

UNIFORM LAW CONFERENCE OF CANADA

**UNIFORM GRATUITOUS CROWDFUNDING ACT  
(2022-CIVIL LAW VERSION)  
FINAL REPORT OF THE WORKING GROUP**

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## History

[1] At its annual meeting in August 2020, which was held remotely, the Uniform Law Conference of Canada (ULCC) adopted the Uniform Benevolent and Community Crowdfunding Act (“UBCCA”). The Act was designed so that it could be enacted in the common law provinces and territories of Canada, excluding Québec.<sup>1</sup> The ULCC also adopted a resolution pursuant to the Working Group’s recommendation that a civil law version of this Act be prepared to be proposed for adoption in Québec. The following report is to present the proposed civil law version of the UBCCA, entitled the Uniform Gratuitous Crowdfunding Act (“UGCA”).

[2] The UGCA and UBCCA build on an earlier pair of ULCC draft laws, which they are intended to replace. Those two earlier draft laws are both entitled Uniform Informal Public Appeals Act (“UIPAA”). The common law version<sup>2</sup> was adopted by the ULCC in 2011, and the civil law version<sup>3</sup> in 2012. The two UIPAAs address public appeals made locally through traditional means of communication. They did not anticipate the advent of crowdfunding facilitated by online platforms and social networks. The Working Group’s report on the UBCCA discusses how the context has evolved as well as the considerations leading to its formulation.<sup>4</sup>

## Working Groups

[3] The Working Group members who prepared the UBCCA were: Arthur L. Close (group leader), Jordyn Allan, Gregory G. Blue, Laura Buckingham, Jane Chapco, Michelle Cumyn, Clark Dalton, Julie McDonald, Albert Oosterhoff, and Cynthia Spencer.

[4] The Working Group members who prepared the UGCA were: Laurence Bergeron, Michelle Cumyn, Justin Ilboudo, Virginie Lachance, and Michel Paquette.

[5] This work is dedicated to the memory of Arthur Close, who passed away in the summer of 2021. Arthur dedicated his career to the reform and harmonization of private law in Canada. In the ULCC projects which he led, Arthur showed interest in the civil law and respect for the particulars of Québec law. For this we are grateful.

## Background

[6] Public appeals for donations are nothing new. Think of holiday food drives, or the fundraisers that made it possible to erect the Statue of Liberty in New York or the Sagrada Familia in Barcelona. Today, crowdfunding campaigns are gaining momentum as social media allows them to be shared widely — often across borders or provincial boundaries — and as online platforms make financial transactions easy, whether the amounts are big or small. The new Uniform Acts reform the UIPAAs by adapting them to the current crowdfunding context while maintaining their relevance for traditional public appeals.

[7] The fundraising activities engaged in by registered charities and other organizations that conduct permanent or routine fundraising to finance their operations typically rely on the services of experienced fundraisers and legal professionals. This is usually not the case in crowdfunding, where an individual or a group spontaneously launches a fundraising campaign in response to a fire, flood or other catastrophe; to help a family or individual in distress, like a child in need of specialized medical treatment; or to fund a community project like a monument or park. The

campaign organizers who launch these kinds of campaigns often have little or no experience in fund management.

[8] Crowdfunding organizers initiate a campaign by publicizing a message requesting donations. The response can be astonishing. Often, donations exceed what is required to meet the stated needs, or they turn out to be unnecessary because those needs are met by government or other sources. Other times, the opposite happens, and the donations received are far from sufficient to be of any use. In all these cases, the campaign organizer is left with a residue. How should the residue be disposed of?

[9] There are several options: return the unused donations to the donors; give them to the beneficiary of the crowdfunding campaign; or transfer them to an organization whose objects are similar to those of the campaign. One would expect the law to lay out what must be done. And yet, the appropriate legal answer in these situations is far from obvious. Indeed, there is a lack of clarity as to the campaign organizer's powers and duties. In many cases, the validity of the donations turns out to be questionable. Even the legal nature of crowdfunding donations is problematic: are they strictly gifts? If so, who is the donee? Are they instead donations to a trust? If so, what rules apply?

