International and Interprovincial Death Duty and Gift Tax Problems

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INTERNATIONAL
AND INTERPROVINCIAL
DEATH DUTY AND GIFT TAX
PROBLEMS

By WOLFE D. GOODMAN, Q.C.

Estate planning has never been easy for a Canadian who holds foreign assets or assets situated in other Canadian provinces than his or her province of domicile. The most difficult problems involve multiple taxation by two or more jurisdictions, which increases the death duty or gift tax burden substantially over what it would be if only one jurisdiction was involved. A vigorous criticism of double taxation in the Canadian death duty field as it existed in the 1930's is contained in the Report of the Rowell-Sirois Commission on Dominion-Provincial Relations, which commented:

"This legal situation has led to great unfairness and inequality in the amount of tax exacted from estates of the same size and bequeathed to beneficiaries bearing the same degree of relationship to the decedent. One estate having assets only in the province in which the decedent was domiciled and passing to beneficiaries within that province will be taxed only once; another estate of the same value having assets in several provinces will be taxed by each province on the assets locally situate within it and will be taxed a second time on the transmission of the property to the beneficiaries in the province in which they reside. It is plainly inequitable that two similar estates within the same province should be taxed substantially different amounts because assets of the same value are held in different forms. . . . Logically the difficulties of double taxation could be minimized by an adequate system of reciprocal agreements between the provinces, but the history of such agreements does not suggest that this remedy, even if possible, is likely to be permanent. Over a number of years reciprocal agreements to avoid double taxation were made between most, if not all, provinces in Canada; they were repudiated within a very short time. So long as such agreements can be destroyed by the unilateral act of one of the parties, the protection which they afford is temporary and uncertain.

Although the total revenue raised by succession duties in all provinces has averaged less than $20,000,000 a year during the past 10 years, or between 3% and 5% of the combined Dominion-provincial revenue, succession duties as they are now enforced are detrimental to the Canadian economy. The rates and the degree of graduation of taxation are not uniform in the different provinces and wealthy individuals have, therefore, an inducement to choose with care their place of residence and location of their investments. They cannot with impunity choose the former on grounds of amenity and the latter in accordance with economic opportunity. There is even an inducement for a province to keep its inheritance taxes relatively low in order to attract the owners of wealth. To avoid double taxation, investors will tend to confine their investments to the province in which they are domiciled. The individual faced with the prospect of double taxation cannot be criticized for taking such steps to avoid it as are open to him, but it is not in the public interest that freedom of investment and the free movement of capital within Canada should thus be hampered."

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1Can. 2 Royal Commission on Dominion-Provincial Relations, (Ottawa: Queen's Printer, 1940) at 117-119 — Rowell-Sirois Report
While many of these double taxation problems are of long standing, a considerable number arise from quite recent tax developments. Although the literature on this subject is considerable, most of it deals with specific problem areas on an ad hoc basis; little work of a theoretical or analytical nature has been published. There may therefore be some value in an attempt to analyze the fundamental nature of these problems, in order to see how they can best be dealt with. The emphasis in the article will be on the techniques of providing relief through appropriate legislation or bilateral tax conventions; however, it should not be forgotten that, in the absence of such relief, the estate planner or tax adviser will have to consider how the establishment of holding companies and of revocable or irrevocable trusts, the use of powers of appointment and other traditional estate planning techniques may assist individual clients to avoid double taxation. To date, the author has been able to identify seven distinct types of double taxation problems.

Type I. Double taxation by jurisdiction of situs and jurisdiction of individual's residence, domicile or nationality.

The commonest and most obvious double taxation problem arises from imposition of taxation by the jurisdiction of the situs of the asset, as well as by the jurisdiction of residence, domicile or nationality of the individual concerned. Because this problem has been recognized for many years, many cases of this type have been the subject of relief, either by legislation or by bilateral interjurisdictional agreement. These solutions may take either of two forms:

(a) Priority of taxation may be accorded to the jurisdiction of situs of the property, with the jurisdiction of residence or domicile of the individual either granting a tax credit against the tax otherwise payable or completely exempting the asset from taxation in the latter jurisdiction. Section 17 of the Manitoba Succession Duty Act is an example of the tax credit technique, applied unilaterally, without regard to whether the

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2 The literature on the subject includes the following:

— D. G. Fuller, Estate Planning — U.S. Citizen Residents in Canada (April, 71), Canadian Chartered Accountant 260
— D. G. Fuller, Canadian Tax Planning for the U.S. Citizen (March/April 73), 21 Canadian Tax Journal 149
— Joseph and Koppel, Foreign Property Owned by American Decedents and Estates of Aliens in J. K. Lasser, ed., Estate Tax Techniques
— R. A. Hendrickson, Interstate and International Estate Planning (New York: Practising Law Institute, 1968), particularly in Chapter 7
— Guterman, Avoidance of Double Death Taxation of Estates and Trusts (1947), 95 U.Pa.L.Rev. 701
— G. D. Simons, Dangers of Double Domicile and Double Taxation (1942), 20 Taxes 345
other jurisdiction concerned grants a reciprocal credit. Some other Canadian jurisdictions, such as Ontario, grant credits only on a reciprocal basis. For a jurisdiction to insist upon reciprocity can cause considerable hardship to its own citizens, The Ontario Advisory Committee on Succession Duties commented on this situation in its 1973 Report:

