Unclaimed Intangible Property 1999

UNIFORM LEGISLATION RESPECTING UNCLAIMED INTANGIBLE PROPERTY

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PART ONE: INTRODUCTION

[1] In the past several years, three provinces ***See Footnote 1*** have enacted, and one province ***See footnote 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] The unclaimed intangible property statutes referred to above 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 preserves the property on behalf of the owner, and 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. These issues include the difficulty of ascertaining when intangible property is properly subject to the law of a given jurisdiction; potential concerns about extra-territorial application of provincial law; and concerns about multiple, competing claims to unclaimed intangible property by various provinces.

[5] These issues and concerns give rise to the question of the potential benefits of uniform legislation. 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.

[6] In light of the developments noted above, and at the request of the Civil Section Steering Committee, the Civil Section of the Uniform Law Conference received and considered a paper in 1998 from the British Columbia commissioners, the purpose of which was to stimulate consideration and discussion of 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 potential legal challenges.

[7] The 1998 paper concluded, based on the discussion of the issues therein, that uniformity respecting unclaimed intangible property legislation would be of considerable benefit.

[8] Uniformity would provide a means of resolving multi-jurisdictional issues which arise respecting unclaimed intangible property legislation. It could minimize the possibility that two or more provinces might claim the same property.

[9] Uniform provisions respecting the basis upon which a province may claim unclaimed intangible property would diminish the likelihood that the legislation of one province could be held to have an inordinate effect on another province. Because of this, uniformity would enable a more creative, less constrained consideration of potential rules providing for the basis upon which a province may properly claim unclaimed intangible property, from the point of view of fairness and practicality, without being subject to the constraints to which provinces enacting non-uniform unclaimed intangible property statutes would necessarily be subject.

[10] In this respect, the paper suggested that a rule which provides that unclaimed intangible property may properly be claimed by the jurisdiction of the last known address of the owner, holds considerable promise.

[11] In addition, uniform regimes would provide a means by which administration respecting reporting, transfer, inspection and enforcement could apply to all holders in the jurisdiction while allowing jurisdictions to co-operate respecting data and property where

appropriate. Such an approach is found in the model U.S. statute.

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

[13] Upon receiving and considering the 1998 paper, the Civil Section resolved that a working group be established to recommend legislative options to deal with the issues identified in the 1998 paper.

[14] This paper considers potential legislative options from the perspective of uniformity, and in so doing, draws upon the recent thoroughly developed statutes and statutory schemes referred to above.

[15] With one exception, the regimes examined provide for holders of unclaimed intangible property to report and remit such property to a public agency which would be responsible for preserving the property and for endeavouring to reunite owners with their property. The exception is the most recent paper of the British Columbia Office of the Comptroller General dated February 19, 1999. It proposes that holders of unclaimed property would make reasonable efforts to return such property to owners. The paper indicates that this proposal is made in response to concerns expressed by representatives of holders that the cost of reporting and remitting property would outweigh the potential benefit to owners (page 3).

[16] Proceeding from the perspective of uniformity, this paper adopts the approach in 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.

[17] It is suggested that uniformity would do much to make this model the option 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 multi-jurisdictional scope and cooperation. Also to be considered is the benefit of provisions which would be parallel to unclaimed intangible property legislation in the United States. Lastly, uniform legislation, uniformly adopted, would benefit holders of unclaimed property by providing for clarity and consistency in the reporting and remitting of unclaimed property.

[18] The following parts of the paper address issues which appear to be central to uniformity of unclaimed intangible property legislation.

PART TWO: JURISDICTIONAL ISSUES

[19] It is evident that there shall be instances involving unclaimed intangible property where one or more foreign elements are present. These foreign elements could consist of one or more of the following factors: the location of the owner of the property; the domicile of the holder; the principal place of business of the holder; or the location of the property.

[20] In such instances, there could be uncertainty respecting the application of a provincial statute. In particular, should the legislation in question provide for the government to claim and receive unclaimed property, the question would arise as to when the government might properly claim unclaimed intangible property. Should there be two or

more provincial legislative regimes, there shall be concerns respecting potential multiple, competing claims by different jurisdictions to unclaimed intangible property, and concomitant concerns about the lack of clarity for holders respecting their obligations to report and remit unclaimed property.

[21] To address these concerns respecting foreign elements, and the multi-jurisdictional issues they entail, legislative regimes typically enact a rule, in the form of a provision setting out the basis upon which the enacting jurisdiction may assert a claim to unclaimed intangible property.

[22] The fundamental benefit of uniformity would lie in the provision of a uniform jurisdictional rule to provide when a given province's law is applicable, and the province may properly assert a claim to unclaimed intangible property. However, a uniform jurisdictional rule, per se, if unclear or impractical, will be of little or no assistance. Conversely, a good jurisdictional rule without uniformity would be of limited value due to the necessarily limited scope of application of legislation in a single jurisdiction. What is required is a uniform rule which is clear, practical, and sound in policy. What would be the best rule in terms of consistency with the purpose and principles of unclaimed intangible property legislation and also in terms of practicality, clarity, simplicity, and cost?

The Basis for Asserting a Claim to Unclaimed Intangible Property

[23] 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.

[24] Section 36 of the Prince Edward Island Public Trustee Act refers to the public trustee rather than the Crown in right of the province, but is otherwise the same as the Ontario provision.

[25] 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 (p. 12).

[26] 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 act 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.

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

The property referred 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.

[28] The 1995 Uniform Unclaimed Property Act of the National Conference of Commissioners on Uniform State Laws in the United States 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 domiciliary or a government or government 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 domicilary 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 cheque or money order purchased in this State, or the issuer of the travelers cheque 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 escheat or custodial taking of the property.

[29] In essence, the U.S. Uniform Act provides that unclaimed intangible property may be claimed by the state of the last known address of the owner. The secondary rule which applies if the last address 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.

Discussion of Alternative Rules for Claiming Unclaimed Intangible Property

[30] The Ontario and Prince Edward Island legislation, and the British Columbia discussion paper assert a right to claim unclaimed intangible property which is located in the

jurisdiction, or the ownership of which is governed by the law of the jurisdiction. The use of the location, or "situs", of property raises a number of concerns which have been noted in commentary provided on the B.C. discussion paper and the Ontario legislation.