### **The common law version of the crowdfunding uniform act (the UBCCA)**

[10] The UBCCA adopted by the ULCC in August 2020 implements the following principles:

- Donations received during a crowdfunding campaign are held in trust. The Act specifies the duties and powers of campaign organizers and other persons in the role of trustee, as well as the rights and remedies of donors and beneficiaries.
- Reform is pursued through a stand-alone act dedicated to crowdfunding campaigns, rather than as an amendment to a province or territory's existing *Trustee Act*.<sup>5</sup>
- The Act applies only to donation-based crowdfunding. Investment or presale crowdfunding are excluded from the scope of the Act.
- The Act applies to donation-based crowdfunding when the donations are to secure a benefit for a third party or to fulfill a purpose of private or social utility. The Act does not apply where campaign organizers are collecting donations for themselves, or to fulfill a personal purpose.
- The Act does not apply to the fundraising activities of registered charities and other qualified donees within the meaning of the *Income Tax Act* (Canada).<sup>6</sup> The Act applies to organizations that routinely raise funds to finance their activities.
- The Act is largely comprised of rules that apply by default. Under certain conditions, the campaign organizer or the crowdfunding platform can stipulate different rules.
- The Act recognizes the validity of certain types of trust that otherwise would be ineffective, including non-charitable-purpose trusts. The Act extends the *cy-près* doctrine so that such trusts may benefit from its application.
- The Act provides a mechanism for disposing of any surplus or residue.

## **The civil law version of the crowdfunding uniform act (the UGCA)**

[11] The Working Group took the following approach:

- The UGCA uses the UIPAA (civil law version) as its starting point and makes changes like those introduced in the UBCCA, in order to adapt it to the current crowdfunding context.
- The UGCA uses concepts and adopts a structure that are in harmony with the *Civil Code of Québec* (“Civil Code”), which will complete it. Its drafting style is consistent with Québec civil law drafting principles. Therefore, the proposed Act contains few definitions, and when there are definitions, these are included in the substantive provisions. The UGCA is also less detailed and precise than the UBCCA.
- The UGCA adapts or elaborates on the rules regarding trusts and administration of the property of others set out in the Civil Code. The rules that should be adopted in Québec to achieve solutions equivalent to those of the UBCCA will sometimes be different, because the background law is different.
- For instance, in Québec, private trusts, which are like common law non-charitable purpose trusts, are legally valid and benefit from rules akin to the *cy-près* doctrine (arts. 1268 and 1294 of the Civil Code). There is therefore no need to articulate rules on this point in the UGCA.
- Conversely, the conditions for creating a trust may pose an obstacle under Québec law that does not exist in the common law. For this reason, in the UGCA the trust arises by operation of law.
- Finally, the UGCA does not include rules relating to private international law, as the Civil Code already provides a complete and coherent set of rules in this area.

## **Current law governing crowdfunding in Québec**

[12] Under the law of Québec as it currently stands, donation-based crowdfunding may be characterized either as gifts pure and simple or as gifts made to a trust.

### **Pure and simple gifts**

[13] Under Québec civil law, gift is a contract by which the donor transfers ownership of the property by gratuitous title to the donee (art. 1806 of the Civil Code). Applying the law of gifts to donation-based crowdfunding raises two main difficulties.<sup>7</sup> The first concerns the formation and validity of such gifts and the second concerns the campaign organizer’s duties regarding the use of the gifted property.

[14] It is necessary to identify the contracting parties, in particular the donee. Is the donee the campaign organizer, or the beneficiary of the crowdfunding campaign? It may be useful to compare donation-based crowdfunding with the fundraising carried out by not-for-profit organizations that are seeking to secure funding for themselves. In the latter type of fundraising, the charity or organization normally becomes the owner of the gifted property, even if it has announced that donations would be used for a specified purpose or to assist a specified group or individual.<sup>8</sup> The question then becomes the extent to which the organization or charity is (or ought to be) legally bound to use the gifted property in accordance with the purposes it has announced,

despite the fact that it has full ownership of such property. However, this is not the issue that the UGCA seeks to address. Indeed, the UGCA does not apply to such fundraising efforts.