“Section 9 presently permits a foreign tax credit where an order-in-council names a jurisdiction. There is some thinking that such orders should be passed on the basis of reciprocity. In the Committee’s opinion, it is wrong in principle to require reciprocity as a condition of granting foreign tax credits. When another jurisdiction refuses to grant a foreign tax credit in respect of property situated in Ontario and belonging to a deceased person dying domiciled in its jurisdiction, it must bear the wrath of its citizens for such double taxation, and its lack of a decent respect for the rules of civilized international comity affords no reason for Ontario to deny a foreign tax credit. For Ontario to take the position, merely because the jurisdiction in which the foreign property is situated will not grant a similar credit on a reciprocal basis, merely would punish Ontario citizens without furthering the cause of reciprocity.”

The exemption technique is widely used for foreign realty, although its use is declining. Ontario and Quebec do not attempt to levy succession duty in respect of realty or immovable property situated outside the province, even when it passes on death from a decedent who died domiciled in the province to a beneficiary who is resident in the province. This form of unilateral exemption has no parallel in Manitoba.

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3 The Succession Duty Act, S.M. 1972, c. 9, s. 17 “Where the successor to any property of a deceased that is not situated at the time of the death of the deceased within the province or within a co-operating province is a resident, there shall be deducted from the duty otherwise payable by him on that property the lesser of (a) any duty otherwise payable on that property; or (b) the amount of any estate, death, inheritance, or succession tax or duty payable on that property under the laws of the jurisdiction in which the property is situated at the time of the death of the deceased.”

4 The Succession Duty Act, R.S.O. 1970, c. 449, s. 9 “Where estate, legacy or succession duty is payable and paid in any jurisdiction that may be designated by the Lieutenant Governor in Council, on property in respect of which there is a transmission, the duty levied, pursuant to clause b of section 6 on any person to whom there is such transmission with respect to such transmission shall be reduced by the amount of the duty so paid which does not exceed the amount of the duty so levied.”

5 Ont. Report of the Ontario Advisory Committee on Succession Duties, (Toronto, 1973) 50


7 This was probably never intended as an exemption; rather, it reflected the view which prevailed until recent years that it was unconstitutional for a province to tax realty situated outside the province, even where it passed from a decedent who was domiciled in the province to a beneficiary who was resident in the province, since such realty was not transmitted under the law of the province, but under the law of its situs. Id. at 10
and the other provinces which have adopted the Uniform Succession Duty Act.

(b) The jurisdiction of situs may exempt the property from taxation, either unilaterally or by bilateral agreement. Under Sec. 4(h) of the Ontario Succession Duty Act, where the deceased was domiciled outside Ontario at the date of his death, Ontario unilaterally exempts from duty interests in insurance policies, annuities, employee pension plans, retirement savings plans and pooled investment funds maintained by trust companies. The Draft Convention on Taxation of Inheritances, which was adopted in 1966 by the Fiscal Committee of the Organization for Economic Cooperation and Development (O.E.C.D.), adopts the bilateral approach, by which each party to the Convention agrees to waive death taxes on most types of movable property situated in its jurisdiction and owned by a decedent dying domiciled in the other jurisdiction, on a reciprocal basis. The “cooperating provinces” of Canada (Manitoba, Saskatchewan and the four Atlantic provinces) adopted a similar system under the Uniform Succession Duty Act, by which the province of situs waives its right to levy duty on all property other than real property situated in the province which is inherited by a person who is resident in another cooperating province.

Three examples may be given of different instances of Type I double taxation which are not relieved under existing law:

(a) Ontario and Quebec grant a tax credit for transmissions only in respect of property situated in certain designated jurisdictions. While Ontario's list of designated jurisdictions is fairly long, comprising the United Kingdom, South Africa, Australia, Eire (Ireland), New Zealand, each of the provinces and territories of Canada, and the United States of America, its states and the District of Columbia, Quebec's list is very short, covering only the United Kingdom, Northern Ireland, Trinidad and Tobago, Ontario and British Columbia. (It is understood that Quebec will soon designate all the other provinces of Canada as eligible for tax credit.)

