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"The Alberta Shift": How to Avoid Ontario Succession Duties

“THE ALBERTA SHIFT” – HOW TO AVOID ONTARIO SUCCESSION DUTIES*

By PAUL H. SHAPIRO**

The primary object of estate planning is to arrange the financial affairs of an individual so that upon his death his estate will attract the least possible amount of tax. With the changes in the laws regarding estate taxes and succession duties brought about by the abolishment of Federal estate and gift tax, and the subsequent amendments to *The Ontario Succession Duty Act*,¹ the opportunity has arisen to achieve the ultimate goal in estate planning; the successful avoidance of all succession duties. Provided that one's financial affairs have been properly arranged, and with the exception of deemed realization of capital gains at death (if any), it should be possible at death to benefit almost anyone to virtually any extent, without fear of attracting any death taxes or succession duties whatever. This possibility becomes readily apparent if one juxtaposes the repeal of the federal death taxes with a careful reading of *The Ontario Succession Duty Act* as amended to May 3, 1972.

The most crucial section of *The Ontario Succession Duty Act*, for the purposes of this note, is section 6 which details the property upon which succession duties may be levied.² It should be noted that section 6 applies on the death of any person whether he dies domiciled in Ontario or not. By subsection a of section 6, duty is levied on any property situate in Ontario which passes upon the death of a person.³ By subsection b, duty shall be levied upon any person receiving a “transmission”. A transmission is defined in section 1 (w) as “the passing upon the death of any person domiciled in Ontario to any person resident or domiciled in Ontario at the date of death of the deceased of any personal property situate outside Ontario at the date of such death”. By subsection c, duty shall be levied upon the recipient of any “disposition” other than that of realty situate outside of Ontario, which is made in Ontario, on or after July 1, 1892 to any person who is resident in Ontario at the date of the death of the deceased. By subsection d, duty is levied upon the recipient of any disposition of personal property made outside of Ontario on or after March 8, 1937,

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¹ R.S.O. 1970 c. 449.

² Section 6 is subject to sections 4 and 5 which exempt certain persons and property from succession duty. For the purposes of this comment, these sections are not important.

³ “Property passing upon death” is extensively defined in section 1(r) and section 2 of the Act; however, since all property in this method of planning passes through the will of the deceased, it is without doubt “property passing upon death”.

if the recipient was resident in Ontario at the time such disposition was made and at the date of death of the deceased, and if the deceased was domiciled in Ontario at the time the disposition was made and at the date of his death.⁴ A "disposition" is defined at length in section 1 (g). Although the passage is too long to paraphrase here, for our purposes the *sine qua non* of a disposition is that the property must have passed during the lifetime of the deceased. Since all of the property in the following passes upon the death of the deceased, subsections c and d of section 6 have no reference to the plans outlined below.

The effect of section 6 is to allow the following general statement. Provided that one is concerned solely with property passing upon the death of an individual, Ontario succession duties are levied only upon the following:

- 1) Property situate in Ontario.
- 2) Personal property situate outside Ontario which is left to a person resident or domiciled in Ontario at the time of the death by a person domiciled in Ontario at the time of his death.

It would appear, therefore, that all one has to do to avoid Ontario succession duties entirely is to arrange things so that an individual leaves property, either personal or realty, that is situated outside Ontario to a person or persons who are not domiciled or resident in Ontario.⁵ Nor is such a situation too difficult to arrange. It would appear that a judicious use of a fundamental principle of corporate law — the principle that the property and assets of a limited company are totally distinct and separate from the property and assets of the shareholders of that company — and the rules of *situs* of property, declared by the Privy Council to be beyond the authority of a Provincial Legislature to amend, the above noted situation may be brought about without the actual removal of either the property or the beneficiaries from Ontario.

