Unclaimed Intangible Property 1998

Unclaimed Intangible Property

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Purpose of the paper.

[1] In the past several years, three provinces(1) have enacted, and one province(2)has contemplated, unclaimed intangible property legislation to provide a means of reuniting people with their unclaimed intangible property, and to provide provincial governments with the use of unclaimed intangible property unless and until it is claimed by the rightful owner. In addition, in 1995, the U.S. National Conference of Commissioners on Uniform State Laws published a new draft Uniform Unclaimed Property Act, further to the prior 1954 and 1981 uniform statutes.

[2] Intangible property is a defined term in these statutes. It is typically defined to refer to the right of ownership respecting personal property which is not a chattel, mortgage or leasehold of real property, and generally a right to receive payment of the amount of a debt or obligation.

[3] Unclaimed intangible property statutes require holders of intangible property which is determined to be unclaimed after a specified period under the legislation to endeavour to notify the owner of the property, and if unsuccessful, to report annually and remit unclaimed property to the Crown. The government office responsible endeavours by means of advertisement to draw the existence of the property to the owner's attention. If no claim is made within a certain period, the province may have the use of the property, subject to the continuing right of the owner to recover the property.

[4] However, the nature of unclaimed intangible property is such that a variety of complexities and uncertainties may arise with such regimes, and a number of objections have been raised by potentially interested parties, most notably the present holders of such property.

[5] These concerns include the difficulty of ascertaining the location of intangible property (and the related question of to what extent the artificial concept of "location" of intangibles has relevance to such regimes); potential issues of extraterritorial application of provincial law; and potential concerns about multiple, competing claims to unclaimed property by various provinces.

[6] In 1991, John Gregory reported to the Uniform Law Conference on the unproclaimed Ontario Unclaimed Intangible Property Act of 1989. Therein he described the nature of the act, some comments and criticisms it had received, and the potential benefits of uniformity. He recommended a watching brief on further developments.

[7] In light of the developments noted above, it appears timely to revisit this matter. Specifically, the purpose of this paper is to stimulate consideration and discussion as to how the development of uniform legislation might address some or all of these potential concerns, and in particular, concerns about resolving potential competing claims to unclaimed property by two or more jurisdictions, so as to permit the development of legislative regimes that are both practicable and likely to withstand any potential legal

challenges.

The basis for asserting a claim to unclaimed property.

[8] Each of the legislative regimes referred to above sets out the basis upon which the enacting jurisdiction may assert a claim to unclaimed intangible property.

[9] Section 3 of the Ontario Unclaimed Intangible Property Act provides as follows:

The Crown in right of Ontario has the right to claim and receive unclaimed intangible property that is in Ontario or the ownership of which is governed by the law of Ontario.

[10] Section 36 of the Prince Edward Island Public Trustee Act refers to the Public Trustee rather than the Crown in the right of the Province but otherwise is the same.

[11] This use of the situs of the property as the basis for asserting a claim to unclaimed property is also found in the British Columbia discussion paper (page 12).

[12] An alternative basis upon which a jurisdiction may assert a claim to unclaimed property is set out in the Quebec Public Curator Amendment Act of 1997. Section 24.1 of that At provides for a right to unclaimed property where the owner or other interested party is domiciled in Quebec. Section 24.2 provides as follows:

an interested party is deemed to be domiciled in Quebec if the party's last known address was in Quebec or, where the address is unknown, if the acts constituting the party's rights were made in Quebec.

[13] Section 24.3 sets out a secondary basis for asserting a claim:

The property refered to in section 24.1 is also considered to be unclaimed if the property is situated in Quebec and the law of the place of domicile of the interested party does not provide for provisional administration.

[14] The 1995 Uniform Unclaimed Property Act of the U.S. National Conference of Commissioners on Uniform State Laws provides the basis upon which the enacting state may assert a claim to unclaimed property as follows:

Section 4 - Rules for Taking Custody.