(b) British Columbia does not grant any credit at all against its succession duties for property situated outside Canada. Grave as this situation was before 1972, it has been rendered much worse by the introduction in 1972 of the accessions basis of succession duties, under which a beneficiary who is resident in the province and who inherits property of any

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7b Ontario grants no tax credit at all in respect of inter vivos dispositions of property situated outside the province. Accordingly, if a person domiciled within Ontario makes a gift of property situated in Quebec to a donee resident in Ontario and if the donor dies within five years after making the gift, both Ontario and Quebec will subject the gift to succession duty, but Ontario will not grant any credit for Quebec duty.
kind, real or personal, immovable or movable, situated outside the province is liable to provincial duty, even if the decedent died domiciled outside the province. A testator domiciled in British Columbia might possibly be expected to be aware of the narrowness of the tax credit provided under B.C. law and, if well advised, to deal with it during his lifetime by using a holding company for foreign assets or in some other manner. However, where the testator has no connection with British Columbia and owns no assets there, he and his advisers are unlikely even to be aware of the fact that if one of his intended beneficiaries resides there, the province will impose duty upon the testator’s death.\(^8\)

(c) Inter vivos gifts of foreign property may also give rise to Type I double taxation problems. While the United States exempts non-resident aliens from U.S. federal gift tax in respect of gifts of intangible personal property situated in the U.S.,\(^9\) it grants no exemption for gifts of U.S. realty or tangible personal property. If a Manitoba resident makes a gift of a Florida condominium, both Manitoba and the U.S. will levy duty but Manitoba grants a tax credit.\(^10\) However, Manitoba and the other Canadian provinces imposing gift taxes grant tax credits for gift taxes levied by other jurisdictions only on gifts of realty situated in such jurisdictions; they grant no credit in respect of gifts of personalty situated outside the province. Accordingly, if the Manitoba resident makes a gift of a car in Florida, to be used in connection with the condominium, both Manitoba and the U.S. levy gift tax on the value of the car, but Manitoba does not grant a tax credit.

This double taxation problem may also exist in reverse. If a U.S. resident makes a gift of realty situated in Ontario, both Ontario and the U.S. levy gift tax, but the U.S. does not grant any tax credit. In fact, the U.S. does not have any statutory provisions for foreign tax credits in respect of gift taxes, although it has gift tax conventions with Japan and Australia which grant such credits.\(^10a\)

The most obvious solution to Type I double taxation is the enactment

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\(^8\) J. G. Watson, *British Columbia Succession Duty Act, Compared with the Statutes of the Other Provinces* (1973) speech delivered at the Canadian Bar Association Conference, August, 1973, as yet unpublished. Since delivery of this paper, British Columbia has moved to rectify this situation by amending its legislation to extend a tax credit to a “jurisdiction designated by the Lieutenant-Governor in Council.”


“Where in any year a resident makes a gift of real property that is not situated within the province, there shall be deducted from the tax otherwise payable by him on that property the lesser of

(a) any tax otherwise payable under this Act on that real property; or

(b) the amount of any gift tax payable on that real property under the laws of the jurisdiction in which the real property is situated.”

of unilateral foreign tax credit provisions in the statutes imposing death taxes and gift taxes. The negotiation of bilateral tax agreements in order to provide such relief is likely to be time-consuming and incomplete, although it is certainly better than permitting double taxation to occur.\textsuperscript{11}

Type II. \textit{Problems created by the accessions basis in respect of property in third countries.}

There are glaring loopholes in the transmissions basis used by Ontario and Quebec in respect of property situated outside the province. Personal or movable property situated in other jurisdictions is taxed by these two provinces only if it passes from a decedent who died domiciled in the province to a beneficiary who is resident or domiciled in the province; real or immovable property situated in other jurisdictions is completely exempt. The accessions basis, which was adopted in 1972 by British Columbia and the "cooperating provinces", closed these loopholes in a manner consistent with the constitutional limitations imposed by Section 92(2) of the British North America Act, which restricts the provinces to "direct taxation within the province".\textsuperscript{12} However, the accessions basis can cause grave problems in international estate planning, since it is inconsistent with the death tax systems of most other countries, which impose death taxes on the basis of the decedent's domicile or nationality. The major problem concerns assets situated in a third jurisdiction. For example, if a decedent who dies domiciled in, or a citizen of, the United States leaves property situated in the Bahamas to a resident of Manitoba, both the U.S. and Manitoba will impose taxes, without credits for the other's taxes.\textsuperscript{13}

The ultimate solution to this problem involves a constitutional amendment which would permit the Canadian provinces to impose duty on "successions", rather than "transmissions" or "accessions". That is, a province would be permitted to tax the estate of a decedent dying domiciled in the province in respect of all his property, whether situated in or outside the

\textsuperscript{11} Green's, \textit{The Death Duties}, 7th ed. (London, Butterworths, 1967) at 755, discusses another type of partial relief which is granted by the U.K. authorities where relief is not otherwise available. A deduction for non-British duty is normally conceded against the value of property (not a credit against duty) in two special cases:

(a) Where shares in a company, which are transferable in the U.K. and therefore situate in the U.K. according to British law, are chargeable with duty in some Commonwealth country on the footing that, under the law of that country, they are situate there.