[15] In the case of a crowdfunding campaign launched by an individual or organization for whom the object of the campaign is not a regular activity, it seems inconceivable that the campaign organizer should be considered the donee of the gifted property. Consider the example of a small IT firm that has launched a crowdfunding campaign among its employees, clients and suppliers to raise funds for the children of a female employee killed by her partner. This situation is fundamentally different from one where a fundraiser is conducted by a foundation whose object is to help victims of domestic violence, even if that fundraiser pertains to a named victim. The foundation acquires ownership of the gifted property. The same solution should not avail in the case of the IT firm, given all the consequences that would follow: ability to dispose freely of such property or commingle it with its own assets; possibility that such property could be seized by its creditors in the event of insolvency or bankruptcy, etc.<sup>9</sup>

[16] In light of this, should the campaign beneficiaries — in this case, the children of the deceased employee — be considered the donees instead? This would raise problems in relation to the validity of the contract of gift. Members of the public who make donations generally do not have any direct contact with the campaign's beneficiaries. Instead, the contract is typically between the donor and the campaign organizer. One might then consider the campaign organizers to be mandataries (agents) of the beneficiaries, in order to explain how a contract has been formed between each of the donors and each of the beneficiaries (arts. 2130 and following of the Civil Code). Nonetheless, it could be difficult to prove that donations were accepted by the campaign's beneficiaries, whether directly or through a mandatory.<sup>10</sup> This would be all the more difficult if the crowdfunding benefits an unnamed group of people, or if its object is to fulfill a purpose of private or social utility.

[17] A second difficulty, if one applies the law of gifts in the case of a crowdfunding campaign, concerns use of the gifted property. In a gift, the donee acquires ownership of the gifted property and may dispose of it as the donee sees fit. This means that donors who contribute to a crowdfunding campaign could not complain about misuse of their donations. Nor could they recover their donations in situations where they are of no use to the donee. Only in limited cases could it be argued that the gift is null or that the donor has grounds for revoking it.<sup>11</sup> There is no mechanism for returning gifted property to a donor or for redirecting it to a similar object if it cannot be used or if it exceeds the beneficiaries' needs.<sup>12</sup>

[18] Accordingly, in the vast majority of cases, gift pure and simple is not the appropriate legal vehicle by which to govern donation-based crowdfunding campaigns. As for situations where campaign organizers launch crowdfunding campaigns for themselves or to fulfill a personal purpose, these do not pose any particular problems. In those situations, the campaign organizer is the donee of the gifted property and can dispose of it as he or she sees fit. Unless the organizer has committed a fraud, donors have no recourse if they do not use the property as was announced. The UGCA does not apply to such a case because the general rules of law address it adequately.

## Gifts made to a trust

[19] Donation-based crowdfunding can potentially be characterized as a trust.<sup>13</sup> If so, the campaign organizer is a trustee. The Civil Code provides for three types of trust, each of which may apply to a crowdfunding campaign, depending upon the circumstances:

- the personal trust, if the crowdfunding campaign is launched to secure a benefit for one or more determinate or determinable persons (art. 1267 of the Civil Code);
- the private trust, if the object of the crowdfunding campaign is to appropriate the gifted property to a specific use, whether for the indirect benefit of a person or persons, or for some other private purpose (art. 1268 of the Civil Code); and
- the social trust, if the crowdfunding campaign pursues “a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose” (art. 1270 of the Civil Code). As with the private trust, a social trust can benefit one or more persons, but these individuals do not have to be specifically determined in the terms of the campaign.