[31] First, the existing common law conflict of laws rules for determining the location, or situs of intangible property are, as indicated in comments made on the B.C. discussion paper, extremely complex. A number of comments strongly favoured the adoption of a rule based on the last known address of the owner, which is the approach taken in the U.S. Uniform Act.

[32] In particular, the complexity of ascertaining the location of intangible movable property could result in significant legal costs for holders and others seeking to apply such legislation to particular property, who must determine, on a case by case basis, where property is situated, and to what regime they must respond.

[33] In Ontario, the public trustee published draft guidelines indicating how it might be determined that intangible property is in the jurisdiction. The British Columbia discussion paper also proposes the use of such guidelines. It is not clear, however, how such guidelines could effectively clarify determination of situs issues as they could not of themselves alter existing rules of law respecting the determination of the situs of property.

[34] In addition to the difficulty of determining whether property might be said to be in a given jurisdiction or, indeed, in more than one jurisdiction, the existing rules of law respecting the determination of situs of movable property may not be appropriate for the purposes of unclaimed, intangible property legislation. Existing rules of law for determining the situs of property have been developed for purposes other than unclaimed intangible property legislation. John Gregory noted in his 1991 paper on this topic:

> A good deal of statute and case law exists prescribing the situs of intangibles for the purpose of death taxes, and the like. An argument can be made that legal rules developed in the context of death taxes are not always appropriate for cases involving reuniting owners with unclaimed property or taking custody of that property pending identification of the owner.

[35] As Castel notes, "It is possible for property to be regarded as having different locations for different purposes," such as administration, succession, duty or taxation (J.G. Castel, *Canadian Conflict of Laws*, Fourth Edition, page 458). The Supreme Court of Canada has recently called into question the use of common law conflict of laws situs rules for the purposes of a specific legislative scheme: in *Williams* v. *Canada* (1992), 90 DLR (4*th*) 129, the court was asked to consider whether an Indian person who lived on a reserve was obligated to pay tax on Unemployment Insurance benefits. The Crown argued that the common law conflict of laws rules should be used to locate the situs of these entitlements as being off-reserve and hence taxable. The court stated at page 138:

The respondent argues that the situs of the receipt of Unemployment Insurance benefits should be determined in the same way the conflict of laws determines the situs of a debt. The debtor is the federal Crown or the Canada Employment and Immigration Commission, neither of which resides on a reserve, therefore, the receipt of benefits is not situated on the reserve.

[36] The court rejected this argument and in so doing stated at page 138-139:

> In resolving this question, it is readily apparent that to simply adopt general conflicts

principles in the present context would be entirely out of keeping with the scheme and purposes of the Indian Act and Income Tax Act. The purposes of the conflict of laws have little or nothing in common with the purposes underlying the Indian Act. It is simply not apparent how the place that a debt may normally be enforced has any relevance to the question of whether to tax the receipt of payment of that debt would amount to the erosion of entitlements of an Indian quay Indian on reserve. The test for situs under the Indian Act must be constructed according to its purposes not the purposes of the conflict of laws. Therefore, the position that the residence of the debtor exclusively determines the situs of benefits such as those paid in this case must be closely re-examined in light of the purposes of the Indian Act. It may be that the residence of the debtor remains an important factor, or even the exclusive one. However, this conclusion cannot be directly drawn from an analysis of how the conflict of laws deals with such an issue.

[37] As well as the above discussed question of the appropriateness of existing rules of law respecting situs, it may be questioned, more fundamentally, to what extent the artificial concept of the location of intangible property has relevance in principle to unclaimed intangible property legislation when the purpose of such legislation is considered.

[38] Lastly, the second limb of the rule in the Ontario and Prince Edward Island legislation and in the B.C. discussion paper provides that the Crown has the right to claim property "the ownership of which is governed by the law" of the enacting jurisdiction. This seems simply to be a direction toward the existing conflict of law rules which appear to be of uncertain utility and guidance.

[39] The merits of the several alternative rules were examined by the United States Supreme Court in *Texas* v. *New Jersey*, 379 US 674 (1965). Therein, four different possible rules as to when a state should have jurisdiction to claim and receive unclaimed intangible property were advanced and considered by the court. The first potential rule considered was that the state with the "most significant contacts with the debt" should be able to claim it. The court was of the view that this substantial connection approach would fail to yield a clear rule as it amounts, in essence, to a direction to examine the circumstances of any given item of property on its own facts, and as such would yield only uncertainty.

[40] The second proposed rule was that a state should have the right to unclaimed property if it is the state of the holder's ("debtor's") domicile. The court acknowledged that this proposed rule was clear and easy to apply but that there were other possible rules which also shared these virtues. The court decided that the principle of fairness, which it said must be paramount, precludes such a minor factor to be determinative in allowing property to be claimed by the state in which the holder happened to incorporate itself.

[41] The third proposed rule considered was that a state should be entitled to claim property if it is the holder's principal place of business. The court recognized that the state of the holder's principal place of business conferred the benefits of its economy and laws on the holder whose business activities brought the property into existence. However, the court said that the property in question was not the holder's own property but rather a debt or liability owing to the owner; and that, in many instances, it would be difficult to ascertain the location of the principal place of business of the holder.

[42] The court said that a rule based on determining the state in which the debt was created would require a decision making on a case by case basis and should not be adopted unless there is no other rule which is more certain and yet still fair.

[43] The rule that the court did adopt as being most certain and fair is that property is

properly claimed by the state of the creditor's (owner's) last known address as shown on the debtor's (holder's) books and records. The court said that such a rule involves a simple and easily resolved factual enquiry and leaves no other legal issue to be decided. The court also stated that such a rule recognizes that the property is an asset of the owner, and that it would likely distribute such property amongst the states in the proportion of the commercial activities of their residents. Lastly, the court noted that the use of the standard of last known address rather than the more technical legal concepts of residence or domicile would simplify the administration and application of unclaimed intangible property laws.

