UNIFORM LAW CONFERENCE OF CANADA
CIVIL SECTION

STATUS REPORT OF THE WORKING GROUP ON A
Uniform Informal Public Appeals Act

[Loi uniforme sur les appels informels aux dons du public]

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Halifax, Nova Scotia
August 2010

The Origins of the Project and the Working Group

[1] This project was added to the program of the Uniform Law Conference of Canada [ULCC] by the Advisory Committee on Program Development and Management [ACPDM] in October 2009. The topic was one of a number originally suggested as possible projects to be undertaken jointly with the (US) Uniform Law Commission. It did not proceed on a joint basis but commended itself to the ACPDM as a distinct Civil Section project. Since a considerable amount of work had already been done on this topic by both the former Law Reform Commission of BC and by the BC Law Institute, it would not constitute a significant drain on ULCC resources.

[2] Arthur Close was asked to form and lead a Working Group to carry this project forward. He did this in the autumn of 2009. The Working Group members are as follows:

Gregory G Blue, Q.C.
Arthur L Close, Q.C. Prof. Michelle Cumyn
Vera Mesenzew
Prof. Albert Oosterhoff

[3] Mr. Blue is the Senior Staff Lawyer with the BC Law Institute and was the principal author of the BC Law Reform Commission's 1993 Report on Informal Public Appeal Funds. Arthur Close is a Past President of the ULCC. Prof. Cumyn Teaches at Laval and has assisted the ULCC with its projects on Unincorporated Associations and on Illegal Contracts. Ms. Mesenzew is Counsel with RBC and is a member of both the Ontario and Quebec bars. Prof. Oosterhoff is Professor Emeritus at the Faculty of Law, the University of Western Ontario and was project leader of the ULCC project on Charitable Fundraising. Both Messrs. Blue and Close are members of the Working Group developing a Uniform *Trustee Act.*

Informal Public Appeals - the Issues

[4] Appeals to the public for donations are a feature of everyday life. Appeals that occur on a regular basis are usually conducted by registered charities and other organizations having the benefit of experienced fundraisers and professional advice. But spontaneous appeals occur frequently as well, especially after a disaster like a fire or a flood. They may follow publication of a news item about a family or individual in some sort of distress. Campaigns on behalf of individual children requiring specialized medical treatment elsewhere have also become familiar examples of this kind of fundraising.

[5] Unlike the regular campaigns of established fundraising organizations, spontaneous appeals are often begun by a single person or a small group. Rarely is an organization or foundation created at the beginning to manage the fund. The fundraisers simply issue a message asking for donations and, possibly, open a bank account to hold the fund. The help of the press and the electronic media may

be enlisted to publicize the appeal. The emergency that gives rise to the appeal may have substantial emotional impact, and the generosity of the public's response is sometimes astonishing. The amount donated may go well beyond what is required to meet the original need. Sometimes the appeal turns out to have been unnecessary, because the need is met through governmental or other sources. Substantial amounts may already have been collected, however. Occasionally the opposite situation arises. Too little may be raised to be of any use at all.

[6] In either case, the fundraisers may be left with money on their hands. This does not cause any difficulty if the terms of the appeal indicate clearly how any surplus or unused funds will be handled, and if donations are made with that understanding. But in the heat of the moment, the fundraisers may not have thought of the possibility of a surplus or unusable donations.

[7] At first glance, the courses of action open to the fundraisers appear to be straightforward. Either give the money back, turn it over to an equally worthy cause, or retain it for similar emergencies in the future. But all of these seemingly self-evident alternatives are rife with legal pitfalls.

[8] If the purpose of the fund falls within the legal definition of "charity,"[1] returning the contributions would probably amount to a breach of trust. It would also be legally incorrect for the fundraisers to turn over the unused funds to an equally worthy cause without the permission of the court. People who issue spontaneous appeals for donations out of public-spiritedness or humanitarianism rarely appreciate the complexities of the law of charity. In an emergency, there is little or no time to get legal advice on the subject.

[9] If the purpose of the fund is not legally charitable, the surplus may have to be returned to the donors. Chances are, however, that the fundraisers will encounter difficulty with this. Many of the donations are likely to be anonymous, since collections are often made door-to-door or on the street. In this setting, donors' names and amounts given are not usually recorded. Some portion of a non-charitable fund is almost sure to be unreturnable for reasons like these. Moreover, even if the donors can be identified, if the amounts of the individual donations are small the cost of processing refunds may well exceed the amount available for distribution.