[20] The contract of gift still has a role to play if the crowdfunding campaign is characterized as a trust, but its application no longer poses the same difficulties: rather, it is the creation of a trust that becomes problematic, as we will see. The Civil Code provides that a person may increase the trust patrimony once a trust is created, by transferring property to it by contract (art. 1293). Thus, the trustee receives the gifted property and adds it to the trust patrimony he or she administers. Because in this case the beneficiaries are not the donees, the problems regarding the valid formation of a gift disappear. Nor does the gifted property belong to the campaign organizer, since the organizer is a trustee. The law of trust is helpful in devising solutions regarding the use of any donations that exceed requirements or cannot be used for the objects being pursued. The trust is therefore the most appropriate vehicle for governing gratuitous crowdfunding that secures a benefit for a third party or fulfills a purpose of private or social utility.

[21] When the trust is created gratuitously by contract, the relevant contract for its creation is that of gift from the settlor to the trustee.<sup>14</sup> The Civil Code provisions on trusts do not impose formal requirements for drafting a trust act: such an act need not be notarial, and need not even be in writing (arts. 1260 and 1262). However, the trust act must comply with the conditions of form and validity of gifts. Though this is a matter of some debate, it seems that a trust may be created by manual gift; accordingly, the campaign organizers do not need to prepare a notarial act.<sup>15</sup>

[22] In any event, creating a trust by contract requires an act of transfer. According to article 1260 of the Civil Code, the trust “results from an act whereby a person [...] transfers property from his patrimony to another patrimony constituted by him [...] and which a trustee undertakes, by his acceptance, to hold and administer.” It seems that the transfer needs to occur immediately<sup>16</sup> when the trust is created, although opinions diverge.<sup>17</sup> Note as well that the intervention of at least two persons is required to create a trust: the settlor and the trustee.<sup>18</sup> Lastly, the intention to create a trust is required. This requirement might not be easy to meet in Québec, where one still finds a perception of the trust as a technical and sophisticated legal instrument. By contrast, we have no difficulty recognizing the existence of numerous contracts witnessed in everyday life, even though the parties may not have formed the specific intent to enter into such contracts: we infer such intent

from the communications between the parties and from their conduct. It would not be as easy to recognize the intention to create a trust. For this reason, characterizing a crowdfunding campaign as a trust where the campaign organizers have not clearly expressed their intention to establish such a trust is not self-evident<sup>19</sup>. It would nevertheless be quite easy to comply with the requirements of the Civil Code, provided one were aware of them<sup>20</sup>.

[23] In common law systems, donation-based crowdfunding is quite easily characterized as a trust, in so far as the campaign organizer is not the donee of the gifted property. There are no formal requirements for the creation of a trust, and its creation may be implicit. A trust may also be created unilaterally by a trustee who declares that he or she holds the property on behalf of a third party or that he or she solicits donations for a third party (*declaration of trust*).

[24] For the reasons outlined above, the approach of the UGCA is to state that the creation of a trust stems directly from the Act. This way, the conditions for the formation of a conventional trust, which are generally not present in a crowdfunding campaign, do not have to be met.

### **Additional features of the *Uniform Gratuitous Crowdfunding Act***

[25] There are few commentaries that accompany the UGCA because the working group did not reiterate those that accompany the UBCCA. New commentaries are introduced primarily to signal differences between both versions, and to explain the UGCA's interaction with certain key provisions of the Civil Code.

[26] After each section of the UGCA, there are references in square brackets to the corresponding sections of the UIPAA (civil law version) and the UBCCA, so that the reader may compare them and refer to the relevant commentaries. The table at the end of this report makes it possible to proceed in reverse.

[27] In the following sections of this report, we will outline certain points that were discussed by the Working Group but are not explained in a commentary to the proposed UGCA. Note that this is not a comprehensive presentation of the content of the proposed UGCA. Unless otherwise indicated, all references to section numbers refer to the UGCA.