[44] The court also set out ancillary rules to address instances in which there are no records of an owner's address or where the last known address is in a state which does not have any provision for claiming unclaimed intangible property. The court held that in such instances, property should be subject to the jurisdiction of, and properly claimed by, the state of the domicile of the holder provided that, with respect to the first situation where there is no known address, the property could later be claimed by another state upon proving that it is the state of the owner's last known address; and with respect to the second situation, the state of the last known address of the owner can subsequently claim the property if and when it enacts a law providing for such claims.

[45] The Supreme Court focussed on the need for a workable approach to address the complexities involved. 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 is it 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.

[46] 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.

[47] Use of the owner's last known address is simpler and more consistent with many of the comments provided to the B.C. Comptroller General respecting his 1997 discussion paper. This is also, of course, the rule which has been adopted by the U.S. Uniform Unclaimed Property Act, and is consistent with the first limb of the rule in section 24.1 of the Quebec Public Curator Amendment Act of 1997.

[48] It is, therefore, submitted that a uniform rule based on the last known address of the owner is the best rule as a matter of legal policy. It meets standards of fairness, clarity and practicality. In addition, it is also the rule which appears to be most consistent with the purpose and principles of unclaimed intangible property statutes.

[49] A uniform rule, uniformly adopted, would also obviate potential conflict of laws issues respecting choice of laws and enforcement.

Constitutional Issues

[50] Constitutional issues can arise respecting assets in institutions which are federally regulated or are 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.

[51] It has also been suggested that a jurisdictional rule providing for the basis on which a province may assert a claim to unclaimed intangible property raises the issue of potential extraterritoriality. Specifically, it has been suggested by some that any unclaimed property regime would have to rely on the situs of the property as the basis for assuming authority over the property, as any claim on 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.

[52] In *Churchill Falls Corp.* v. *AG Newfoundland* (1984) 8 DLR (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 court 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.

[53] 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 DLR 337 (PC)) 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 DLR 1.

[54] Professor Elizabeth Edinger has said with respect to the approach in *Ladore* v.*Bennett* that of the possible approaches to the interpretation of the territorial limitation on provincial legislative power, *Ladore* v. *Bennett* is the best with respect to both certainty and flexibility:

This certainty resides in the fact that the test can be easily and clearly stated. A province may legislate without infringing the territorial limitation provided only two conditions are met: first, that the legislation is in relation to some provincial object; and second, that the expanded application is necessary for the attainment of the object and that there is some nexus with the province. The flexibility lies in the application. It permits the provinces to avoid gaps in their legislation and gives them the opportunity to reassess the wisdom, convenience and justice of the common law conflicts rules both generally and in relation to specific questions.

[55] In addition Professor Edinger states:

Furthermore, in addition to the needed flexibility for provincial legislative activity, the *Ladore* v. *Bennett* approach has a very significant advantage: it is consistent with the ordinary interpretative doctrine which upholds provincial legislation whose pith and substance relates to a head of power in section 92 of the British North America Act, even if a federal matter within section 91 is thereby affected. If federal jurisdiction may be so

affected, why not the legislative jurisdiction of another province? This is an approach familiar to the courts and so admits of convenience in application.

Another factor in favour of the Ladore v. Bennett approach is that is accords with the present solution in the other federations comparable in age and composition with Canada, namely Australia and the United States. **See footnote 3**

[56] It would, therefore, seem that a strong argument could be made that legislation that allows the province to claim unclaimed intangible property based on the presence in the province of the last known address 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*.

[57] 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 (the owner) and not the debtor (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, page 14.) The prefatory comment to the model act further notes that the state of last known address 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, page 4.)

Conclusion:

[58] From the foregoing discussion, it would seem that the best option would be a uniform rule providing that a province may properly claim unclaimed intangible property when the last known address of the owner, as shown on the holder's records, is in that province, with ancillary rules similar to those in the U.S. Uniform Unclaimed Property Act of 1995. A uniform provision would obviate a potential conflict of laws problem and would be constitutionally sustainable.

[59] Uniformity per se is of fundamental importance in view of the multi-jurisdictional aspects which arise in any unclaimed intangible property regime, but a sound rule determining when a jurisdiction may properly claim unclaimed intangible property is necessary in order to realize the full benefits of uniformity.

[60] Adoption of the last known address of the owner as the basis upon which a province may claim unclaimed intangible property is recommended as the rule which would be most effective in realizing the purpose of unclaimed intangible property legislation, that is, of reuniting owners with their property, in a fair and practical manner.

[61] In the absence of uniformity, an individual province might still wish to enact an unclaimed intangible property statute which provides for the last known address rule. The foregoing discussion indicates that it could withstand concerns respecting extraterritoriality,

and, given the purpose and effect of unclaimed intangible property legislation, and, in particular, that it does not purport to affect property rights, but rather endeavours to preserve property on behalf of owners, it would not conflict with common law choice of law rules. However, in the absence of uniformity, no jurisdictional rule could be guaranteed to be accepted outside the enacting jurisdiction, as a forum court would be free to select the law it wishes to apply. Also, in the absence of uniformity, the ability of a given jurisdiction to enforce its rule, of its own force, would be necessarily limited.

[62] The foregoing indicates the benefits of uniformity. Uniformity would obviate potential problems respecting conflict of laws. Uniformity would render less likely the possibility that two or more provinces would claim the same piece of property. A uniform unclaimed intangible property statute would also further diminish concerns respecting any potential extraterritoriality as it would be less possible to argue that another jurisdiction is being unduly affected. Because of this, uniformity enables a consideration of a potential rule providing for the basis upon which a province or territory may properly claim unclaimed intangible property, from the point of view of what rule is best suited to achieve the policy objective of the legislation, without being subject to the constraints to which a single jurisdiction enacting non-uniform legislation would necessarily be subject.

[63] **RECOMMENDATIONS**

* A uniform statute should provide that a province or territory may claim and receive unclaimed intangible property if the last known address of the owner, as shown on the holder's records, is in the province or territory; or it is otherwise established that the owner's last known address is in the province or territory, should the holder's records be inadequate.

* Should the owner's last known address not be ascertainable, the province or territory of the holder's domicile should be able to claim and receive the property, subject to the province or territory of the owner's last known address being able to claim, should the address be subsequently become known.