[10] What does the law say must be done with the unreturnable portion in a case where the donors are entitled to get their donations back? The answer would shock anyone. *Nothing can be done with it except to let it accumulate interest indefinitely or else pay it into court.* This was confirmed in 1958 in the notorious English case *Re Gillingham Bus Disaster Fund.*[2] The law is clearly unsatisfactory with regard to surpluses or unusable balances in informally created public appeal funds.

[11] The preceding paragraphs were drawn from a Report of the British Columbia Law Reform Commission that was submitted in 1993.[3] Thus the Commission identified the first difficulty in relation to public appeals – its inability to deal rationally with surpluses. Little has happened to specifically address this issue in the intervening years.[4]

[12] A second difficulty in relation to public appeal funds is that their creation is seldom

well documented. As the Commission observed:[5]

[13] As with most other legal relationships, there is less room for disputes and misunderstandings in connection with a trust if the rights, powers, and duties involved are spelled out clearly in a written document. Trustees of a public appeal fund should be encouraged to enter into such a document. It is to their benefit to assume administrative powers that other trustees normally have, and to establish procedures for retirement and the appointment of new trustees. It is also to their benefit to put in place the kinds of limitations on trustee liability that are commonly found in modern trust documents. The fact that the trustees of a public appeal fund may have little or no background in trust administration makes an explicit trust document all the more important. A trust document is more likely to be signed by trustees of public appeal funds if a workable standard form in plain language is available.

[14] Both of these difficulties were addressed by recommendations contained in the BCLRC Report.

The Approach of the Working Group

[15] The Working Group met several times by teleconference since its formation. The members first considered whether the work of the Law Reform Commission provided an appropriate point of departure for its own deliberations. They reviewed the BCLRC Report's lengthy analysis of the existing law concerning surpluses and public appeal funds to determine whether the analysis retained its currency. It did.

[16] The next step was to examine the overall strategy of the approach to reform taken in the BCLRC Report and its suitability in relation to developing a uniform law. Briefly stated, the BCLRC strategy was as follows:

- Reform should be pursued through a stand-alone act dedicated to public appeal funds rather than as an amendment to the existing *Trustee Act.*[6]

- The application of the proposed act should be narrow in scope so as to exclude the fund-raising activities of established bodies for their usual purposes.

- The proposed act should confirm that money raised through a public appeal is held in trust for the objects of the appeal.

- The proposed act should be largely default in character and capable of being displaced by more specific documents and rules created to govern the appeal.

- The proposed act should confirm a power in the court to direct the application of surplus funds raised for non-charitable objects.

- The proposed act should provide a mechanism for the disposition of small surpluses.

- The proposed act should provide a mechanism for refunds to identifiable donors of larger amounts where an appeal for non-charitable objects results in a surplus.

- The proposed act should include, as a schedule, a model trust document that would provide a default governance structure for the trust created by the appeal. Where a governance structure otherwise exists, the model trust document would apply only to the extent that it did not conflict with the existing structure.

[17] The Working Group concluded that the general approach taken in the BCLRC Report was suitable for adoption in a uniform act on this topic although a number of modifications were desirable. This led to a more detailed consideration of the issues raised in the Report and the solutions proposed. The result of the Working Group's deliberations is the preliminary draft of an English language version of a *Uniform Informal Public Appeals Act* [hereafter *UIPAA]* with a draft commentary.

Some Features of the Current Draft of the *UIAPP*

Scope

[18] A starting point in assessing the scope of the act is its core concept - the "appeal" which is broadly defined to include a variety of communications for the purpose of soliciting donations. The definition is immediately narrowed by excluding "a message communicated as part of a permanent or continuing fundraising effort." Thus, for the purposes of the act "appeal" is confined to sporadic, informal appeals.

[19] The application of the act is further narrowed by two additional provisions. One states that the act does not apply to a fund raised by a body that is registered with the Canada Revenue Agency as a charitable organization, or any other incorporated body for the advancement of its usual objects.[7] The reference to CRA registration constitutes a bright line test that will clarify the applicability of the act in many otherwise problematic cases.