### **Title**

[28] The 2020 Uniform Act is entitled *Uniform Benevolent and Community Crowdfunding Act*, translated into French as the *Loi uniforme sur le sociofinancement à des fins caritatives ou communautaires*. The translation of “benevolent” as “caritatif” (“charitable”) in French is problematic. This is because the word “charitable” has a specific meaning in common law; it is notably used to designate a class of trusts called “charitable trusts” that benefit from preferential treatment under the general law. The French term “fiducie caritative” is often used to refer to these common law trusts. The English word “charitable” is also used to refer to registered charities within the meaning of the federal Income Tax Act. For this reason, the English title deliberately uses the terms “benevolent” and “community”, which have no specific legal meaning. In the body of the French UBCCA, the word “caritatif” is generally used to translate “charitable”, which is correct. The use of this term in the title as a translation of “benevolent”, however, creates a risk of misunderstanding. The same problem exists with the translation of “benevolent” as “bienfaisance” in the introductory commentary to the UBCCA.



[29] The term “*caritatif*” is rarely used in Québec legislation and does not carry a specific legal meaning.<sup>21</sup>

[30] To accurately convey the purpose and scope of the uniform Act in the Québec context, the Working Group has adopted the *Uniform Gratuitous Crowdfunding Act* as its title. This title clearly indicates that investment and presale crowdfunding are not affected by this Act. These other forms of crowdfunding assume that contributors are not driven by a liberal intention, and that they receive consideration in exchange for their contributions.

## Scope

[31] As we have seen, the UGCA is intended to govern gratuitous crowdfunding campaigns, i.e., campaigns in the form of donations. It does not apply to investment or presale crowdfunding (s. 1). In investment crowdfunding, sometimes known as equity crowdfunding, contributors receive common shares, preferred shares or bonds in exchange for their contribution. This type of crowdfunding is regulated by the Canadian Securities Administrators.<sup>22</sup> In presale crowdfunding, contributors receive a sample of the product developed using the contributions. The contract between the contributors and the campaign organizer is a contract of sale for future goods or, in some cases, a contract for services. It is not always easy to distinguish a gift from a presale.<sup>23</sup> This is in part because it is common in donation-based crowdfunding for the campaign organizer to offer donors a reward or other form of acknowledgement. As long as the reward or public recognition is of token value relative to the donation, it is fair to say that the donors are driven mainly by a liberal intention and this is therefore a case of gratuitous crowdfunding. Conversely, if the reward is the main incentive for contributors to participate in the crowdfunding campaign, it would be characterized as a presale.<sup>24</sup>

[32] The UGCA also excludes gratuitous campaigns from its scope (ss. 2 and 3) where:

- the campaign organizer collects donations for herself or himself, or to fulfill a personal purpose;
- the campaign organizer is a registered charity;
- the campaign organizer initiates the campaign to secure financing as part of permanent or continuing fundraising activities;
- the fundraising activity in question is governed by election legislation.

[33] These have been excluded because: (1) a trust is not relevant if the campaign organizer is the donee of the gifted property; (2) charities and political fundraising are already well-regulated by law; (3) organizations that conduct continuing fundraising campaigns are accustomed to doing so and generally do not require a new framework; (4) these entities are, in any event, the donees of the gifted property. In these cases, the trust is not the appropriate vehicle for governing crowdfunding campaigns.

[34] The UGCA does, however, apply to:

- Campaigns where the campaign organizer collects donations for a charity or other organization. In this case, the campaign organizer is a trustee and must remit all gifted property to the organization in question.
- Campaigns where the terms of the crowdfunding campaign state that any residue will be donated to a charity or other organization.

## Main Concepts

[35] In French, the Working Group has used the term “sociofinancement” rather than “financement participatif.” These are both synonyms for crowdfunding, but “financement participatif” is the term used in the Canadian Securities Administrators’ regulations governing crowdfunding in the form of investment.<sup>25</sup>

[36] The UBCCA uses the concept of crowdfunding in the title and commentary but continues to use “public appeal” in the body of the Act. For greater clarity, in the UGCA, the phrase “public appeal” has been removed and replaced by “crowdfunding campaign” throughout.