* Should the province or territory of the owner's last known address not have unclaimed intangible property legislation, the province or territory of the holder's domicile should be able to claim the property, subject to the province or territory of the owner's last known address being able to claim should it subsequently enact unclaimed intangible property legislation.

* Should the owner's last known address be in a foreign country, then the province or territory of the holder's domicile should be able to claim the property.

* Should the holder be domiciled in a province or territory without unclaimed intangible property legislation, and the owner's last known address is unknown, or is in a province or territory without unclaimed intangible property legislation, the province or territory in which occurred the transaction out of which the property arose, should be able to claim the property, subject to the province or territory of the holder's domicile being able to claim should it subsequently enact unclaimed intangible property legislation.

PART THREE: HOLDING PERIODS, AND NOTICE,
REPORT AND TRANSFER

HOLDING PERIODS

[64] A fundamental issue that unclaimed property legislation must address is when property becomes unclaimed. The Ontario, Prince Edward Island Acts and the 1995 Uniform Unclaimed Property Act of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the British Columbia 1997 discussion paper all use five years as their standard time period. There are some exceptions in each jurisdiction. For example, all of these Acts use a 15 year waiting period for travellers cheques and seven years for money orders. On the other hand, one year is the standard for unclaimed utility deposits and unpaid wages. These differing periods are apparently based on anecdotal information and intuition about when it can safely be assumed that a person "must have" forgotten about the property. There is nothing scientific about this process. The various time periods adopted for each type of property are arguably arbitrary. However, in the interests of reducing administrative costs, consistency among jurisdictions is appropriate.

[65] **RECOMMENDATIONS**

* The standard holding period should be five years.
* The Act should provide for exceptions to be set out in regulations.

NOTICE, REPORT AND TRANSFER

[66] Once property meets the definition of being unclaimed, holders have certain responsibilities. These responsibilities fall into three categories:

* notifying owners that the property is unclaimed within the meaning of the statute;
* reporting unclaimed property to the administrator;
* transferring unclaimed property to the administrator.

NOTICE TO OWNER

Requirement For Notice

[67] As a general rule, unclaimed property systems require holders to give notice to owners before the holders transfer unclaimed property to the administrator. There are exceptions in most jurisdictions, based on the value of the property and whether the holder has an accurate address for the owner.

[68] For example, NCCUSL requires a holder to send notice to an owner 60-120 days before sending notice to the administrator, if the holder has an address for the owner that its records do not disclose to be inaccurate, the claim of the owner is not barred by the statute of limitations and the value of the property is $50 or more. The Quebec Act requires the notice to be given three to six months before sending notice to the administrator unless the holder cannot, by reasonable means, ascertain the owner's address, the value of the property

is less than $100, or in other cases determined by regulation. (See paragraphs 81-83 below respecting the value of the property.)

[69] **RECOMMENDATIONS**

* A holder should be required to give notice to an owner once property becomes unclaimed within the meaning of the Act.
* The notice to the owner should be sent three to six months before the report is sent to the administrator.
* The requirement for notice to the owner should be waived where the holder has reasonable grounds to believe that the address in its records for the owner is inaccurate.

Fees for Notice

[70] A related issue is whether the holder may charge a fee to the owner for providing this notice. NCCUSL allows a fee only where there is a valid and enforceable written contract between the holder and the owner authorizing the fee, and the holder regularly imposes the fee and does not regularly reverse or otherwise cancel the fee. The amount of the fee may not be unconscionable. The Comment respecting this provision is as follows:

Proposals to limit the charges by specifying maximum permissible amounts were considered, but were rejected as being less desirable than the existing rules of limitation including the rule against unconscionable contracts, contained in the Uniform Commercial Code, Article 2, Section 302, which by this section is made applicable to service charge contracts.

[71] Prince Edward Island prohibits a holder from charging more than a prescribed amount for sending this notice; Ontario and Quebec have similar provisions. The purpose of regulating the fee is to ensure holders do not undermine the process by taking the entire value of the unclaimed property as a fee.

[72] **RECOMMENDATION**

* Holders may not charge a fee for sending the notice unless it is authorized by a written contract between the holder and the owner and it does not exceed the prescribed amount.

Dormancy Fees

[73] Another issue that some jurisdictions address is dormant account charges. They prohibit holders from charging owners a fee for failing to communicate with the holder unless the fee is authorized under an Act or in a written contract between the holder and the owner and the holder regularly imposes the fee and does not regularly reverse or otherwise cancel the fee.

[74] **RECOMMENDATION**

* Holders may not charge a dormancy fee unless it is authorized by a written contract between the holder and the owner and it does not exceed the prescribed amount.

REPORT TO ADMINISTRATOR

[75] If an owner does not claim the property in response to the holder's notice, the next step in the process is for the holder to report unclaimed property to the administrator. Prince Edward Island requires the holder to report to the administrator annually. An annual report is also required by Ontario, Quebec, and NCCUSL. This requirement helps to ensure that holders are complying with their obligations under the Act.

[76] **RECOMMENDATION**

* Holders should file annual reports with the administrator respecting unclaimed property in their possession with respect to which notice has been given to owners.

TRANSFER OF PROPERTY TO ADMINISTRATOR

Timing of Transfer

[77] There are two approaches to when property is transferred. Prince Edward Island requires the holder to transfer the property within six months after the annual report is due. This approach, in effect, requires holders to report twice a year. The second report must itemize which property is not being transferred because it has been claimed since the first report was filed. This is the same approach taken by the Ontario Act. However, Bill 178 of 1994 would have instead required the property to be forwarded with the first report. This approach, which is consistent with the NCCUSL approach, significantly reduces the amount of work for holders.

[78] **RECOMMENDATION**

* Holders should be required to transfer the unclaimed property to the administrator when they file their annual report.

Effect of Transfer

[79] The advantage of an unclaimed property system, for holders, is that they no longer bear responsibility for the property. The legislation must reflect this new relationship.

[80] **RECOMMENDATION**

* Holders should be relieved of responsibility for unclaimed property once it has been transferred to the administrator.

