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John Lee
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Via Email: john.a.lee@ontario.ca

Dear Mr. Lee:

Re: Unclaimed Intangible Property Program Consultation

We are writing in response to the Ministry of the Attorney General's consultation regarding Ontario's proposed Unclaimed Intangible Property Program (the "Program").

About Advocis

Advocis, The Financial Advisors Association of Canada, is the country's largest and oldest professional membership association of financial advisors and planners in Canada. Through its predecessor associations, Advocis proudly continues a century of uninterrupted history of serving Canadian financial advisors and their clients. Our over 11,000 members are licensed to sell life and health insurance, mutual funds and other securities, and are primarily owners and operators of their own small businesses who create thousands of jobs across Canada. Advocis members provide comprehensive financial planning and investment advice, retirement and estate planning, risk management, employee benefit plans, disability coverage, long-term care and critical illness insurance to millions of Canadian households and businesses.

As a voluntary organization, Advocis is committed to professionalism among financial advisors. Advocis members adhere to an established professional Code of Conduct, uphold standards of best practice, participate in ongoing continuing education programs, maintain professional liability insurance, and put their clients' interests first. Across Canada, no organization's members spend more time working one-on-one on financial matters with individual Canadians than do ours. Advocis advisors are committed to educating clients about financial issues that are directly relevant to them, their families and their future.

Comments

Before providing specific comments, Advocis would like to voice its general support for the Program. As noted in the discussion paper, people lose track of intangible property for a multitude of reasons, and we believe that the Program is a laudable initiative to help reunite owners with their property.

This objective is particularly important to Advocis, as it is the mandate of our members to help clients secure their financial futures. With intangible property such as securities investments and insurance proceeds representing a significant portion of Ontarians' wealth, we believe that a structured system such as that proposed by the Program is vital to ensuring that Ontarians are able to identify, recover and benefit from all of their financial assets.

We would like to make the following specific comments in regards to the Program:

A. The Uniform Act and the Benefits of Harmonization

We agree with the government's approach of using the *Uniform Unclaimed Intangible Property Act* (the "Uniform Act") as the basis of the Program's enabling legislation and making the necessary modifications to best suit Ontario's needs. Advocis has been a longstanding supporter of the province's harmonization efforts, including the work plans flowing from the Ontario-Quebec *Trade and Cooperation Agreement*, so long as those efforts recognize and accommodate important regional differences.

In regards to the Program, many Canadians have beneficial rights to intangible property located in multiple provinces; for example, an Ontarian may own securities placed through a broker located in Alberta and may also be the named beneficiary of a life insurance policy of a family member residing in Quebec. Harmonization makes it easier for that Ontarian to understand his rights and obligations in recovering the assets, particularly to the extent that harmonization facilities interjurisdictional agreements. It also reduces compliance costs for the market intermediaries who hold those assets and work across multiple provinces, allowing them to establish and follow substantially the same procedures in each of those provinces.

B. Scope of the Program: *De Minimis* Thresholds

The consultation paper states that one of the guiding principles of the Program is to minimize additional burdens to holders of unclaimed intangible property. To that extent, we submit that the Program should not apply to property with a value below a certain *de minimis* threshold. At a certain level, the value of that property to owners does not justify the administrative burden of preserving records, sending notices and maintaining databases imposed on holders and the administrator.

This balancing of interests is recognized in the programs established by other provinces. In Alberta, Section 3(4)(b)(i) of the *Unclaimed Personal Property and Vested Property Act*, SA 2007, c U-1.5, states that Alberta's program generally does not apply to intangible property with a value of less than $250. British Columbia, through its *Unclaimed Property Regulation*, B.C. Reg. 463/99, exempts holders where the property's value is less than $50, or where the holder's gross annual revenue is $250,000 or less, regardless of the value of the property.[1] This latter exemption is notable because it recognizes that program compliance is disproportionately burdensome on small businesses, which often do not have the infrastructure to maintain sophisticated recordkeeping systems.

In section 4(3)(b), the Uniform Act does include a threshold of $100 below which the holder is not required to provide written notice to the apparent owner in regards to the unclaimed property. However, this threshold does not apply to the holder's requirement to ultimately

[1] *Unclaimed Property Regulation*, B.C. Reg. 463/99, ss. 7(1) and 7(2).

transfer that property to the administrator. This means that the holder would still be responsible for remitting, and maintaining related records for, all unclaimed intangible property, regardless of the property's value.