(b) Where shares in a company (wherever incorporated) are British assets by reason of the fact that they are transferable (only) on a British register, but a duty in respect thereof is levied and collected from the company in a Commonwealth country where it is incorporated or where it carries on business, and is recoverable by the company from the executor, etc.

While better than nothing, this form of relief has little to recommend it.

\textsuperscript{12} See, \textit{supra}, note 7A at 12

\textsuperscript{13} This situation may arise if the decedent was either a U.S. citizen or was domiciled in the U.S., a point which seems to have been dealt with incorrectly by D. G. Fuller, \textit{Canadian Tax Planning for the U.S. Citizen} (1973) 21 Canadian Tax Journal 149 at 152.
province, without regard to the residence or domicile of the beneficiaries. This solution is recommended in the Report of the Ontario Advisory Committee on Succession Duties;\(^{14}\) in the current state of federal-provincial relations, there seems to be little reason for the federal government to oppose such an amendment. However, in its absence, it would be helpful to have bilateral agreements between the U.S. and the Canadian provinces concerned, by which each jurisdiction agreed to reciprocal abatement of a portion of its taxes in respect of property situated in third jurisdictions in order that the total of the two taxes is reduced to an amount which is equal to the higher of the two taxes before the abatement.\(^ {15}\) Precedent for such an agreement is found in Article V(2) of the Canada-U.S. Estate Tax Convention, which states:

> “Where each contracting State imposes tax on any property situated outside both contracting States or in both contracting States, each contracting State shall allow against so much of its tax (as otherwise computed) as is attributable to such property a credit which bears the same proportion to the amount of its tax so attributable or to the amount of the other contracting State's tax attributable to the same property, whichever is the lesser, as the former amount bears to the sum of both amounts.”\(^ {16}\)

**Type III. Problems created by the nationality basis, especially in respect of property in third countries.**

Some of the most serious double taxation problems arise from the fact that the U.S. imposes taxes on the basis of U.S. nationality as well as on the basis of U.S. domicile or residence. Where the decedent was domiciled in a Canadian province but retained his U.S. nationality, and where an individual resident in the province inherits personal property of the decedent which is situated in a third jurisdiction, double taxation will occur. For example, suppose a U.S. citizen dies domiciled in Ontario, leaving property to an Ontario resident beneficiary. If the inherited property is situated in Ontario, the U.S. will grant a credit against its estate tax and if it is situated in the U.S., Ontario will grant a credit against its succession duty. However, if the property is situated in a third jurisdiction, such as Alberta, neither Ontario nor the U.S. will grant credit for the other's taxes.\(^ {17}\)

This problem may be even worse as regards those provinces which have adopted the accessions basis of succession duties. If a U.S. citizen dies domi-

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\(^{14}\) See, *supra*, note 5 at 48


\(^{16}\) This article lapsed when the federal government of Canada vacated the estate tax field at the end of 1971

\(^{17}\) This problem arises wherever one jurisdiction asserts jurisdiction over the world estate of a decedent on the basis of his nationality, while another asserts a similar jurisdiction on the basis of his domicile. U.S. Rev. Rul. 56-251, 1956-1 Cum. Bull. 846, held that where a decedent was a citizen of the United States and died domiciled in France and had in his estate shares of stock in corporations organized in Canada, the Union of South Africa and the United Kingdom, and both the United States and France imposed a tax on these securities, the death tax convention between the United States and France did not prevent double taxation. See, *supra*, note 10A at 1,100, footnote 48
ciled in the U.K., leaving Alberta property to a Manitoba resident, the U.S., the U.K. and Manitoba will all impose taxes, without tax credits, even though Alberta, a tax haven, does not.

One solution to this problem is discussed in the Report of the Ontario Advisory Committee on Succession Duties, which, after advocating adoption of a unilateral statutory foreign credit similar to Section 17 of the Manitoba Statute, comments:

"Adoption of the proposal will not wholly resolve the double taxation problem. If, for example, a person dying domiciled in Illinois left property situated in the Bahamas to an Ontario resident, Ontario would levy duty on the beneficiary under our proposal (for an accessions tax). Ontario would grant credit for any death taxes payable in the Bahamas where the property is situate, in respect of this property. But it would not grant any credit for U.S. federal or Illinois taxes. That is, Ontario generally acknowledges, and the statute we propose will recognize, the prior right of the jurisdiction of situs to tax the property. But Ontario has not heretofore accorded priority to or recognized the right of the jurisdiction of the deceased's domicile or citizenship. The solution to this problem requires negotiation of suitable tax conventions with the United States and other major jurisdictions. It is to be hoped that the federal government will co-operate in the negotiation of such conventions. Ontario should seek to negotiate in respect of the following matters:

(1) Where movable or personal property is situated in Ontario and the deceased and the beneficiary are both neither resident nor domiciled in Ontario but in the foreign jurisdiction, Ontario will exempt the property from duty in exchange for a reciprocal concession.¹⁸ (We are hopeful that the U.S. will accept this proposal, since it has recently negotiated several treaties utilizing this principle of reciprocal exemption which was recommended in 1966 by the Fiscal Committee of the O.E.C.D.).