DE MINIMIS RULE

[81] An important administrative issue which must be addressed is whether the Act should apply to all unclaimed property no matter what its value. Existing unclaimed property systems establish a minimum value of property to which their legislation applies, either $50 or $100. For property below that value, a notice to the owner is not required. A report to the administrator which lists the names of the owners of these small amounts is only required in Quebec and Prince Edward Island. However, all jurisdictions require

payment of these small amounts to the administrator.

[82] The British Columbia Discussion Paper was not supportive of this approach. Going back to first principles, the purpose of this legislation is to reunite owners with their property. If the property is given to the administrator with no information about the owners, owners have virtually no opportunity to recover their property. The approach they recommended was to leave this property with the holders, and allow owners to make their claims directly to the holders. This approach has the advantage of reducing administration for holders, while at the same time increasing the likelihood that owners can be reunited with their property.

[83] **RECOMMENDATION**

* For unclaimed property valued at less than $50, the holder should have no obligation to give notice to the owner, report to the administrator or transfer the property to the administrator.

Public Notice By Administrator

[84] Once the administrator received unclaimed property, its mandate is to attempt to reunite the property with its owner. Therefore, it is important that information about the property it holds be readily accessible to the public. Early legislation in this area provided for lists of owners to be published in newspapers or the Gazette. Today, notice will be more effective and less expensive if there is a publication over the Internet.

[85] **RECOMMENDATION**

* The administrator should be required to give public notice of unclaimed property received by it.

PART FOUR: ADMINISTRATION OF THE
UNCLAIMED INTANGIBLE PROPERTY PROGRAM

[86] There are a number of issues to be addressed with respect to how an unclaimed property program is to be administered. Although uniformity may not be required in all instances, a uniform scheme of administration would be of benefit to jurisdictions, would ensure a similar "look and feel" and would be best understood by holders of unclaimed property with whom various unclaimed property programs would have dealings. This latter point is of importance, as a single holder, if sufficiently large, may deal with every unclaimed property program in Canada. Similar schemes of administration would ease these multiple relationships.

Nature of the Unclaimed Intangible Property Administrator

[87] If property is to be remitted to an unclaimed property program to be held in perpetuity for owners to come forward and claim, there are two alternatives with respect to administration of an unclaimed property program: an office or division within the Ministry of Finance or a public trustee.

[88] A great number of American unclaimed property programs operate through a division or office of the state treasury department. The major advantage of locating the

administration in such a program relates to efficiencies that could be obtained with respect to ensuring compliance by holders. Revenue departments in Canada have inspectors, with enforcement powers, to which unclaimed property could be added as another of their duties. This would simplify relationships between holders and government.

[89] The alternative administrator is the provincial public trustee. Unlike the United States, Canada has a developed system of provincial bodies responsible for property administration. For example, public trustees are typically the estate administrator of last resort and manage property where there is no family able to do so, or on behalf of missing persons by court order. The synergy between such administration and unclaimed property is evident. The major advantages include the trust accounting, trust administration and case management and focus on reuniting individuals with their property. An example of this latter point is that public trustees seek out beneficiaries of estates all over the world for estates they administer in each province. It is only when such beneficiaries are not found that provincial law typically provides that such property escheats to the province.

[90] The preeminent consideration should be to ensure both holders and owners that the program is operating independently from any influence or tendency that would inhibit the locating of owners. The experience in the United States is that holders are more accepting and interested in complying with an unclaimed property program that clearly seeks to reunite owners with their property. Programs that do not do a good job of reuniting owners may be seen to be in the nature of a tax. Owners have the same interest, that is, a program that will aggressively seek out and attempt to locate owners. Thus the preeminent issue is the reuniting of owners with their property, which spans both holders' and owners' interests. The statutory unclaimed property programs to date (Ontario, Quebec and Prince Edward Island) utilize the public trustee model.

[91] **RECOMMENDATION**

* The provincial public trustees should administer the unclaimed property program within their jurisdictions.

[92] The above recommendation is premised on the unclaimed property program being of the type where holders remit the property to the administrator for property administration pending return of the property to an owner. If the ULC adopts a model where holders retain the property under regulatory rules, the location of administration should be reviewed. It may be that an office more closely connected with government would be more appropriate if the office is simply to apply regulatory rules rather than carry out property administration.

Financial Structure and Authority of the Unclaimed Intangible Property Administrator Respecting Unclaimed Property

[93] Unclaimed intangible property transferred to the unclaimed intangible property administrator would be invested and would earn interest. The administrator should be able to exercise the rights and powers related to ownership of unclaimed property transferred to the administrator.

[94] The administrator would maintain a balance in the account containing unclaimed intangible property at an amount sufficient for the prompt payment of claims approved by the administrator and for the defraying of necessary costs. Surplus amounts may be transferred each year to the jurisdiction's consolidated revenue fund and amounts would be required to be transferred from the consolidated revenue fund to the credit of the unclaimed intangible property administrator's account should the obligations of the program so

indicate.

[95] The administrator should also be able to charge against the account for administrative expenses as approved by provincial or territorial treasury boards.

[96] It is important that the statute be clear that the unclaimed property administrator has all the rights that the owner has in respect of the property. For example, it is necessary that the administrator have the right of sale, conversion or election that an owner would have. One only has to consider the situation of an unclaimed property administrator receiving professional advice that a particular equity should be sold and yet not have that right, in order to appreciate the need for the administrator to be able to deal with the property in the same manner as the owner could have.

[97] If property were liquidated, the unclaimed property program would be required to invest the cash equivalent in the unclaimed property account and pay out the requisite interest earned thereon.

[98] This approach differs somewhat from the British Columbia 1997 discussion paper, which proposed certain time periods during which unclaimed property administrators could not sell the property and during which owners could come forward and claim the higher of the sale price or the then market value. This proposal is not recommended as it could potentially put the unclaimed property program at risk since it would indemnify variations in the stock market. There is no policy logic to giving owners who have forgotten their property such indemnification. Indeed it is inconsistent with the scheme and could, in the event of extreme variations and equity prices, represent a significant burden without policy justification on the unclaimed property program.