[20] The other provision that limits the application of the act states that it is displaced by more specific features of the governing documents or the terms of the appeal that may conflict with the act.[8]

The Trust

[21] The act confirms that a public appeal fund is subject to a trust for the benefit of the person(s) for whom, or the object for which, it is raised and is enforceable whether or not the object is charitable. The persons who direct the management and disbursement of a public appeal fund are its trustees and a savings institution in which the fund is deposited is not a trustee. Persons entitled to enforce the trust include a trustee, donor, beneficiary, the Attorney General and any person having a "sufficient interest" in enforcement.[9]

Terms of the Trust

[22] The act confirms the role of a formal trust document and refers to the model trust document [MTD] in Schedule A as one that trustees may wish to adopt. A trust document created for the purposes of the appeal is deemed to include as much of the model trust document as does not conflict with its other provisions, the terms of the appeal or other governing documents. This may include the entire model trust document where there is no other governing document.[10]

Surplus Funds

[23] "Surplus" is defined to mean money or other property remaining in a public appeal fund that ceases to be needed or cannot be used for the object described in the appeal. To avoid a *Gillingham* outcome the act sets out several measures.[11] First, it stipulates that where a surplus occurs there is no resulting trust in favour of a donor.[12] Second the principle of *cy pres* is extended to trusts for non-charitable objects. The court is authorized to approve a scheme to distribute a surplus. A distribution may be made for a charitable object whether or not the appeal that led to the surplus was charitable. If that appeal was for a non-charitable object the court may authorize a distribution to another non-charitable object that is consistent with the spirit of the appeal.

[24] Any person entitled to enforce the trust may apply to the court for a distribution of a surplus. But an application to court may be unnecessarily expensive and cumbersome if the surplus is small. For this reason, if the surplus is below some threshold amount, the act permits the trustees to distribute the it among one or more charities designated in a schedule to the act or by regulation. The value of the threshold suggested in the act is $10,000.

Refunds

[25] If the appeal was for a charitable object the donor has no claim to a refund if there should be a surplus. If, however, the appeal was for a non-charitable object other considerations may apply. Since donors are often motivated to give only for the specific purpose of the campaign, a person who has made a substantial donation should be able to obtain a refund if the donation will not be used for that purpose. The act allows such a donor to claim a refund, or call for a reapplication, of a *prorated* share of the surplus. The right to a refund arises only with a donation valued at $100 or more and only where the donor had, at the time of the donation, made a written request for a refund in the event there should be a surplus. In the rare case of a donation of real property that is no longer needed or can not be used for the object of the appeal the donor may be entitled to its return.

Accumulations

[26] In some provinces the law, based on an English statute of 1800, limits the time during which a fund is permitted to accumulate (the "rule against accumulations").[13] While the rule against accumulations has no application to charitable trusts, In those provinces where the rule is in force the permitted accumulation period (in most cases, 21 years) may be too short to allow the objects of the public appeal fund that is made for non-charitable objects to be fully realized. For this reason, the draft act stipulates a much longer permitted period of duration for non-charitable funds (80 years)[14] and the application of the old rule against accumulations is abrogated with respect to them.[15]

The Model Trust Document

[27] The model trust document set out as Schedule A to the act incorporates most of the features that the members of the Working Group believe would be found in a trust instrument created expressly for most informal public appeals. The objects of the appeal and the reasons for its creation are left sufficiently open-ended to permit the model to be adapted to the circumstances of the particular case. The MTD provides examples of these to assist fundraisers in adapting it to their appeal without legal assistance.

[28] Some specific issues addressed by the MTD are:

- A statement of the trustees duties including a requirement that at least once each year the trustees must consider whether any money remaining in the fund is needed or can be used for its objects. If not, it is surplus and must be dealt with accordingly.
- The powers of the trustees in relation to
- further appeals and donations,
- payments from the fund,
- investing and otherwise dealing with the fund
- the use of nominees and professional advisors
- transfer of the fund to another body with similar objects including one formed by the trustees
- The discretion of the trustees in administering the fund
- The ability of the trustees to act by majority
- The retirement and appointment of trustees.

[29] As far as possible the MTD avoids technical legal language to encourage its adoption by non-lawyer trustees.

Relationship to the *Uniform Trustee Act* Project

[30] Work is currently proceeding on the development of a *Uniform Trustee Act* [hereafter *UTA]*. This project also uses BC law reform work as its point of departure.[16] Since trust law lies at the core of both projects the question naturally arises whether work in relation to public appeal funds should simply be merged with and form part of the larger project.

