

UNIFORM LEGISLATION RESPECTING UNCLAIMED INTANGIBLE PROPERTY

Report of the Working Group

[1] The purpose of a uniform act respecting unclaimed intangible property is to provide a harmonized legislative scheme for the consideration of those provinces and territories which may wish to enact unclaimed intangible property legislation, and in particular, to offer a common means of addressing the inter-jurisdictional aspects which arise in unclaimed intangible property legislation.

[2] Unclaimed intangible property statutes provide for a means of endeavouring to reunite owners with their unclaimed intangible property. In the past several years, four provinces¹ have enacted or contemplated unclaimed intangible property legislation.

[3] However, the nature of unclaimed intangible property gives rise to inter-jurisdictional issues. These issues include the difficulty of ascertaining when intangible property is properly subject to the law of a particular jurisdiction; potential concerns about extra-territorial application of provincial or territorial law; and concerns about multiple, competing claims to unclaimed intangible property by different provinces or territories.

[4] Should provinces and territories wish to enact unclaimed intangible property, uniformity of legislation would be a benefit in providing a means of resolving inter-jurisdictional issues which could arise as a result of different legislative schemes in different provinces and territories.

[5] In particular, uniformity of legislation could provide a uniform basis upon which a given province or territory may claim unclaimed intangible property, and thus eliminate competing claims. Uniformity would also benefit holders of unclaimed intangible property by providing for clarity and consistency in administration and by simplifying their reporting requirements. It would also enable cooperation amongst provinces and territories.

[6] In 1998, the civil section of the Uniform Law Conference of Canada received a paper suggesting that uniformity could be of considerable benefit in addressing concerns arising from different provinces and territories enacting different legislative schemes. The Conference formed a working group to recommend legislative options, and in 1999,

¹ Ontario, Prince Edward Island, Quebec, British Columbia

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adopted a report containing recommendations upon which a draft uniform act would be based.

[7] The approach of the draft act is to address the issues from the perspective of endeavouring to achieve uniformity, and in so doing, it draws upon recent, thoroughly developed legislative schemes in Canada and the United States. It would require holders of intangible property which is determined to be unclaimed after a specified period, to endeavour to notify the owner of the property, and if unsuccessful, to report on and deliver that unclaimed intangible property to the appropriate province or territory. The provincial or territorial administrator responsible would preserve the property on behalf of owners, and would endeavour to draw the existence of unclaimed property to the attention of owners. If no claim is made within a certain period, the province or territory may have the use of the property, subject to the continuing right of the owner to recover the property.

[8] In the last year, the working group has held monthly meetings, exchanged memoranda, and consulted with people in Canada and the United States. The working group worked through a number of drafts to the present 14th draft. The members of the working group are Arthur L. Close, Q.C., Susan Amrud, Q.C., Michael Finley, Elizabeth Strange, Jay Chalke, Public Guardian and Trustee of British Columbia, and Russell Getz. Ken Downing, Legislative Counsel in the British Columbia Ministry of Attorney General, drafted the act and Diane McInnis of the New Brunswick Department of Justice has provided French language translation of the act and commentaries. François Frenette has also been a member of the working group until earlier this year when other obligations required him to withdraw.

[9] The most crucial element in the development of the draft act and the one that has commanded the most extensive effort has been the establishment of the basis upon which a province or territory may properly claim unclaimed intangible property. The draft act provides that an enacting province or territory is entitled to claim and receive unclaimed intangible property from a holder of such property if the property belongs to an owner whose last known address, as shown on the holder's records, is in the enacting province or territory. To achieve this principle, it is necessary to provide for appropriate jurisdiction over holders. In the United States, legal obligations of holders anywhere in the United States to report and deliver property to a given state flow from the rule in the United States Supreme Court decision in *Texas v. New Jersey*. It has subsequently been held that the obligation to deliver property to the state of the owner's last known address does not depend upon the owner being domiciled or carrying on business in that state. All that is required is that the state claiming property has a statute which provides it with

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the authority to claim and receive such property. In the United States, the secondary rule that applies if the identity or last known address of the owner is not ascertainable, or is within a state without an applicable statute, is that the property is payable to the state of the holder's domicile.