[99] **RECOMMENDATIONS**

* Unclaimed intangible property transferred to the unclaimed intangible property administrator should be recorded and held by the administrator in the unclaimed intangible property account, and invested.

* Amounts surplus to the obligations of the account should be able to be transferred annually by the administrator to the consolidated revenue fund of the jurisdiction, and any amounts required by the account should be required to be transferred from the consolidated revenue fund to the unclaimed intangible property account.

* The unclaimed intangible property administrator should have and be able to exercise all the rights and powers related to ownership in respect of unclaimed intangible property transferred or required to be transferred to the administrator.

Agreements with Other Jurisdictions

[100] Given the national scope of unclaimed intangible property, and the importance of uniformity, each jurisdiction's unclaimed intangible property legislation should empower the unclaimed intangible property administrator to enter into inter-jurisdictional agreements. These agreements could be broad in scope, namely to provide for a multi-jurisdictional unclaimed property program operated as a partnership between administrators. On the other hand, the inter-jurisdictional agreements could be more specific in providing for the reciprocal use of audits, or determination of the unclaimed property to which an administrator is entitled (thereby facilitating the administration of the act and ensuring that

holders would have to deal with fewer inspectors); and secondly, to provide for the exchange of information on a reciprocal basis between programs to locate owners. Specifically, a program may wish to enter into a reciprocal arrangement with another program to exchange information to locate owners believed to be in the other jurisdiction. This would allow searching efforts carried out by the administrator to focus on individuals believed to be in their own province.

[101] **RECOMMENDATION**

* The unclaimed intangible property administrator should be empowered to enter into reciprocal or joint agreements with other jurisdictions to provide for the establishment of multi-jurisdictional programs; or for reciprocal arrangements respecting audit and inspection powers, and exchange of information for the purpose of locating owners.

PART FIVE: CLAIMS

Filing of Claims, Response, and Return of Property

[102] Once unclaimed intangible property is transferred by a holder to the unclaimed intangible property administrator, a person claiming an interest in property may file a claim with the administrator, who shall allow or deny the claim within a certain period of time.

Ninety days is a common time period in unclaimed intangible property regimes. Jurisdictions may wish to consider whether the imposition of a fee for expenses in processing claims would be of value in discouraging non-meritorious or frivolous claims.

[103] Interest should be payable on claims allowed by the administrator. The interest paid would be the rate of interest earned from time to time on the value of the claimant's property from the time the claim was remitted by the holder to the administrator. If the property transferred to the administrator was in a form other than money, the administrator should pay to the claimant any dividends, interest, or increments realized from the date of transfer to the date it was converted to money, and thereafter at the rate earned by the administrator.

[104] Jurisdictions may also wish to consider the possibility of providing for the possibility, in the absence of claimants possessing a legal claim, of responding to claims by people who may have a moral claim, akin to similar provisions in escheat statutes.

[105] Provisions should be made to address the possibility of disagreement between the unclaimed intangible property administrator and a person claiming to be the owner of property which has been transferred to the administrator. In such circumstances, a claimant or the administrator should be able to apply to a court for the determination of the claimant's rights. Jurisdictions may also wish to consider requiring alternative dispute resolution procedures prior to an application to the court.

[106] **RECOMMENDATIONS**

* A person claiming an interest in unclaimed intangible property transferred to the unclaimed intangible property administrator should file a claim with the administrator in the form prescribed by regulation.

* The unclaimed intangible property administrator should consider and respond to a claim within 90 days of the claim being filed.

* If the administrator allows the claim, the administrator should, within 30 days after a claim is allowed, transfer to the claimant the unclaimed property, or if the property has been sold by the administrator, the net proceeds of the sale.

* If a claim is allowed, the unclaimed intangible property administrator should pay interest earned by the administrator on the property of the claimant from the time the claim was remitted to the administrator by the holder. If the property transferred to the administrator was in a form other than money, the administrator should pay to the claimant any dividend, interest or increment, realized or accrued on the property from the date the property was transferred to the administrator; and once converted into money, at the rate of interest earned by the administrator.

* Upon application by a claimant or the administrator, within a period of time prescribed by regulation, a court of competent jurisdiction may determine the rights of a claimant under this part.

Position of Holders

[107] An essential part of an unclaimed intangible property scheme, in which the administrator receives unclaimed intangible property for the purpose of preserving and restoring such property to owners, is to relieve holders who comply in good faith with the requirements of the act of liability for any claim respecting the property transferred to the administrator.

[108] An unclaimed intangible property regime should also indemnify holders who act in good faith from further claims respecting property transferred to the administrator.

[109] **RECOMMENDATIONS**

* A holder who transfers property to the unclaimed intangible property administrator for the purposes of the act, in good faith, should be relieved of all liability to the extent of the value of the property transferred for any claim respecting that property.

* If a holder transfers property to the unclaimed intangible property administrator in good faith and thereafter another person claims the property from the holder or another jurisdiction claims the property under its laws, the administrator, upon proof of the claim, should indemnify the holder respecting the claim, damages and legal costs.

* The unclaimed intangible property administrator, upon receiving written notice from the former holder, may defend or contest the claim to which the notice relates.

PART SIX: INSPECTION AND RECORDS

[110] All the unclaimed intangible property regimes reviewed for this paper provide for the ability of the administrator to examine a holder's records, premises, and operations.

[111] The British Columbia discussion paper refers to the American experience of the importance of inspection for increasing compliance and reuniting more owners with their property. Effective inspection increases remittances from inspected holders and also increases reporting from other holders who perceive the risk of being detected should they not comply. It further notes that inspections may assist by providing information to holders on how to comply; by identifying unreported unclaimed property; and by identifying and making recommendations for improvements respecting any weaknesses in a holder's record keeping or other procedures.

Examination of Records

[112] In each of the Canadian unclaimed intangible property regimes examined for this paper, the administrator is able to appoint inspectors who may, at any reasonable time, enter a holder's business premises to make an inspection and to examine the business records to determine if the holder is in compliance.

[113] The Ontario and the Prince Edward Island legislation and the British Columbia discussion paper expressly provide that entry may be made without a warrant. The B.C. discussion paper also adds the comment that the examination of a holder's business premises should be upon reasonable notice.