We urge Ontario to consider *de minimis* value thresholds for unclaimed intangible property, below which is excluded from the Program. Otherwise, holders will be heavily burdened with compliance obligations to track property that does not create a significant benefit to their owners. Illustratively, if we look at Quebec (which does not feature a *de minimis* threshold in its program), of its 959,000 cases of unclaimed property, 93% are valued at $500 or less.[2] A minimum threshold makes the Program easier to administer for holders and, without the clutter of hundreds of thousands of small claims in the system, more responsive to owners of substantial claims.

C. Scope of the Program: Accident and Sickness Insurance

Related to our recommendation regarding value thresholds, we submit that the Program should exclude amounts payable under accident and sickness insurance coverage from the definition of property. Accident and sickness insurance, such as for health, drug or dental plans, generates a tremendous volume of claims for relatively small amounts. Accounting for these claims in the Program would result in significant compliance costs for holders while returning little benefit to the insured parties.

Instead, we submit that unclaimed amounts owing under accident and sickness claims should be recovered in the same manner as unclaimed property below the *de minimis* value threshold: the owner should recover these amounts directly from the holder through existing channels of communication and be subject to existing limitation periods.

D. Indicating Continued Interest in Property

Our members help Ontarians establish financial plans that will prepare them for life's events: saving for a home, helping children finance higher education, retiring from the workforce, leaving a legacy for family members and so on. This is a long-term outlook, and the investment decisions recommended by advisors to achieve these plans are often based on a timeframe of years or decades.

This extended timeframe means that there may not be regular two-way communication between holders and owners. For some investments, such as mutual funds, holders provide periodic reporting to owners regarding the performance of those investments. For other investments, such as paid-up life insurance policies, holders need not communicate with owners at any pre-determined interval. In either case, it is quite common for the owner not to communicate back to the holder at all. But by no means does this "silence" indicate that the owner has forgotten about, or wishes to relinquish, his or her interest in the property.

Section 2(3) of the Uniform Act puts the onus on the owner to perform an action that prevents the property from being classified as unclaimed: the owner must either communicate with the holder regarding the property, or otherwise indicate an interest in the property. As mentioned, it is common for the owner to not communicate with the holder for periods that are longer than

[2] See table at http://www.revenuquebec.ca/en/bnr/registre/renseignements3.aspx.

those prescribed in section 2(1). Therefore, we submit that the interpretation of what constitutes an owner "indicating an interest in the property" should be expansive.

For example, in the case of securities, owners may elect to have any dividends or distributions they receive to be automatically reinvested; we submit that this automatic action should qualify as the owner indicating its continued interest in the whole of the property. There should be no requirement that the owner receive the distribution in the form of cash, whether through cheque or electronic means, which could be the interpretation reached through a plain reading of section 2(4)(a).

In the case of insurance, many owners purposefully choose policies that feature provisions that prevent forfeiture despite the non-payment of premiums (such as through policy loans or reduced paid-up insurance values). Sections 2(4)(d) and 2(5) should explicitly take such provisions into account, to make clear that the automatic operation of non-forfeiture clauses are evidence of the owner's continued interest in the property.

What we wish to convey is that many Ontarians have made a conscious choice to select investments with these automatic provisions; they kick in when the owner would otherwise have to make an explicit decision regarding the investment. So rather than showing a lack of interest in the property, choosing investments with these provisions shows that the owner has thought about these scenarios in advance and has pre-determined how it wants to handle them. Consequently, the Uniform Act should explicitly state that the operation of an automatic provision is evidence of the owner's continued interest in the property for the purposes of section 2.

E. Indemnification

Section 12(1) of the Uniform Act states that holders who deliver to the administrator unclaimed intangible property, or an amount in compensation for that property, are relieved of all liability in respect of the property delivered or the amount paid. While this indemnification clause is sensible and necessary, it is defined too narrowly and does not include important intermediaries that should also benefit from indemnification.

For example, financial advisors will be instrumental to the successful operation of the Program in regards to unclaimed financial assets. Advisors are the intermediaries who deal directly with the public and their extensive documentation obligations will likely form the basis of determining whether assets are unclaimed and assessing any future ownership claims by owners. However, advisors do not fall within the definition of "holder", and thus do not benefit from the indemnification, as they do not possess legal title to the financial assets; rather, they act as the agents of the financial institutions that possess title.