(2) Where the above exemption does not apply and where both Ontario and the foreign country seek to impose tax on property situated in a third jurisdiction, Ontario and the foreign country should each abate their taxes proportionately, in order to ensure that the total of the two taxes does not exceed what would otherwise be the higher tax. (We can also be hopeful that at least the U.S. will accept this proposal, since it is similar to the present Article V(2) of the Canada-U.S. Estate Tax Convention).

Since this matter is of considerable urgency, the cooperation of the Canadian federal government should be enlisted as soon as possible. The federal government should be more than willing to undertake the negotiation of such conventions and agreements in view of its strongly held position that provinces should not enter into negotiations or agreements with foreign governments, the exclusive right to negotiate being vested in the federal government. The federal government is currently obliged to treat on such questions in connection with its own tax laws and could conveniently include the Ontario concerns among the matters to be negotiated."¹⁹

Type III double taxation in the gift tax field is not confined to property in third countries. If a U.S. citizen who is resident in Ontario makes a gift

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¹⁸ Manitoba, New Brunswick, Nova Scotia and Saskatchewan now unilaterally exempt all personal property situated in the province, which was owned by a decedent who was domiciled outside the province and which is inherited by a beneficiary who is not resident in the province. Newfoundland and Quebec grant similar exemptions, provided the decedent was domiciled outside Canada and the beneficiary is resident outside Canada.

¹⁹ See, supra, note 14 at 51
of personal property which is situated in either country, both jurisdictions will impose gift taxes, without foreign tax credits. In fact this problem may also arise even if the donor is merely domiciled in the U.S. but resident in a province of Canada; although the U.S. imposes gift tax on the basis of U.S. residence, “residence” is defined by Reg. 25.2501-1(b) as domicile in the District of Columbia or in a state of the U.S.

Type IV. Differing concepts of domicile

The legal term “domicile” has different meanings in some jurisdictions. The English concept of domicile, which seems to have been largely adopted by Canadian courts, was developed in an era when young Englishmen frequently went abroad to live and work in countries whose laws and customs were very different from those of England. No matter how long they lived in India, for example, they still thought of themselves as Englishmen, and English courts still applied English law to them in respect of such matters of personal law as marriage and succession on death. Jurisdictions which have adopted this English concept of domicile require very strong evidence that an individual has abandoned his domicile of origin and adopted a new domicile of choice. On the other hand, in continental western Europe, domicile for tax purposes means little more than permanent residence and it is much easier for an individual to change his domicile. When Lord Beaverbrook, the newspaper magnate, died, after living for many years in the U.K., the newspapers reported that the U.K. Inland Revenue had conceded that he died domiciled in New Brunswick, where he had been born, which almost

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20 See, supra, note 17 at 1,103, footnote 40

21 For a summary of the English law of domicile, see Green's The Death Duties, supra, note 11 at 638.

22 The commentary by the Fiscal Committee of the O.E.C.D. to its Draft Double Taxation Convention of Estates and Inheritances states at p. 57:

"According to the domestic law of the majority of the States, the total estate left by the deceased is liable to tax by reason of the personal connections which the deceased had with the estate in question. It is these personal connections that are meant by the reference in paragraph 1 of the Article to domicile determined according to the domestic laws of the Contracting States. This criterion of liability, which is expressed in the domestic laws by such terms as domicile, home, residence, or all other similar terms, does not refer solely to the meaning given to the word "domicile" in private civil law, but also to the circumstances of habitual abode or any other situation of this kind. This situation is characterized in certain laws by special expressions, such as "Inlander" in the law of the Federal Republic of Germany, "habitant du Royaume" in Belgian law, etc. Moreover, the concept of domicile or any other concept standing for it which is employed as a test of liability of estate tax varies according to the domestic laws."

23 On September 8th, 1965, the Toronto Telegram reported the following:

"The bulk of the $12,600,000.00 estate left by Lord Beaverbrook will not be subject to death duties in Britain, one of the Beaverbrook newspapers reported yesterday. . . .

The Evening Standard said it understands that the "British Inland Revenue has agreed with the view of the Canadian authorities that Lord Beaverbrook was domiciled "within Canada"."