[31] The same question was confronted by the Project Committee that developed the 2004 BCLI report. It was the conclusion of the Project Committee that the larger *Trustee Act* operated at a much higher level of generality and the legislation in relation to public appeals set out a level of detail in addressing a specific issue that made it a bad fit with legislation applicable to trusts generally. They concluded that public appeals were best addressed in a separate statute.

[32] The same concern holds true with respect to work on the two projects by the ULCC and the Working Group on public appeal funds endorses proceeding with this project as one whose goal is the development of a separate uniform statute. There is a recent precedent for this approach. In 2007 the ULCC adopted its Uniform *Income Trusts Act* in response to the need to provide a

governance structure for income trusts which had become a popular investment vehicle at the time the project was added to the ULCC program. This uniform act, while it dealt with an aspect of trust law was so specific and detailed in terms of its drafting that it would function better as a distinct statute rather than as part of a larger statute on trust law that was of general application.

[33] But the proposed *UIPAA* and the proposed *UTA* would not operate in isolation from each other. A fund raised by a public appeal would be a trust and, subject to specified exceptions, would be subject to most provisions of the *Trustee Act* such as those concerning trustee investments.

[34] There are also a handful of areas in which the two uniform acts (at least in their most recent versions) overlap and address the same issue. This is deliberate. There is no assurance that both uniform acts will be adopted in a particular jurisdiction so some changes to the current law are embodied in each to ensure that it is capable of operating in isolation from the other if necessary. Three examples:

- In both acts the need to demonstrate a "general charitable intent" to apply the *cy pres* doctrine would be abolished.

- Both acts would be capable of dealing with a *Gillingham* type of scenario should it arise although the *UIPAA* would provide a more sophisticated range of options.

- Both acts would permit the enforceability of certain non-charitable purpose trusts although the purposes validated by each act are not identical.

[35] Work on both uniform acts continues. Since the membership of the two working groups partially overlaps, the two acts should develop in harmony.

Implementation in Quebec

[36] The *UIPAA* will be legislation developed primarily for implementation in the common law provinces of Canada. While a French language version of that act will be developed at a later stage in this project, it will be most helpful to those common law provinces that operate in both official languages. The Working Group has concluded that the principles of the *UIPAA* are suitable for adoption by Quebec notwithstanding that it is a civil law jurisdiction. This is best achieved through the enactment of a stand-alone statute rather that through amendments to the Civil Code of Quebec.

[37] It is also the view of the Working Group that the French language version of the common law act is not the best vehicle for implementation in Quebec. What is called for is a Quebec-specific statute, drafted in the style normally used there and more closely aligned with civil law concepts and the CCQ. Subject to the availability of drafting resources this is the we plan to take. We hope to have the "Quebec draft" available in time to permit it to be used for the purposes of further consultation in Quebec.

Public Appeal Funds and Financial Institutions

[38] A common thread that links almost all public appeal funds is that the person or persons who spearhead the appeal will open an account in a bank (or similar deposit-taking institution). Particulars of the account may often be widely publicized through the media with the public urged to donate directly through a deposit. Since banks play a pivotal role in relation to public appeal funds the Working Group thought it important to gather information on bank practices regarding such accounts to ensure the *UIPAA* operated harmoniously with them.

[39] Our preliminary inquiries suggest that there may be a great diversity of practices among banks touching on issues such as who is entitled to open an account for the fund, the kind of account that may be opened and the maximum duration of the account. This diversity appears to exist between different banks but it may also occur within the same bank, possibly at the branch or regional level. We expect that further information will become available during the course of this project.

[40] The Working Group hopes that the development of uniform legislation on public appeals funds will stimulate banks to examine their own role in this area and develop practices that are in harmony with the legislation and with each other. A particular aspect of this is the use of the model trust document that forms a schedule to the *UIPAA.* In cases where those leading the appeal do not appear to have prepared a governing document, their attention should be drawn to the MTD and they should be urged to complete it or develop a governing document more closely tailored to their needs.

Conclusion: Consultation and Next Steps

[41] The current draft of the *UIPAA* exists in an English Language version only. This draft will form the basis of a consultation document to be distributed by the Working Group to interested persons and organizations. The assistance of the ULCC's Jurisdictional Representatives will be sought in this regard. By August 2010, copies of the consultation document will have been made available to the JRs for each province and territory for informal distribution to their delegates and to others that may wish to respond to the consultation.[17] Because of this informal distribution, the current draft is not included as a formal part of this written report[18] although it will be referred to as part of the oral part of this Report.