[10] In Canada, by contrast, given the absence of such a superordinate rule, a harmonized inter-provincial regime must be accomplished by properly harmonized provincial legislation imposing statutory obligations on holders to report and deliver property to the appropriate province or territory. The working group would like to acknowledge the generous counsel of R. Vick Farley, Q.C., Senior Constitutional Solicitor in the British Columbia Ministry of Attorney General, in the consideration of these issues. The provisions set out in section 5 of the draft act are designed to be as fair, clear, and practical for holders as possible

[11] The majority of the legislative regimes examined provide for holders of unclaimed intangible property to report and deliver such property to a public agency in the appropriate jurisdiction which is responsible for preserving the property and for endeavouring to reunite owners with their property. An exception to this approach is the British Columbia Unclaimed Intangible Property Act of 1999 which was brought into force in 2000. That Act requires holders of unclaimed intangible property to make reasonable efforts to return such property to the owners, and that non-governmental holders should report, but not deliver, unclaimed property to the unclaimed property administrator. Proceeding from the perspective of uniformity, and having regard to the fundamental policy of the act, the draft uniform act adopts the approach of the other regimes examined in contemplating a role in a uniform statute for a third party public agency responsible for administering the legislation, receiving and ensuring the preservation of unclaimed intangible property without time limit for the rightful owner, and endeavouring to reunite owners with their property.

[12] It is submitted that uniformity would do much to make this model the one best calculated to realize the objective of unclaimed intangible property legislation. Uniformity would increase the effectiveness of a public agency given the opportunities created by uniformity for inter-jurisdictional scope and cooperation. Also to be considered is the benefit of harmonized provisions which would be similar to unclaimed intangible property legislation in the United States. Lastly, uniform legislation uniformly adopted would benefit holders of unclaimed property by providing clarity and consistency in the reporting and delivery of unclaimed property.

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[13] As a result of consultations, a number of issues have been resolved. There are three significant issues outstanding: first, with respect to the definition of intangible property, the intention is to capture the notion of the underlying property right or interest as distinct from the instrument which evidences it. The issue is how best to express what is required to transfer the appropriate right or interest to the administrator.

[14] The second issue concerns the definition of unclaimed intangible property. It sets out the period of time which must elapse between the date property becomes payable or distributable by the holder to the owner and the date it becomes unclaimed under the act. In issue is whether there should be different periods of time provided for respecting different types of intangible property, and if so, should there also be particular rules as to when certain types of property become payable or distributable by the holder to the owner.

[15] The third issue is how best to provide to the administrator the ability to deal effectively with investment securities. The U.S. Uniform Unclaimed Property Act of 1995 refers to Article 8 of the Uniform Commercial Code in providing the administrator with the ability to make endorsements or give directions on behalf of an apparent owner. This approach is not presently available in all Canadian jurisdictions; and therefore, appropriate language must be found that is sufficiently precise to provide the requisite powers, while being sufficiently general to accommodate different provincial schemes.

[16] Those from whom advice has been and is being sought include Mr. R. Vick Farley, Q.C., BC Ministry of Attorney General; Ms. Michele McBride, BC Unclaimed Property Administrator; Mr. Arn van Iersel, BC Comptroller General; Office of the Public Curator of Quebec; Financial and Corporate Sector Policy Branch, BC Ministry of Finance and Corporate Relations; the BC Information, Science and Technology Agency; Mr. Eric Spink, Alberta Securities Commission; Ms. Branda Benham, BC Securities Commission; Mr. Steven Larson, US National Association of Unclaimed Property Administrators; Mr. Lynden Lyman and Ms. Paula Y. Smith of ACS Unclaimed Property Clearing House, Inc., Boston, Massachusetts.

[17] Upon resolving outstanding issues with the benefit of expert advice, the working group will consult with organizations representing industries likely to be holders under the act. In the event that consultations are concluded in early 2002, the draft act could be distributed to jurisdictional representatives noting any differences in the text after August 2001. Should there be no objections or recommendations for changes, the act could be adopted by March 31, 2002. In the event that consultations are not concluded by that

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time or if there are objections or queries respecting the draft text of the act, the act would be brought to the Conference for final approval in August 2002.