[114] The NCCUSL 1995 draft act does not have a provision regarding the administrator's right of entry. The U.S. Act allows the administrator to conduct the examination even if a holder believes it is not in possession of any reportable or transferable property. The spirit of this requirement is reflected in the requirement in the several Canadian regimes examined that holders cooperate fully with inspectors.

[115] **RECOMMENDATIONS**

* The administrator should be able, at any reasonable time, and without warrant, to enter a holder's business premises in order to make an inspection and, in particular, to examine a holder's business records.

* A holder and its employees should be required to cooperate with inspectors by permitting them to enter its premises where its business records are kept; by producing and permitting examination of those records; and by providing any assistance and information requested respecting those records and respecting any intangible property being held for an owner.

Powers of Inspection

[116] The above section addressed the administrator's right of inspection and examination and a holder's corresponding obligations. This section addresses the issue of other specific powers contained in the various Canadian unclaimed intangible property regimes reviewed for this paper which are ancillary to the purpose of effective inspection and examination. The Ontario and Prince Edward Island legislation and the British Columbia discussion paper set out powers to inspect a holder's premises and operations. Other specific powers refer to access to books of account, documents, correspondence and records in any form and the power to require production of a legible physical copy for examination. Other powers are the right to remove, upon providing a receipt, any materials for the purpose of making a copy and returning them; and to be able to question any person on any relevant matter.

[117] An important power contained in those regimes is the ability of the administrator to deal with situations in which a holder may have failed to maintain records as required,or where records are inadequate for the preparation of reports to the administrator. In order to prevent the purpose of the act from thereby being frustrated, the administrator would be allowed to require the holder to report and remit the amount which the administrator estimates is appropriate. The basis upon which such estimates would be made would be set out, including the use of past reports or other available records of the holder, or other reasonable methods of estimation, such as the use of industry averages. The NCCUSL draft Uniform Act provides for this as does the British Columbia discussion paper.

[118] The Ontario and Prince Edward Island legislation provide a specific prohibition against obstructing or failing to cooperate with an inspector and provide that an inspector may apply for a warrant in the event of obstruction. Ontario's Bill 178 also allows the public trustee, on demand, to require a holder to file reports or supplementary reports, provide any information or produce any records or documents required.

[119] **RECOMMENDATIONS**

* An inspector should have an express right to:
    * inspect a holder's premises and operations thereon
    * have access to accounts, documents, correspondence and other records in any form with a right to require production of a physically legible copy.
    * upon giving a receipt, be able to remove, copy, and return such materials
    * question a person on matters relevant to the inspection, subject to the person's right to have counsel or other representative present.

* No one should be allowed to deny entry, obstruct, or fail to cooperate with an inspector. In the event thereof, an inspector should be able to apply and obtain a warrant from a justice of the peace upon satisfying the justice that there are reasonable grounds for believing that is necessary to enter and examine a holder's records and that the inspector has been denied entry or has been otherwise obstructed.

* The administrator should be able to require that a holder file a report or a supplementary report in a prescribed form, or other information or documents for a purpose under the act, as a result of the inspection.

* In the event that a holder has failed to maintain required records and the available records are insufficient to allow a report to be prepared, the administrator should be able to require a holder to report and pay an amount which the administrator might reasonably estimate, on the basis of the holder's records or other reasonable method of estimation.

* If the examination results in a disclosure of reportable and transferable property, the administrator should be able to assess the holder for the costs of the inspection on the basis of a daily rate to some maximum amount.

Maintenance and Preservation of Records

[120] The Ontario and Prince Edward Island statutes, the British Columbia discussion paper, and the NCCUSL 1995 draft act all contain a requirement that holders maintain and preserve records relating to intangible property. The general scheme is that regulations shall prescribe the period of time during which the holder is required to retain the records. The British Columbia discussion paper proposes a general rule of 10 years from the date

that the property was first reported as unclaimed property. The general rule could be varied for certain holders based on certain circumstances of a type of holdersuch as the nature of the business of the holder, or other specific burdens or difficulties experienced by a holder.

[121] **RECOMMENDATION**

* Everyone who is required to file a report with the administrator respecting intangible property should be required to maintain and preserve the records relating to the property for the period of time prescribed by the administrator.

PART SEVEN: DETERMINATION AND APPEALS

[122] Two of the unclaimed property regimes reviewed for this paper expressly address circumstances in which a holder has not transferred unclaimed property to the administrator, as required.

Provisional and Final Determination and Review

[123] The Ontario legislation and the British Columbia discussion paper allow the administrator to make a determination specifying what property is transferable, the amount of any penalty, as well as any interest payable or which shall continue to accrue. The determination becomes final in the absence of any objection from a holder, who then has a certain period of time such as 60 days, in which to transfer the property.

[124] Ontario's Bill 178 provides that if a holder objects to the determination by providing the relevant facts in writing within 60 days, the public trustee shall review the objection.

[125] By contrast, the British Columbia discussion paper contemplates a review of a holder's objection by the minister as distinct from the administrator. This suggests that the unclaimed property office is conceived as a bureau reporting to a minister, although the office is described on page 24 of the discussion paper as being a separate office with a special account.

[126] Aside from the question of the nature and degree of independence which the administrator should have from the line operations of a government ministry or department, it would seem preferable that the review be carried out by the administrator.

[127] There is a trend in some jurisdictions to move away from having ministers of the crown hear administrative appeals, especially ones that do not involve large issues of public policy, or the allocation of public resources.

[128] The value of a review is that it provides the administrator with the opportunity to reconsider a determination should there be an objection. It gives a holder the opportunity to draw to the administrator's attention any relevant facts which may not have been considered by the administrator.

[129] **RECOMMENDATIONS**

* If a holder has not transferred a property as required, the administrator should be able to issue a provisional determination as to the property which is transferable, the penalty or interest payable and any accruing interest. A determination should be sent personally or by registered mail. Should the holder not object, the determination would become final and would require transfer and the payment of any penalty and interest within 60 days.

* A holder who objects should be able to file a request that the administrator review its determination. The request should set out the relevant facts in writing and made within a specified period of time, such as 60 days.