We submit that, since advisors have such a key role in the Program, they should be included as indemnified parties in section 12 of the Uniform Act.

F. Fees

We submit that for the Program to not be unduly burdensome, parties should be able to charge reasonable fees for efforts associated with Program compliance. Section 5 of the Uniform Act stipulates conditions for allowing fees to be charged to an apparent owner, including the condition that any fee must be authorized by a written contract between the holder and the apparent owner.

This requirement does not recognize the standard contractual framework in the financial advisory sector. Usually, a financial advisor enters into a contract with the financial institution that issues investment products (such as a mutual fund dealer), and the client/apparent owner enters into a separate contract with that financial institution. While some advisors enter into separate engagement letters/agreements directly with the client, this is not yet an industry standard.

As discussed in Section E above, financial advisors will be critical to the successful operation of the Program due to their key documentary role. In furtherance of the Program, they will undoubtedly be called upon by holders to review and report on volumes of records that span several years. Given this arduous task, advisors should be able to charge reasonable fees for the time and effort they spend.

This situation can be rectified by modifying Section 5 to allow holders to charge reasonable fees: (i) in connection with *all* duties required to comply with the Uniform Act, including sending notices, reviewing records and completing reports; and (ii) for work done both by the holder directly, and work that is completed on behalf of the holder by third parties who are in a superior position to perform that work.

G. Retroactive Application

The consultation paper states that Ontario is contemplating whether to include s. 33(2)(b) of the Uniform Act, which would exclude from the Program property that has been unclaimed for more than five years before the Uniform Act comes into force (the "Limiting Clause"). If the Limiting Clause is not adopted, the Program would apply to all property, regardless of how long that property has been unclaimed.

We submit that Ontario should include the Limiting Clause in its Program. While the Program should ideally reunite as many owners with their property as possible, Ontario must also be practical in the Program's implementation. Without the Limiting Clause, property that has been unclaimed for decades or more would need to be accounted for in the Program. This will present a tremendous challenge: holders will be required to piece together records from a time when there was no legislative obligation to retain such records. Many of the records will have been lost, and those that can be found will not be complete or in electronic form. An enormous amount of work will be required to manually compile, review and modernize those records.

The implication of excluding the Limiting Clause would be to exact an enormous burden on holders and their agents. This burden would be compounded if the other suggestions in this submission regarding *de minimis* thresholds (Section B) and recovery of reasonable fees (Section F) are not adopted. Cumulatively, this would result in holders spending endless amounts of time and effort tracking down an inestimable number of small unclaimed amounts, and the tremendous cost of doing this would have to somehow be absorbed by the holders and agents themselves.

This would be an unpalatable scenario. Instead, we urge that Ontario follow the approach taken in British Columbia's program, which applies only where the prescribed circumstances leading to the property being classified as unclaimed occurs after July 1, 2000 (being the date that British Columbia's act came into force).[3]

H. Province's Power to Claim Property

Section 7 of the Uniform Act permits the administrator to claim unclaimed property prior to the property becoming deliverable and reportable in accordance with the rest of the legislation. According to the accompanying commentary, this power is only to be used in "exceptional circumstances".

This broad power requires actors to comply within a very short timeframe of 21 days. We submit that Ontario should clarify what constitutes the "exceptional circumstances" that would engage this section, so parties can better predict what conditions are likely to result in the administrator exercising this power. We further submit that the 21 day period is unacceptably short and this timeframe should be extended to, at a minimum, 30 days; this is particularly important as this section 7 power could be exercised unexpectedly, making it difficult for parties to scramble and compile the necessary records on such short notice.

I. Ongoing Dialogue

Finally, the consultation paper notes that the legislation is only the first step in the development of the Program, with regulations and policies forthcoming. The paper also states that the government intends to work with interested parties throughout this process. We believe that, as the leading association of financial advisors who work with both asset owners and holders, we have a unique and important perspective to add to the discussion. We would like to take this opportunity to indicate our interest in participating in future Program consultations.

Advocis appreciates this opportunity to provide our comments and we look forward to working with the Ministry of the Attorney General. Should you have any questions, please do not hesitate to contact the undersigned, or contact Ed Skwarek, Vice President, Regulatory and Public Affairs at 416-342-9837 or via email at eskwarek@advocis.ca.

Sincerely,

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President and CEO

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Chair, National Board of Directors

[3] See *Unclaimed Property Act*, S.B.C. 1999, c. 48 at s. 8.