Unless otherwise provided in this (Act) or by other statute of this State, property that is presumed abandoned, whether located in this or another State, is subject to the custody of this State if:

(1) the last known address of the apparent owner, as shown on the records of the holder is in this State;

(2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this State;

(3) the records of the holder do not reflect the last known address of the apparent owner and it is established that:

(i) the last known address of the person entitled to the property is in this State; or

(ii) the holder is a domiciliary or a government or governmental subdivision or agency of this State and has not previously paid or delivered the property to the State of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address of the apparent owner, as shown on the records of the holder, is in a State that does not provide for the escheat or custodial taking of the property and the holder is a domiciliary or a government or governmental subdivision or agency of this State;

(5) the last known address of the apparent owner, as shown on the records of the holder, is in a foreign country and the holder is a domiciliary or a government or governmental subdivision or agency of this State;

(6) the transaction out of which the property arose occurred in this State, the holder is a domiciliary of a State that does not provide for the escheat or custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a State that does not provide for the escheat or custodial taking of the property; or

(7) the property is a travelers check or money order purchased in this State, or the issuer of the travelers check or money order has its principal place of business in this State and the issuer's records do not show the State in which the instrument was purchased or show that the instrument was purchased in a State that does not provide for the escheat or custodial taking of the property.

[15] In essence, the U.S. Uniform Act provides that unclaimed intangible property may be claimed by the state of the last known residence of the owner. The secondary rule which applies if the last residence is not ascertainable or if it is within a state which does not have an applicable law, is that the property is payable to the state of the holder's domicile.

Issues of practicality, workability and cost.

[16] From a practical perspective, the use of the "situs" of property raises a number of concerns which have been noted in the commentary provided on the proposed B.C. and Ontario legislation.

[17] First, the existing common law rules for determining the situs of intangible property are, as indicated in comments received on the B.C. discussion paper, extremely complex, and may not be appropriate in this context. (See the comments of John Gregory in his 1991 paper on this topic, as well as the decision of the Supreme Court of Canada in *Williams v. Canada* (1992) 90 D.L.R. (4th) 129). It has been noted that such complexity and uncertainty will result in significantly increased legal costs for holders who must determine, on a case by case basis, where property is situated and which regime they must respond to.

[18] While it has been suggested that the rules regarding determination of situs in unclaimed property regimes could be simplified through use of guidelines, it is not clear how guidelines or policy directives could alter the various existing common law rules. Moreover, even if they could, this would have the potential to result is different rules among provinces (and thus multiple claims to property). While the development of uniform situs guidelines might help reduce inconsistencies among jurisdictions, this would not in any event itself address all the complexities that result from assigning an artificial location to intangible

goods on a case by case basis.

[19] In contrast to the complexities and uncertainties of the situs rule, use of the last known address of the owner would appear to be a simpler, and potentially more effective basis on which to assert claims to unclaimed property. It has the merit of basing a claim on the location of the owner of the property in question, when it is the ownership of the property which is of central concern. It would also seem more effective for the jurisdiction in which the owner was last resident to have the responsibility to notify him or her of his or her unclaimed property.

[20] Use of the owner's last known residence is simpler and more consistent with many of the comments provided to the B.C. Comptroller General respecting his discussion paper. This is consistent with the approach used in the United States. In setting out the principles adopted in the U.S. Uniform Legislation, U.S. Supreme Court in *Texas v. New Jersey*, 379 US 674 (1965), focused on the complexities involved and the need for a workable approach. The conclusion of the majority opinion states as follows:

We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor it is entirely one of logic. It is fundamentally a question of ease of administration and of equity. We believe that the rule that we adopt is the fairest, is easy to apply, and in the long run, will be the most generally acceptable to all the states.

[21] The relative simplicity and workability of this approach would, however, likely be significantly compromised in the absence of uniformity. For example, a holder in province A of property situate there would be in a difficult position if province A claimed the property based on situs and another province claimed the same property based on the last known residence of the owner.

Constitutional issues

[22] Constitutional issues can arise respecting assets in federally regulated institutions or otherwise possessed of a federal character pursuant to section 91 of the Constitution Act. In particular, of course, the Bank Act provides for the disposition of unclaimed bank deposits. These issues will have an impact upon the scope of a province's legislative scheme. It may be that there is a role for further federal unclaimed property legislation.

[23] Constitutional questions also arise respecting the issue of extraterritoriality. It has been suggested by some that any unclaimed property regime would have to rely on the situs as the basis for assuming authority over the property, as any claim over property "situate" outside the province would amount to an unconstitutional extraterritorial application of provincial law. It seems that this is not necessarily the case, and that this assertion is too sweeping.

[24] In *Churchill Falls Corp. v. AG Newfoundland* (1984) 8DLR (4^{th}) 1, the Supreme Court of Canada declined to hold that the mere fact that extra-provincial rights were affected would establish constitutional invalidity. Rather, the courts said it was necessary to consider the relative significance of the intra-provincial and extra-provincial elements of the statute in question. The court said on page 30:

Where the pith and substance of the provincial enactment is in relation to matters which fall

within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*.

