stated that there is a general rule against the recovery of taxes paid under unconstitutional statutes, with exceptions where the relationship between the state and a particular tax payer resulting in the collection of the tax is unjust or oppressive in the circumstances.

In *Re Eurig*, the executor had paid the probate fee under protest and did so after she lost at the Ontario Court (General Division) level. Major J. stated that had the proper decision been rendered at first instance, the appellant would not have paid the fee and therefore it would be inequitable to deny recovery to the appellant at this stage.

If you would like a copy of *Re Eurig Estate*, please contact Ian Hull at 416.369.7826.