



Unclaimed Intangible Property Trusts and Estates Issues

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General

Submitted by: The Ontario Bar Association,
Trusts and Estates Section



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The Ontario Bar Association (“OBA”) appreciates the opportunity to comment on the proposed Unclaimed Intangible Property (“UIP”) regime. This submission was prepared by our Estates and Trusts Section. As the policy is further developed and implementing legislation is drafted, other sections may wish to comment on more detailed issues. We look forward to further opportunities to do so.

In addition, according to our discussions with officials at the Ministry of Finance, all pension assets (not just in the wind-up context) will be exempted from the UIP regime on which you are currently consulting. Implementing legislation should explicitly exempt pension assets so that they aren’t inadvertently caught in another more general definition. The OBA looks forward to consulting with your Ministry and the Ministry of Finance on a separate regime for pension assets.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing 18,000 lawyers, judges, law professors and law students. We advocate both in the interest of the profession and, as in this case, in the interest of the public.

The OBA’s Trusts and Estates Section has over 800 members, including the leading practitioners in the field. Our members would count among their clients virtually every stakeholder with an interest in this issue, including substitute decision-makers, testators, beneficiaries, estate trustees and financial institutions.

Principal Issues to be Addressed from a Trusts and Estates Perspective

The Trusts and Estates Section raised two issues that should be addressed in the UIP regime. These are:

- (a) The current regime for unclaimed estate assets should be preserved. In particular, it is important to preserve the ability of trustees to pay money into court where they cannot locate beneficiaries; and
- (b) Ensuring that the UIP regime gives appropriate recognition to the fact that a Guardian or Attorney acting under a Power of Attorney stands in the shoes of a property owner.

Each is addressed in more detail below.



(a) Payment into Court by Trustees

Typically where estate trustees are unable to locate beneficiaries under a will and wish to terminate their responsibility for administering an estate, they avail themselves of the process provided under the *Trustee Act*. Section 36 of that Act provides:

Payment into court by trustees of trust funds or securities by order of court

36. (1) Where any money belonging to a trust is in the hands or under the control of or is vested in a sole trustee or several trustees and it is the desire of the trustee, or of the majority of the trustees, to pay the money into court, the Superior Court of Justice may order the payment into court to be made by the sole trustee, or by the majority of the trustees, without the concurrence of the other or others if the concurrence cannot be obtained.

It is important that the UIP regime not interfere with, or eliminate, this process. Trustees must be able to apply to pay money into court as soon as it becomes apparent that they are unable to locate and pay beneficiaries. This may become clear well before the five-year time limit contemplated by the UIP proposal. If a trustee is unable to find a beneficiary after taking reasonable steps, he or she should not be forced to continue to bear trust obligations or the other burdens of administering the estate. The section 36 process must continue to be available to trustees and should not be *replaced* by the UIP process.

In a scenario where the trustee has paid estate moneys into court, the UIP regime could apply to that money after it is in the hands of the court. Currently, section 36 provides:

(8) Money paid into court is subject to the order of the court.

If the money has not been dealt with by court order within the five year period contemplated by the UIP proposal, the UIP regime could be triggered. In a case where beneficiaries cannot be located and unclaimed money has been paid into court, this time period could run from the date the estate became capable of paying money to beneficiaries (through letters of administration or otherwise) as opposed to the date of payment into court.

(b) Status of Guardians and Attorneys

The UIP regime must recognize the special status of Guardians of Property or Attorneys acting under a Power of Attorney for Property. These substitute decision makers step into the shoes of a property owner for the purpose of dealing with property. The UIP regime must recognize that property cannot be considered unclaimed if a Guardian or Attorney is available to claim or otherwise provide instructions in respect of the property.

The existence of a UIP regime may necessitate amendments to legislation governing substitute decision makers to ensure that:



- (i) They have the breadth of powers necessary to give instructions to institutions so that property does not inappropriately fall into the UIP regime; and
- (ii) There is a process by which Guardians and Attorneys can deal with property in cases where they cannot locate the grantor. It is not necessarily appropriate that this property end up in UIP.

Other Statutes to Review and Reconcile with UIP Regime

In order to ensure that property that should fall into an estate does not prematurely become unclaimed intangible property, the UIP regime should take into account:

- (i) the *Absentees Act* and circumstances in which a committee might currently be appointed to manage assets; and
- (ii) the *Declarations of Death Act, 2002*.

Conclusion

The OBA would be happy to provide further assistance on any of the issues raised. We look forward to continued consultations as the policy and implementing legislation are developed.