[25] The *Churchill Falls* case is important to unclaimed property regimes. It rejected a previous line of cases (starting with *Royal Bank of*Canada v. The King (1913) 9 D.L.R.337(P.C.)) which had held that provincial statutes whose effects were not wholly confined to the province would be deemed *ultra vires*. Instead, the Court adopted the more flexible approach that was employed by the Judicial Committee of the Privy Council in *Ladore v. Bennett* [1939] 3 D.L.R. 1.

[26] It would therefore seem that a strong argument could be made that legislation that claims unclaimed intangible property based on the last known residence of the owner might well be constitutionally permissible, even if the right applied with respect to property with a situs in another province, due to the fact that the principal purpose and effect of such legislation is to transfer an owner's interest in property to the province of that owner's last known address, subject to the right of the owner later to claim it. Given that holders of the property (either within the province or without) do not have a proprietary interest in the property and would always be under an obligation to transfer the property upon being presented by a claim by the owner or the owner's assignee or successor, it would seem that there is not an impairment of the holder's rights; or if the holding of property could be a right for certain purposes, it could be viewed as being incidental to the owner's property right, and any effect on a holder would be a "necessary incident" under the reasoning in *Churchill Falls*.

[27] This approach is indeed consistent with the reasoning of the United States Supreme Court in *Texas v. New Jersey* 379 US 674 (1965), which held that unclaimed property is an asset of the creditor (i.e., the owner) and not the debtor (i.e., the holder) (see also the commentary on Section 4 of the Uniform Unclaimed Property Act of the National Conference of Commissioners on Uniform State Laws, p. 14). The prefatory comment to the model act further notes that the state of last known residence test is a rough indicator of the owner's domicile, and that such a state is entitled to legislate in respect of succession of this property (see UUPA Comment, p.4).

Conclusion

[28] Irrespective of which of the approaches discussed above is adopted, it would seem that uniformity of legislation among provinces holds the promise of addressing and resolving multi-jurisdictional issues which arise in unclaimed intangible property legislation. Uniform legislation could minimize the possibility that two provinces might claim the same piece of intangible property.

[29] Uniform provisions respecting the basis of a claim would make it less likely that the legislation of one province could be held to have an inordinate effect on another province.

[30] Uniform regimes could provide a means by which administration respecting reporting, transfer, inspections, and enforcement could apply to all holders in the jurisdiction, while allowing jurisdictions to share data and property with other jurisdictions as appropriate. Such an approach is found in the model U.S. statute.

[31] Uniform legislation could allow for the development of a revised (and common) choice of law rule. The question of what law applies is of course distinct from issues of the substantive legal rights in question, and so would not be resolved simply because a province purported by its legislation to establish a substantive claim over property. Under existing

choice of law rules in Canada, questions regarding title to moveables and government actions respecting the same are governed by the lex situs as determined according to common law conflicts rules (see for example McLeod, The Conflict of Laws, pages. 366 and 367). While choice of law rules may be altered by statute, uniformity could address the problem of different choice of law rules in different provinces. Such a rule could provide that questions regarding government action in respect of unclaimed intangible property are governed by the law of the last known residence of the owner.

[32] Lastly, uniformity could of course benefit holders of unclaimed property by providing for clarity and consistency in their obligations.

[33] The issues discussed above would appear to be threshold questions respecting the desirability and practicality of uniform legislation. The development of unclaimed intangible property regimes has the potential to provide significant benefit to owners of unclaimed property and to provincial governments interested in pursuing the matter, but it is a complex area which requires careful consideration or both practical and legal/constitutional concerns. The proposals, comments, and debate to date seem to suggest that use of the last known residence of the owner as a basis for claiming unclaimed intangible property has the promise of being an option that is both workable and likely to withstand legal/constitutional challenge, particularly if uniform legislation is developed in this regard.

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[1]Ontario: Unclaimed Intangible Property Act, R.S.O. 1990 c.4.1 (as amended by Bills 178 and 200, 1994) not in force

Quebec: Public Curator Amendment Act, 1997 c.80, not in force.

Prince Edward Island: Public Trustee Act, 1994 c.P-32.2, in force

2.

[2] British Columbia: New Approaches to Unclaimed Intangible Property Administration in British Columbia, A Legislation Discussion Paper, 1997

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