Beaverbrook contended throughout his life — and reiterated in his will — that he was a Canadian citizen, although he spent more than 50 years in Britain."
certainly would not have happened if he had lived in France or Germany. The United States seems to be somewhere between these two extremes and it should never be assumed that the answers to the domicile question will be the same for both Canada and the U.S. In particular, U.S. law may treat a married woman as having a domicile different from her husband's, a situation which cannot arise in the common law provinces of Canada, although it can arise in Quebec.\textsuperscript{24}

If two jurisdictions each assert that a decedent died domiciled in its jurisdiction,\textsuperscript{25} Type IV double taxation is likely to result in respect of property situated in a third jurisdiction, although property situated in either of the jurisdictions asserting domicile is unlikely to create problems.

The obvious solution lies in the negotiation of bilateral agreements which, \textit{inter alia}, define domicile for death tax purposes. For example, the Draft Convention on Taxation of Inheritances which was adopted in 1966 by the Fiscal Committee of the Organization for Economic Cooperation and Development (O.E.C.D.) states:\textsuperscript{26}

"1. For the purposes of this Convention, the question whether a person at his death was domiciled in a Contracting State shall be determined according to the law of that State.

2. Where by reason of the provisions of paragraph 1 a person was domiciled in both Contracting States, then this case shall be determined in accordance with the following rules:

(a) He shall be deemed to have been domiciled in the Contracting State in which he had a permanent home available to him. If he had a permanent home available to him in both Contracting States the domicile shall be deemed to be in the Contracting State with which his personal and economic relations were closest (centre of vital interests);

(b) If the Contracting State in which he had his centre of vital interests cannot be determined, or if he had not a permanent home available to him in either Contracting State, the domicile shall be deemed to be in the Contracting State in which he had an habitual abode;

(c) If he had an habitual abode in both Contracting States or in neither of them, the domicile shall be deemed to be in the Contracting State of which he was a national;

(d) If he was a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement."

Type V. \textit{Differing concepts of situs}

Double taxation of a particularly intractable nature can arise whenever

\textsuperscript{24}J. G. Castel, \textit{The Civil Law System of the Province of Quebec} (Toronto: Butterworth's, 1962) 76, states that the Quebec law of domicile is almost similar to that prevailing in the other provinces. The domicile of a person for all purposes is of the place where he has his principal establishment. A married woman, separated from bed and board, may, however, acquire a domicile different from her husband's.

\textsuperscript{25}The problem in the U.S. is particularly acute, since the Supreme Court has ruled that the courts of more than one state may determine that an individual is domiciled in that state. \textit{Worcester County Trust Co. v. Riley} (1937) 302 U.S. 292. See G. D. Simons, \textit{Dangers of Double Domicile and Double Taxation} (1942), 20 Taxes 345

\textsuperscript{26}See, \textit{supra}, note 5 at 38
two jurisdictions each assert taxing jurisdiction on the basis that the dece- 
dent's property was, under its situs rules, situated in its jurisdiction. Examples 
of this situation are far too numerous to list, but three problems are of par-
ticular severity:

(a) Under the U.S. Internal Revenue Code, shares of a corporation are 
regarded as property situated in the jurisdiction in which it is incor-
porated, whereas under Canadian provincial situs rules they are regarded 
as situated in the jurisdiction in which they may be transferred or, if 
there is more than one such jurisdiction, in the jurisdiction in which 
they are most likely to be transferred. If a U.S. corporation has a transfer 
register in a Canadian province, shares belonging to Canadian decedents 
domiciled in any part of Canada are likely to be subjected to double 
taxation on the basis of situs.\(^2\) Where the decedent died domiciled in 
the U.S. or the U.K., owning shares of a Canadian corporation, these 
countries seem to bend their situs rules a little in the taxpayer's favour. 
The U.S. Internal Revenue Service interprets Sec. 2014 of the Internal 
Revenue Code as permitting a U.S. foreign tax credit with respect to 
Canadian provincial succession duty imposed on property having a situs 
in any province in Canada, even though the property has, for U.S. tax 
purposes, a situs in a province different from the one imposing the 
duty.\(^2\) Similarly the U.K. grants a credit where duty is paid in Quebec 
on shares situate, under British law, in Ontario or British Columbia, 
and vice versa.\(^2\)

(b) The U.K. Finance Act, 1894, does not attempt to define the situs of 
property, leaving this to be determined by the courts under common 
law principles. In general, these principles are identical with those af-
flecting the Canadian provinces, which is hardly surprising, since the 
provinces are, according to the National Trust Co. decision,\(^2\) bound to 
apply the situs rules of, or derived from, those of the common law. 
However, in at least one case, the U.K. courts do not seem to apply 
the Canadian rule that intangible property can have only one situs. If 
a promissory note of a debtor who is resident in the U.K. is physically 
located in a Canadian province, it seems that both the U.K. and the 
province can impose duty.\(^3\)

(c) The revocable trust, which is extremely common in the United States as 
a will substitute, to reduce the expenses and publicity of probate, can 
create particularly difficult problems of double taxation, if a trust which 
is established in one jurisdiction owns property which is situated in 
another jurisdiction. Great theoretical difficulty arises in determining

\(^{27}\) D. G. Fuller, discusses the problem in Canadian Tax Planning for the U.S. 
Citizen (March/April 73), 21 Can. Tax Journal 149 at 153. See also R.T.A. Molloy and 
R. L. Woodford, Estate Planning Techniques and the Ownership of Canadian Securities, 
62 Yale L.J. 147.