[37] The UGCA also contains fewer concepts and definitions than the UBCCA. The following concepts are not included or defined: beneficiary, vulnerable beneficiary, user agreement, governing authority, intermediary, or appeal organizer. This reduced the Act’s complexity without altering its substance.

[38] The Working Group also looked closely at the meaning of the French words “fin”, “objet”, “finalité” and “but.” The way these words are used in the Civil Code does not point to any clear distinction between them. They are largely used as synonyms. In keeping with the most common usage, the UGCA uses the word “purpose”/ “fin” to refer to the different varieties of trust. It uses the more concrete term “object”/ “objet” to designate the specific purpose of a crowdfunding campaign. In two provisions, the term “spirit”/ “esprit” is used to refer to the broader intention underlying the campaign.

## Legal instruments and rules of precedence

[39] A number of legal instruments are likely to apply to a crowdfunding campaign, and the UBCCA lists these in the definition of “governing authority” (s. 1(1)). In the event of a conflict, the UBCCA sets out an order of precedence among these instruments (s. 6(4)). The UGCA takes a simpler and more flexible approach.

[40] Unlike the UBCCA, the UGCA does not distinguish between the terms of the crowdfunding campaign and a platform’s terms of use. The terms of a campaign include “the information given to the public, in relation to the object of the campaign, on which a decision to make a donation may be based.” (s. 5) They primarily include information in relation to the campaign that was announced by the campaign organizer, typically through a dedicated page in a crowdfunding platform. These terms may include the terms of use of the platform, if the donors have expressly or implicitly agreed to them. However, the terms of use should not form part of the terms of the campaign if donors are unlikely to have been aware of them or to have read them.

[41] In addition to the terms of the crowdfunding campaign, both the UBCCA and the UGCA refer to the trust declaration or trust act that may have been established by the parties. A simple model trust declaration or trust act has been included in the schedule to both versions, although it is unlikely to be used unless required or suggested by an intermediary, such as a bank or a crowdfunding platform. The UBCCA states that every trustee of the fund is deemed to have executed a trust document in keeping with the schedule (s. 5(3)). The UGCA takes a slightly different approach. For the reasons set out in paras. [22] to [24] of this Report, the trust is formed by operation of law (s. 4).

[42] The other instruments mentioned in UBCCA, namely an order of a court and the constituting documents of the organization that is an appeal organizer, are not mentioned in the UGCA. It goes without saying that a court order is a paramount authority. Furthermore, the campaign organizer's constituting documents may have an impact in the event of a dispute, but in that case, a judge would need to determine the extent to which they apply to the donors and beneficiaries who, in all likelihood, will not have read them.

[43] The UGCA sets out the most important rule of precedence formulated in the UBCCA: the terms of the crowdfunding campaign take precedence over the trust act (s. 6; see also s. 33). The reason for this rule is that donors are aware of the terms of the campaign as a matter of course, whereas they only receive a copy of the trust act if they request one (see ss. 5 and 14).

#### The crowdfunding platform's terms of use

[44] The Working Group examined the potential effects of the terms of use of a crowdfunding platform. In general, campaign organizers and donors must formally agree to these terms before they can access the platform, whether to start a campaign or to make a donation. The terms of use of some platforms reserve significant powers of intervention in the crowdfunding campaign and in the administration of the property received.

[45] Since these terms of use constitute a contract of adhesion, they are liable to contain clauses that benefit the platform to the detriment of the users. Such clauses are reviewable by the courts, having regard in particular to articles 1435 (external clause), 1436 (illegible or incomprehensible clause) or 1437 (abusive clause) of the Civil Code.

[46] The Working Group wanted to ensure that a platform's terms of use could not circumvent the application of the UGCA in three main areas:

- The ability of the Québec courts to apply the UGCA where a trust is closely connected to Québec or where the platform's terms of use apply to consumers residing in Québec (see "Private International Law", below).
- The application of a trust where the crowdfunding campaign meets the conditions set out in the UGCA. The following sentence from the UIPAA (civil law version) has therefore been removed from s. 4 of the UGCA: "An exception to this rule is made only where the terms of the appeal state clearly that a different legal regime applies."

