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Unclaimed property

Lawyers concerned about push for new regime

BY JUDY VAN RHIJN

For Law Times

The Ontario government is taking a second kick at the can with its latest attempt to capture unclaimed intangible property for government use in the event that it can't locate the owner. But the trusts and estates bar feels the existing legal mechanisms are working well and isn't embracing the new scheme.

The unclaimed property program is the Ontario government's latest attempt to establish a system for reuniting unclaimed property with its owners while using the assets for the public benefit. It last passed legislation on the issue in 1989 but never proclaimed it and repealed it in 2011. In the years since, the Uniform Law Conference of Canada has drafted a law other provinces have used to set up owner notification systems and public registries for unclaimed property. Ontario's attorney general has organized a consultation that closed in September 2013 and is now reviewing the feedback.

A number of institutions hold a wide variety of unclaimed property across Canada, including money due under insurance policies, unpaid wages, and investments represented by shares and bonds. There's also unclaimed money held by trustees through estates, powers of attorney or guardianship orders. The government is of the view that unclaimed intangible property shouldn't rest with the holders indefinitely and that it should be responsible for reuniting the owners with it.

Given that there's already a mechanism in place for trustees to pay money into court if they can't find a beneficiary or owner, there has been no push from the trust and estates bar for any change. Charles Ticker of Charles B. Ticker Law Office in Markham, Ont., isn't aware of any pressure from the public either and suspects that the program is a reflection of the government's wish to increase revenues without hiking taxes. "When you see that the Bank of Canada has approximately \$532 million in unclaimed deposits, you can see there is a source of revenue there."

He's referring to the federal scheme that sees unclaimed deposits or negotiable instruments held by banks and trust companies paid to the Bank of Canada after 10 years. It then holds

unclaimed balances of less than \$1,000 for 30 years and those of \$1,000 or more for 100 years after which the funds go to the receiver general.

It was clear in the 2013 consultations that the provincial government isn't the only body looking to benefit from funds of this kind. Not-for-profit groups and municipal governments made it clear they feel an entitlement to use any monies that are available for public use.

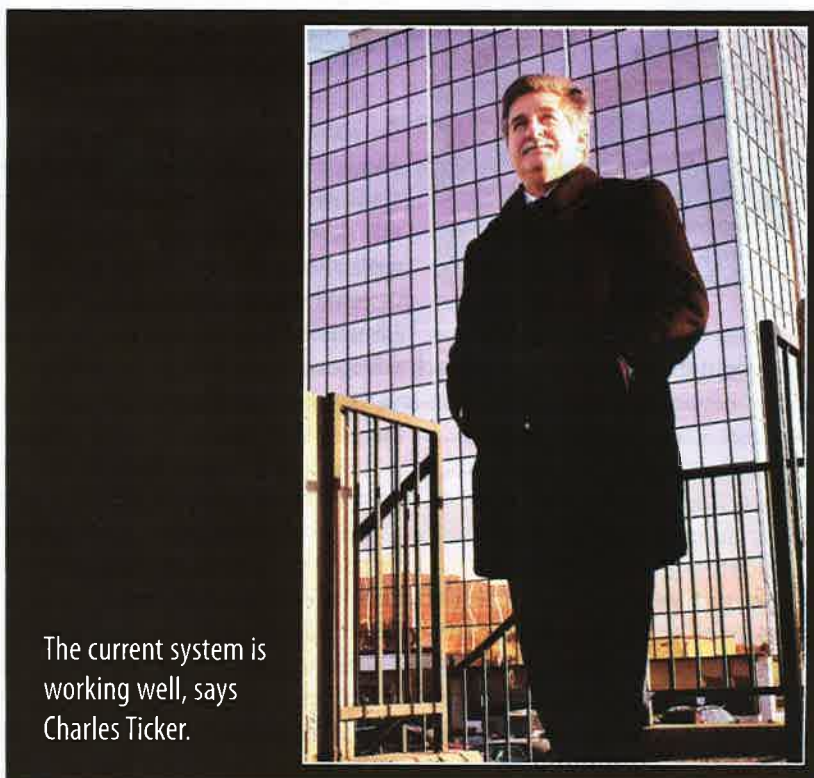
The Ontario Bar Association's trusts and estates section is taking an interest in the issue given that its members represent substitute decision-makers, testators, beneficiaries, estate trustees, and financial institutions. Vincent De Angelis, vice chairman of the trusts and estates section, voices a concern that the scheme might usurp the procedures provided under existing statutes, such as the Absentees Act, the Declarations of Death Act, and, more particularly, s. 36 of the Trustee Act. "We are concerned that it should not prejudice any existing means of holding property."

In the experience of Charles Wagner, an estate litigator at Wagner Sidlofsky LLP, the situation of no one coming forward to claim assets of an estate occurs infrequently. "In my practice, there are usually a lot of people claiming the money, but there are times when people come to me who cannot locate the beneficiaries or when someone dies intestate. In the ordinary course, if there's a legacy to Aunt Bessie and you can't find her and the other beneficiaries are fighting over the rest of the estate, you pay the money into court."

Ticker believes the current arrangement works well. "If the trustee has to worry about all this reporting, it will create a lot of work. Currently, if you've made reasonable enquiries and you can't find the beneficiary, you pay it into court and it's a quick fix. Why fix something that isn't broken?"

The OBA section feels trustees should be able to relieve themselves of the burden of holding money as soon as it becomes apparent that they're unable to locate and pay beneficiaries. That may occur before the five-year time limit contemplated by the government's proposal.

The OBA section also feels the new regime should give proper recognition to the right of a guardian or attorney acting



The current system is working well, says Charles Ticker.

under a power of attorney to stand in the shoes of a property owner. "We need to make sure it specifically recognizes that just because assets are in the hands of a guardian or attorney doesn't mean they are unclaimed or abandoned because in this case the grantor has entrusted it to a person," says De Angelis.

"Obviously, after a period of

time they may want to pay it into court." De Angelis notes that the time period under the new program could apply after the court has held the property for a certain length of time. "The new system could operate in addition to the old."

Ticker believes it's important to clarify that an attorney or guardian has the power to give

instructions to institutions. "Attorneys still have experiences when institutions are reluctant to act upon a document and require a legal opinion as to whether they can act."

One aspect of the new program that would be of benefit to estate trustees is the proposed registry of unclaimed property. Ticker notes it would be helpful to do an online search to see if there are any assets in the deceased's name. "With the new estate administration tax regulations coming in, they will have to swear an affidavit that these are the assets. They can only talk about what they know about."

But Ticker doesn't expect to see a new regime for some time. "When there is a wide net cast in terms of assets and of businesses and institutions affected, you have to review all the legislative schemes."

De Angelis agrees. "When setting up this type of program, you need a system in place to record the assets and who's holding them and also a system for administration. You need lots of resources dedicated to that. It will not be easy." **LT**

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