\(^{28}\) See, supra, note 27 at 151
\(^{29}\) See, supra, note 21 at 701
\(^{31}\) See, supra, note 29 at 666 relying on A. G. v. Bouwens (1838), 4 M & W. 171.
whether the interest of the settlor under a revocable trust can be characterized as a right in personam, i.e. simply a right to compel the trustee to reconvey the trust assets to him, which is regarded as situated where the trust is resident, or as a right in rem, i.e. a property interest in the trust assets themselves, situated where the assets are situated. In general, a jurisdiction which treats the settlor's right as a right in rem will levy tax on the basis of the situs of the trust assets in the jurisdiction, while a jurisdiction which treats his right as a right in personam will levy tax on the basis of the residence of the trust. However, even this rule has exceptions; in one American case, where a nonresident alien life beneficiary of a foreign trust exercised a general testamentary power of appointment over a ⅛th share of a trust which consisted partly of stock in American corporations, the Second Circuit Court of Appeals included ⅛th of the value of the American securities in the taxable estate of the deceased life beneficiary, even though the evidence indicated that he had no direct interest in the trust assets and the trust and the trustees were located abroad. In the only Canadian case dealing with this question, Attorney-General of Nova Scotia v. Davis, Nova Scotia was held to be entitled to levy duty on an inter vivos settlement made under Nova Scotia law, even though the settlor, who had originally been domiciled in Nova Scotia, was domiciled in Bermuda at his death, and even though the bulk of the trust assets were situated in Quebec. If Quebec also attempted to levy duty, on the basis of the situs of the trust assets, double taxation would have resulted, despite the single situs rule enunciated in the National Trust case.

Most international death tax agreements specifically define the situs of various classes of intangible property. However, the situs rules affecting the Canadian provinces are based on common law principles and cannot be altered by legislation. Accordingly, it would not be possible, for example, for a Canadian province to agree with the United States that corporate shares are to be deemed to be situated where the company is incorporated, the rule which prevailed under the Canada-U.S. Estate Tax Convention. Short of constitutional amendment to deal with this problem, which seems undesirable and unlikely, the solution appears to lie in the negotiation of bilateral agreements between the Canadian provinces and foreign countries, somewhat along the lines of the O.E.C.D. Draft Convention, by which each agrees to waive its right to tax personal or movable property situated in its jurisdiction and belonging to a decedent who dies domiciled in the other jurisdiction, provided the beneficiary is not resident in the first jurisdiction. Since the U.S. has already negotiated a death tax convention with the Netherlands follow-

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32a [1937] 3 D.L.R. 673 (N.S.S.C.) This case is the subject of a perceptive comment by the late C. A. Wright in (1937), 15 Canadian Bar Review 664.

33 See, supra, note 30
ing the O.E.C.D. Draft Convention, there is reason to hope that the U.S. will not be averse to a proposal along these lines. In addition, since the cooperating provinces and Quebec already unilaterally exempt from duty all personal or movable property situated in the province which passes from decedents dying domiciled outside Canada to beneficiaries who are non-residents of Canada, they stand to lose very little under such bilateral agreements.

Type VI. Differing extended definitions of taxable property or transactions.

Double taxation problems can also arise from the many differences which exist in the extended definitions of taxable property or transactions, which have the result of subjecting the property of a decedent to a greater degree of taxation in the jurisdiction of situs than it would bear in the jurisdiction which grants the tax credit. Although many other examples may be given, one obvious case in the death tax field is in the area of joint tenancy. Ontario, Quebec, British Columbia and the United States all follow the principle of the U.K. Finance Act, 1894, in taxing joint property on the basis of the proportionate contribution by the deceased joint tenant to the total cost of the property. On the other hand, the provinces which have adopted the Uniform Succession Duty Act simply tax one-half of the value of joint property on the death of the first to die of two joint tenants. As a result, if the surviving joint tenant of Ontario joint property is a Manitoba resident, and if the deceased joint tenant contributed the whole of the cost of the property, Ontario will tax the whole value of the property, while Manitoba will allow credit for Ontario duty only to the extent that it does not exceed the duty which Manitoba would levy on half of the value of the property, the portion which would be taxed in Manitoba.