- Imposing the duties of a trustee on a crowdfunding platform if it acts like a trustee (see ss. 7 and 8). This is because, if a platform is involved in the administration of the donations received by a campaign organizer, it ceases to be an intermediary and must comply with the object of the campaign and the duty of loyalty to the beneficiaries and to the object of the trust.

## Designation of trustees

[47] The UGCA aims to recognize as trustees both the persons who officially adopt this role from the beginning of a crowdfunding campaign (as is generally the case with the campaign organizer), and those who later become involved in the administration of the gifted property, perhaps to compensate for a campaign organizer's lack of knowledge or experience (s. 7). This designation could extend to the crowdfunding platform and to individuals who are close to the beneficiary or affected by the object of the campaign.<sup>26</sup> In some cases, the platform's terms of use authorize this intervention; in others, the campaign organizer agrees to call on more experienced people. The UGCA designates all of these parties as trustees because they carry out the duties of that role. All these trustees have a duty to carry out the appropriation of the property making up the trust patrimony in accordance with the object of the crowdfunding campaign and must comply with the duty of loyalty to the beneficiaries and to the pursued object. Thus, the UGCA recognizes the possibility of multiple trustees who collaborate to administer the gifted property. In the event of a conflict as to how the trust patrimony is administered, for example between the campaign organizer and the crowdfunding platform, these parties must try to reach a decision or, failing that, apply to the courts. Sections 13, 15, 18, 19 and 20 of the UGCA also apply to this situation.

## Violations of public order

[48] The Working Group also considered potential violations of public order in the context of crowdfunding. This issue, which is not addressed in the UBCCA, became a hot topic in connection with the crowdfunding campaigns launched to assist truckers expressing their disagreement with COVID-19 health measures during the "freedom convoys."<sup>27</sup>

[49] A violation of public order may be present from the beginning of a crowdfunding campaign, or may arise later, if the gifted property is used for an unlawful purpose. It could be present in the very terms of the campaign, or a campaign organizer could pursue an unlawful aim without the donors knowing. In all such cases, the law should determine whether the donations are valid or null. Nullity requires the restitution of the prestations received — that is, reimbursing the donors.<sup>28</sup> If certain donors cannot be traced, it seems appropriate to apply the rules for disposal of the residue to the remaining property (see s. 29).

[50] The trust itself can be vitiated by a violation of public order. Since the trust is formed by operation of law, it is important to provide a mechanism to terminate it. The UGCA provides that any interested party may apply to the court to terminate a crowdfunding campaign (s. 23), which results in the termination of the trust (s. 24). In practice, a crowdfunding platform can, through its terms of use, terminate a campaign whose object is prohibited by law or contrary to public order. In this case, court involvement is unnecessary.

[51] In either case, what should be done with the donations already received by the campaign organizer, if any? There are two options: reimbursing the donors or applying the rules for disposal of the residue provided for in the UGCA. The Working Group has chosen the first option, because, at least in some cases, violations of public order could affect the validity of the donations, and thereby give rise to reimbursement. The same solution should apply to the trust, as it can be difficult to separate the two. When the GoFundMe platform terminated the crowdfunding campaign that supported the “freedom convoys,” it reimbursed all donors.<sup>29</sup> It seems appropriate to us that the UGCA enshrine this practice.

[52] The UGCA therefore requires reimbursement to the donors if a trust is contrary to public order. Accordingly, the donations that have been received are not considered a residue. If any property remains in the trust after the donors have been refunded, however, that property is considered to be a residue.

#### Reimbursement of donors and disposal of the residue of the trust

[53] The UBCCA takes a rather restrictive approach to the possibility of reimbursing donors where a residue exists. In that Act, reimbursement to the donors is possible under two conditions: (1) the donor made a written request to that effect at the time the donation was made, and (2) the donation is equal to or greater than \$500 or an amount established by regulation.