* The administrator should advise the holder in writing of the final determination arising from its review, and should return any property should the review be favourable to the holder. In the event of an unfavourable review, the holder should be required to transfer the property and any penalty or interest within a specified period of time, such as 30 days. This requirement should be enforceable despite any further appeal.

Appeal From Determination of the Administrator

[130] The Ontario act and the British Columbia discussion paper contemplate that a holder may appeal the administrator's final determination to a superior court.

[131] Ontario's Bill 178 provides that a holder may appeal to the Ontario Court (General Division) and that the Ontario rules of civil procedure apply unless otherwise expressly provided. The British Columbia discussion paper recommends an appeal by way of originating application.

[132] In both, the court may dismiss the appeal, allow the appeal and vacate or vary the determination, or refer the determination back to the administrator for reconsideration and redetermination. As well, in both regimes, the administrator must return property with any interest or penalty collected should the judgement so require. The two regimes also contemplate that the administrator may issue a warrant for the value of the property, any penalties, interest and expenses of the warrant, which would have the effect of a writ of execution. The B.C. paper would also allow the administrator to accept security for the value of the property.

[133] It may be that a jurisdiction may prefer to provide for an appeal from the administrator's decision to a quasi-judicial administrative appeals tribunal, perhaps with a possible further appeal on questions of law and jurisdiction to a superior court or a court of appeal.

[134] In addition, a given province or territory may wish to consider providing for alternative dispute resolution.

[135] **RECOMMENDATIONS**

* A holder who disputes the administrator's review should be able to appeal the review either to a superior court or to an administrative appeal tribunal.

* The court or administrative tribunal should be able to order the return of the property and any interest or penalty where the appeal is successful.

* The administrator should be able to issue a warrant to obtain property where necessary.

PART EIGHT: AGREEMENTS TO LOCATE PROPERTY

AND APPLICABILITY

Agreements to Locate Property

[136] The purpose of an unclaimed intangible property statute is to reunite owners with their property. The fundamental principle is that the property is rightfully that of the owner and that the justification of the scheme of the statute is that it reunites owners with their property without significant cost to owners.

[137] In keeping with that principle, several of the regimes examined herein contain provisions to regulate commercial property locators.

[138] Commercial property locators charge owners for locating their lost property or inheritances, often basing their fee on a percentage of the value of the property in question. The purpose of such regulation, as stated in the comment to section 25 of the NCCUSL 1995 act is "to enhance the likelihood that the owner of the abandoned property will be located by the efforts of the State, and will receive a return of the property without payment of a 'finder's fee'. In the past, it appears to have been the practice of many States for unclaimed property locators or heir finders to utilize the State's lists of names and addresses of missing owner to contact them and propose to find their property for a fee, before the State has had an opportunity to locate the missing owners."

[139] The NCCUSL 1995 act and the British Columbia discussion paper restrict the time period for such contracts, impose requirements as to the form of such contracts and forbid unconscionable compensation provisions in such contracts. Ontario's Bill 178 provides that the compensation charged to an owner may not exceed 10% of the value of the property, and that the public trustee has the right, despite the existence of a contract, to transfer property or make payment directly to the owner of the property.

[140] The intent of such measures is to further the effectiveness of the purpose of unclaimed intangible property legislation while recognizing that property locator services can be of substantial assistance in reuniting owners with their unclaimed property should an unclaimed property administrator's efforts prove unsuccessful.

[141] **RECOMMENDATIONS**

* Agreements to locate property should be required to be in writing and signed by the owner; clearly set out the terms, including the total cost of the contract and the value of the property; and must not contain any unconscionable provision.
* A provision in an agreement to locate or recover property should not be valid if it provides for compensation or expenses or both exceeding 10% of the value of the property.

* Despite a term of an agreement to locate or recover property, the administrator may transfer any property or amount directly to the owner. An agreement to locate or recover property should not be allowed during the period commencing with the day that property is presumed unclaimed extending to a set date after a transfer of the property to the administrator, such as 24 months after the date that the property is paid or delivered to the administrator. (This recommendation would not apply to an owner's agreement with a solicitor to file a claim as to identify property or to contest the administrator's denial of a claim.)

Applicability

[142] The issue here concerns the question of whether legislation should apply to unclaimed intangible property before the coming into force of the legislation.

[143] Ontario's Bill 178, introduced in 1994, provides that it would not be applicable to intangible property which would have become unclaimed before the date five years earlier in 1989 on which the Unclaimed Intangible Property Act (which is not in force) was enacted. The British Columbia discussion paper recommends a prescribed retroactive period, for example five years, respecting which a holder would be responsible for checking its records to determine if any intangible property would have become unclaimed and subject to the legislation within that period. The NCCUSL 1995 Uniform Act provides for a 10 year period of retroactivity.

[144] Although retroactivity is unlikely to be popular with holders, it is consistent with the goal of unclaimed intangible property legislation to encompass property which is ascertainable from records of the recent past. It may be appropriate to provide for exceptions for certain types of holders who may have unique difficulties, and to delay proclamation of the legislation in order to allow a reasonable amount of time for holders to make adequate administrative preparations.

[145] **RECOMMENDATION**

* Unclaimed intangible property legislation should apply to intangible property which would have become unclaimed and, therefore, subject to the legislation for a retroactive period of five years, unless otherwise prescribed.

Footnote: 1 1 Ontario: Unclaimed Intangible Property Act, R.S.O. 1990 c.u.1 (as amended by Bills 178 and 200, 1994), not in force. Prince Edward Island: Public Trustee Act, 1994, c.P-32.2, in force Quebec: Public Curator Amendment Act, 1997 c.80, in force.

Footnote: 2 2 British Columbia: *New Approaches to Unclaimed Intangible Property Administration in British Columbia: A Legislation Discussion Paper*, Office of the Comptroller General, 1997; British Columbia: *Proposed Amendments to the Unclaimed Money Act*, Office of the Comptroller General, 1999.

Footnote: 3 3 Elizabeth Edinger, Territorial Limitations on Provincial Powers, 14 Ottawa Law Review, 57 at 94.

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