It is difficult to see how this type of double taxation can be avoided. As long as each jurisdiction considers itself entitled to enact its own tax laws, there is no obvious solution.

Type VII. Imposing taxes on different persons.

Some jurisdictions impose death taxes of such an unusual nature that other jurisdictions, however liberal their tax credit provisions, can hardly be expected to allow credits and double taxation will ensue.

(a) The clearest example is Section 2(2)(k) of the British Columbia Succession Duty Act, which subjects to succession duty a corporation which owns property in British Columbia, to the extent that its controlling shares pass on death, even if the corporation, the deceased shareholder and the beneficiaries are all neither resident nor domiciled in the province. If, for example, an Ontario-domiciled decedent dies, leaving his

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34 United States — Netherlands Death Duty Treaty, Supp. Service to European Taxation, Sec. C***, No. 8 (August, 70)
51% of the shares of an Ontario corporation to an Ontario resident beneficiary, British Columbia claims the right to tax the corporation in respect of 51% of the value of the assets of the corporation which are situated in British Columbia. Discussing this provision, the Ontario Advisory Committee on Succession Duties states in its Report:\(^{36}\)

> "We have doubts about the constitutionality of Section 2(2) (k) in its present form and, more important, we think that it is both wrong in principle and largely ineffective in operation. It is wrong in principle because it can create a situation in which double taxation is almost certain to occur. For example, if an Ontario domiciliary leaves his controlling shares of an Ontario corporation to beneficiaries who are resident in Ontario, and if 40% of the assets of the Ontario corporation consist of property situated in British Columbia, British Columbia will, we understand, seek to collect succession duty from the corporation on 40% of the value of the deceased's shares. In these circumstances, since the deceased, his assets and his beneficiaries are all in Ontario, it would be entirely unreasonable, in our opinion, for Ontario to grant a "foreign tax credit" under section 9 of the Ontario Act in respect of the British Columbia duty and unless Ontario grants such a credit, double taxation will result. Legislation such as Section 2(2) (k) is also ineffective, since it merely encourages those who wish to avoid its application to use two or more holding companies in series, thereby creating a situation in which the provision does not apply.

In our view, it is inadvisable for Ontario to adopt legislation similar to Section 2(2) (k) of the British Columbia statute in order to deal with estate planning techniques which alter the situs of property. There are more satisfactory methods of coping with this problem. First, as noted below, we have recommended replacing the "transmissions basis" of taxation under Section 6(b) with an "accessions basis". This will subject to duty any beneficiary who resides in Ontario and who inherits property situated outside Ontario, whether the deceased died domiciled in Ontario or elsewhere. Second, we have recommended that rates be reduced. Complex planning techniques designed to alter the situs of property all share one feature — they are costly to implement. This cost must be weighed by the planner against the possible future benefit, and the risk of changes in legislation, interpretation or political climate which would make the plan ineffective or worse. The more rates are lowered, the less likely it is that planners will wish to incur the expense and trouble involved in the use of tax havens for the siting of property."

Although the British Columbia succession duty authorities have threatened on more than one occasion to impose duty under Section 2(2) (k), it is understood that they have never actually done so.\(^{37}\)

(b) A new problem has been created by subsection 69(1) of the Canadian Income Tax Act, which came into effect in 1972. If a Canadian resident donor makes a gift to a U.S. resident donee of appreciated capital property, the donor will be deemed for Canadian tax purposes to have disposed of the property at its fair market value (which results in the deemed realization by the donor of a capital gain) and the donee will be deemed to have acquired the property at the same figure. If the donee later sells this property, his capital gain will be measured for

\(^{36}\) See, supra, note 14 at 44

\(^{37}\) See, supra, note 8
Canadian tax purposes by the excess of the selling price over this deemed cost. However, for U.S. tax purposes the donee will be deemed to have acquired the property at the donor's cost; if he later sells it, his capital gain will be measured by the excess of the selling price over this lower deemed cost. In the end result, both Canada and the U.S. will tax the portion of the gain which is represented by the appreciation in value to the date of the gift but no credit is available to offset the double tax on the gain, since it was realized by different taxpayers in the two countries. This problem points out one of the dangers of tax reform which results in the establishment of rules in one state for international transactions which are significantly different from those in effect in other states with which it has close connections.

Conclusion

Among tax specialists and estate planners the term “double taxation” is often understood to refer only to situations in which both the jurisdiction of situs of property and the jurisdiction of an individual's residence, domicile or nationality impose taxation in respect of the same property. However, this is merely one type, albeit the commonest type, of double taxation in the death duty and gift tax field. Since the other types, while possibly rarer, are no less serious to the taxpayers concerned, they deserve careful attention, especially from legislators who should be interested in avoiding the imposition of multiple taxation burdens.

8 D. R. Tillinghast, Conference Report, 1971, (Canadian Tax Foundation) 300 and Fuller, supra, note 27 at 156.