[42] After the August 2010 meeting, the Working Group will review the draft in the light of the comments received and proceed to settle its version of the *UIPAA.* This version will serve as "instructions" to a legislative counsel who will revise it as may be necessary to produce an English language version of the *UIPAA* that conforms to all applicable drafting conventions. This is the "formal" version that will be recommended to the Civil Section for adoption in 2011. A French language version will also be prepared. Depending on the drafting resources available, this version may be prepared contemporaneously with the English version rather than as a translation.

[1] In its popular sense, "charity" means virtually the same thing as "benevolence." In law, however, "charity" as a narrower meaning. Essentially, the legal idea of charity is that of a private gift for a public purpose. A "public

purpose," in this context, means a benefit to the community as a whole, or to a significant segment of it. In addition, the purpose of the fund must fit within a limited category of purposes.

[2] [1958] Ch. 300, *aff'd* [1959] Ch. 62 (C.A.). In 1951, a large bus ploughed into more than 50 marine cadets, aged 10 to 13 years, who were marching along the street. Twenty-four cadets were killed and the rest seriously injured. A fund was launched to defray the funeral expenses of the boys who were killed, to assist the injured boys, and to support worthy causes connected with boy cadets. More than £10,000 was raised but not all was needed because the bus company's insurers settled the case against them. On an application to court by the trustees, Harman J. held that the surplus was money that had been collected for a non-charitable purpose and that the donors wereentitled to the money under a resulting trust. Consequently, he directed that the money – some £7,300 -- be paid into court and an inquiry should be made as to the persons entitled to the surplus. The donors were not found and the money languished in court for 42 years. See A.H. Oosterhoff, Robert Chambers, Mitchell McInnes, and Lionel Smith, *Oosterhoff on Trusts: Text, Commentary and Materials*, 7 ed. (Toronto: Thomson Reuters/Carswell, 2009), at 599; Donovan W.M. Waters, Mark R. Gillen, and Lionel Smith, *Waters Law of Trusts in Canada*, 3 ed. (Toronto: Thomson/Carswell, 2005), at 441, note 357.

[3] Report on Informal Public Appeal Funds (LRC 129 1993). Hereafter "BCLRC Report." See http://www.bcli.org/sites/default/files/LRC129-Informal_Public_Appeal_Funds.pdf

[4] An administrative solution for distributing the *Gillingham* fund itself emerged many years later. In 1992 some of the survivors of the injured cadets brought the existence of the fund to the attention of the Treasury Solicitor, who applied to the court to have the funds declared *bona vacantia* (ownerless). The court granted the application in 1993, thus the funds became available to the Treasury Solicitor for distribution among the survivors as a discretionary grant. The survivors submitted claims in relation to the fund which was subsequently distributed among 17 survivors of the disaster, each of whom received slightly more than £400. See Treasury Solicitor, Press Release, 1 September, 1993; *The Guardian*, 4 December, 1993.]

[5] *Supra* note 3 LRC 129 at page 29.

[6] The *Trustee Act* at the time was basically a re-enactment of trustee legislation enacted at various times during the 19 century in the UK.. The BC Law Institute's Project Committee considered incorporating the proposed legislation into the "modern" Trustee Act that was under development. For reasons set out later in this Status Report this was not done.

[7] Section 2(2).

[8] Section 2(1) In this Report the expression "governing document" is used to refer to anything mentioned in paragraphs (a), (b), (c) or (d) of that section:

2 (1) Subject to subsection (2), sections 1 to 6 of this Act apply to a public appeal fund only to the extent that they do not conflict with the terms of the appeal or with

(a) another enactment,
(b) the constitution, charter, incorporating document, or bylaws, of an incorporated body or foundation,
(c) a contract, or
(d) a trust document referred to in section 4 (1)

that governs or regulates the public appeal fund.

[9] Section 3.

[10] Section 4.

[11] Section 5.

[12] Section 6 sets out the circumstances in which a donor may be entitled to a refund when there is a surplus.

[13] *Accumulations Act, 1800,* 39 and 40 George III, c. 98 commonly known as the *Thellusson Act.*

[14] Section 7(1).

[15] Section 7(2). In those provinces that have legislated to abrogate the rule against accumulations section 7(2) may be omitted.

[16] British Columbia Law Institute, A Modern Trustee Act for British Columbia (2004).

[17] The approach to consultation and implementation in Quebec was referred to earlier.

[18] Thus avoiding the translation costs in relation to what is essentially an ephemeral document.