

CONFIDENTIAL

Second Working Session, Constitutional Conference

September, 1970

BRIEFING PAPER

September 7, 1970

Agenda Item 5(b)
Report from the Continuing Committee of Officials (Document 266)
(b) Taxing Power - Death Duties

A. Federal Objectives in the Discussion of this Subject

1. To maintain the federal power to levy death duties (i.e. to maintain the principle of access so that there will be a continued concurrent federal-provincial jurisdiction rather than a change to exclusive provincial jurisdiction) without asking the provinces at this stage to agree to continued federal access to this field.
2. To seek to reach agreement on a means of avoiding duplication in the taxation of the same property on the same death by two or more provinces, preferably by securing their agreement to have access to an indirect tax on all property in the estates of persons dying while domiciled in the province.
3. To maintain the federal position that it is possible in the federal estate tax law to take into account the institutions of both civil and common legal systems and to express the law in terms comprehensible to those trained in either system, but to have discussion of this question proceed on a bilateral basis between legal officers of the governments of Quebec and Canada.
4. To maintain the federal ability to share death duty revenues with provinces that do not wish to collect death duties.
5. To develop the possibility of negotiating with all ten provinces an agreement to collect tax on property in Canada of foreign domiciliaries.

B. Discussion Guide (References are to specified paragraphs of Document 266) (Tab 7, Secretariat Briefing Book)

Objectives 1 & 2

The possibilities of an exclusive federal power to levy death duties and an exclusive provincial power to levy them were examined by officials, but, as expected, there is clearly no consensus for either. Most provinces favour the third possibility examined - concurrent jurisdiction - although some of these merely want to be able to "rent" their own power in return for a share of federal revenues. But other provinces - Quebec, B.C. and Alberta - feel strongly that they should have exclusive jurisdiction, with the possible exception of the tax on property in Canada of

persons domiciled outside Canada (paragraphs 2 and 14). Therefore, provincial agreement to a continued federal presence should not be sought.

The only likely possibility for agreement on this subject is a change from the present form of concurrent jurisdiction (which results in some double or multiple taxation where federal and provincial rules conflict, and some requirements for filing multiple provincial returns) to a concurrent jurisdiction where provincial access to this type of tax is limited to avoid multiple taxation (paragraphs 5 and 9). Although Ontario seems interested in concurrent jurisdiction and Quebec is not, Quebec appears more interested than Ontario in avoiding multiple taxation.

The limitation could be in the form proposed by the federal government, of a provincial access only to use of an indirect tax on the estates of persons domiciled in the province but applicable to all the assets in such estates no matter where situated. This would result in at most two taxes (one federal and one provincial) and would be simpler for the taxpayer. Also such a form would enable Canada to collect the provincial tax, if the same tax base were used (paragraphs 5 and 8). The main disadvantage of this domicile basis is that, unless the federal government were collecting the tax, there would be cases where tax owing by persons outside the taxing province would be difficult to collect because the property is also outside the province; this might require having each province enforce the others' death duty laws (paragraph 12).

The limitation could also be in the alternative form of a right to levy an indirect tax on the sole basis of situs of assets in the province. This form is generally regarded as being less satisfactory than an indirect tax on the sole basis of domicile, but some provinces, such as Ontario, are not as convinced as the federal government that it is a much worse choice. The federal view is: it is less satisfactory because it involves multiple returns and is, therefore, more complex for taxpayers; the existence and degree of multiple taxation would depend on agreements between provinces (and between the federal government and the provinces); it would not be possible for Canada to collect this direct tax (paragraph 8); taxation on the bases of situs is much more open to artificial arrangements made to avoid or reduce taxes.

Opinions differ on the need, kind and extent of the limitation and on whether to achieve it by agreement or by constitutional change (paragraph 10). Ontario, for example, seems to feel that a system whereby provincial taxation would be limited only to domicile or only to situs, might be worked out in practice but is averse in principle to having the constitution changed to impose such a restriction on provincial access to taxing powers.

Objective 3

On the subject of relating the federal estate tax law to the civil code of Quebec, Canada agreed with Quebec that this should be so related, but Quebec did not agree with Canada's contention that it could be effectively done. The other provinces represented seemed indifferent to this, except Ontario, which had some concern about the effect of any such change on a common law province. With a view to proving the federal contention that the Estate Tax Act can accommodate both legal systems, work has been done by federal officials on revising certain sections of the Estate Tax Act.

This work is still in process. The fact that this work is being undertaken has been made known informally to some members of the Canadian Bar Association, including some members of the Quebec Bar Association, who are members of a sub-committee concerned with looking into this problem. Their co-operation has been sought, and their encouragement obtained. It is suggested that Canada propose that this matter be discussed between specialized legal officers of Canada and Quebec, with any other province being represented if it wished.

Objective 4

As long as the federal government remains in the field it can share its revenues with those provinces that do not wish to levy a tax. The federal ability to share death duty revenues with such provinces would not only be maintained, but enhanced, if the proposal for an indirect provincial tax based exclusively on domicile was adopted, because the federal government could then, providing the same base was used, collect the tax imposed by the provincial governments rather than merely share federal estate tax revenue with them, or give an abatement from its tax. It would not be feasible to collect for the provinces where the provincial tax was a direct tax based on situs, because the whole basis of the federal estate tax and the provincial death duties would be different (paragraphs 5, 11, 14).

Objective 5

The present provincial powers to tax the Canadian property of deceased foreign domiciliaries (based on situs of assets as determined by non-statutory rules) are much more limited than the federal powers which, for example, are used to declare by statute that shares of companies incorporated in Canada are situated in Canada. A provincial death duty levied exclusively on the basis of domicile in the province would leave no provincial jurisdiction at all over property of foreigners. There appears to be a considerable chance of successfully negotiating with the provinces, possibly including Quebec, an agreement for Canada alone to levy tax on such property and to share it with the provinces on an agreed basis (paragraph 6).