Property may be removed from Ontario in several ways. Securities such as stocks, bonds, and the like may be converted, or originally procured, in street form. Examples would be shares of stock held in a broker's name, or shares which have been endorsed in blank, thus turning them into bearer certificates. Such securities are legally sited in the jurisdiction in which they are physically located and accordingly the certificate itself would have to be located outside the province. In the case of a share certificate in a broker's name, it will be held by the brokerage office in the city in which the individual has an account. In the case of a bearer certificate, a safe deposit box or a bank's security deposit would be suitable, provided of course that the certificates are physically held outside the province of Ontario. Under such an arrangement, although the certificates are still the property of the Ontario resident, and although he can still negotiate them freely through a stockbroker or other agent resident in the jurisdiction in which the certificates are physically located, from the point of view of Ontario succession duties, they are legally sited outside of Ontario, and they are dutiable

⁴ Normally subsection d would be qualified; but because the whole subsection does not apply to this note, it is unnecessary to detail the qualification.

⁵ Since the definition of a transmission in section 1(w) refers only to personal property situated outside of Ontario and section 6(a) refers only to property situated inside Ontario, real property situated outside Ontario is exempt from succession duty even if it is left by someone domiciled and resident in Ontario.

in Ontario only if they are left to an Ontario resident, or a person domiciled in Ontario.

Alternatively, an Ontario resident may remove his property from this province by arranging to "sell" it to a limited company of his own creation in return for shares of that company. If that company was incorporated outside of the Province of Ontario, and if the shares of that company are transferable only on the books of the company at its head office, located outside of Ontario, the Ontario resident will have legally sited all of his property outside of Ontario. Since he has sold his original property to the limited company, it does not matter whether that property remains in Ontario or not. It is no longer his, it belongs to the corporation. The only property which now belongs to the resident are the shares which he received from the company in return for the sale of his assets. Since these are only transferable on the books of the company at its head office outside of Ontario, the shares themselves are legally sited outside of Ontario regardless of their physical location. Thus, although those shares may be in the man's top drawer in Toronto, his property is legally sited outside of the Province. As in the first instance, succession duties can be levied on such shares only if they are left to persons resident or domiciled in the province of Ontario. It must be remembered, of course, that not all of an individual's property need be transferred outside of the province, for he can still take advantage of the regular exemptions allowed in *The Succession Duty Act*. Thus, for example, a man with an estate of one million dollars, intending to leave everything to his wife, need transfer only half a million outside of the province. The remaining half million can be left to his wife tax free.

Once the property has been removed from the province, artificially or otherwise, all that remains to be done is to arrange to leave it to someone neither resident nor domiciled in the province of Ontario. This can be brought about through the simple expediency of leaving the extra-provincially located property to extra-provincial holding companies which have been set up specifically for this purpose by the intended beneficiaries of the Ontario resident. These companies are set up outside the province by the intended beneficiaries before the death of the resident, each company being wholly owned by one beneficiary or one company may be set up and owned by all of the beneficiaries in the proportion in which the resident would like them to inherit his estate. The companies are named in the resident's will, serve to inherit the estate, and are then quickly wound up to avoid corporate tax complications. The effect of all of this is that property which is legally located outside of Ontario is left by will to corporate entities resident outside of Ontario, and such bequests, under current Ontario law are not susceptible to succession duties inside Ontario.

Although such a scheme appears to be theoretically quite sound and practically quite feasible, certain editorial comments must nevertheless be made. Firstly, it must be remembered that at the moment the scheme is valid only in Ontario. British Columbia has already amended its succession duties act in an attempt to cope with this device, and Saskatchewan is reportedly busy doing the same thing. Whether the amendments announced are sufficient to cope with the problem, especially if a string of corporations is used, and whether, if sufficient, the amendments are constitutional is a question which will ultimately be decided by the courts. To date, however, Ontario has not taken similar steps,

nor has it announced any intention of doing so. Accordingly a device such as the one outlined above may well be useful in Ontario, even for the short term. It has the virtue of being relatively simple to set up, and it may just as easily be dismantled in response to amending legislation. Like many a bright idea, however, it may be primarily a rich man's toy. For estates of half a million dollars and less, it is certainly easier, undoubtedly safer, and unquestionably cheaper to leave it all to your spouse.