[54] This provision, which originated in the UIPAA, was not revisited by the Working Group that developed the UBCCA. However, there is some question whether it is appropriate in the current context of crowdfunding. For one, it is unrealistic that a donor would consider making a written request to this effect, unless the crowdfunding platform offered that possibility. Furthermore, it would not be overly onerous for platforms to reimburse donors for small amounts. On the other hand, reimbursing donors could prove onerous for trustees once the gifted property has been remitted to them. Moreover, one might argue that it is preferable to dispose of the residue by remitting it to the beneficiary or to organizations that pursue similar objects to that of the crowdfunding campaign, rather than to reimburse the donors. The UGCA aligns with the UBCCA, but s. 27 would merit further study if the UGCA were considered for enactment.

[55] There are two cases where the Working Group has chosen to incorporate the rule of reimbursement to the donors rather than the rules on disposal of the residue. These are (a) where a crowdfunding campaign is terminated for being prohibited by law or contrary to public order (see above), and (b) where a campaign is terminated at the demand of a beneficiary (s. 22). The UBCCA does not state which rules should apply in these two situations.

#### Private international law

[56] Further to our analysis, the Working Group decided that it was not appropriate for the UGCA to include specific rules on the international jurisdiction of Québec authorities or on the law that applies in the event of disputes. Book Ten of the Civil Code already sets out rules of private international law that cover these questions.

[57] The Québec legislator chose to group together, in Book Ten of the Civil Code, the rules of private international law that apply to a range of matters, rather than spreading these rules out

among the matters they concern. We find it important to respect this legislative choice. However, we were careful to examine the rules of Québec private international law that would apply to crowdfunding campaigns governed by the UGCA, to ensure that they are adequate. This is an important matter, as many crowdfunding campaigns are international in nature.

[58] While the guiding principles of the UBCCA generally resemble the rules set out in Book Ten of the Civil Code, the Working Group noted certain differences in their respective approaches:

- Article 3107 of the Civil Code provides that, if the parties do not expressly designate the applicable law in the trust act, the law that applies to the trust is the law with which the trust is most closely connected. To determine this, the following elements are considered: the place of administration of the trust, the place where the trust property is situated, the residence or the establishment of the trustee, the objects of the trust, and the places where they are to be fulfilled. These criteria are similar to those listed in s. 3 of the UBCCA, but without an order of precedence.
- If a platform's terms of use purport to state what law is applicable to the crowdfunding campaigns it hosts, a Québec court should consider that they constitute a contract of adhesion and a consumer contract, if those characterizations are appropriate. Article 3117 of the Civil Code overrides a clause that would "result in depriving the consumer of the protection afforded to him by the mandatory rules of the law of the State where he has his residence."
- Finally, article 3149 of the Civil Code could invalidate a choice-of-forum clause that would remove the jurisdiction of the courts of Québec in matters where Québec is the place of residence of the platform user. This jurisdiction is based on the courts' determination that such services constitute a consumer contract.<sup>30</sup>

## Concordance table

### UBCCA, UIPAA (civil law version), UGCA

<b>UBCCA (common law - 2020)</b>	<b>UIPAA (civil law - 2012)</b>	<b>UGCA (civil law - 2022)</b>
<b>Part 1 - Definitions and Application</b>	<b>Chapter I - Object and scope</b>	<b>Chapter I - Object and scope</b>
	1	1
1(1) “public appeal”	2, 3	Replaced by “crowdfunding campaign”: 2.3
1(1) “beneficiary”	--	--
1(1) “vulnerable beneficiary”	--	--
1(1) “user agreement”	--	--
1(1) “trust document”	“trust act” 5, 6	“trust act”: 4
1(1) “governing authority”	--	--
1(1) “qualified donee”	3, 29	3, 32
1(1) “savings institution”	9	8
1(1) “surplus”	“residue”: 23, 24	“residue”: 27 to 29
1(1) “trustee”	8	7
1(1) “fund”	“trust patrimony”: 8	“trust patrimony”: 4
1(1) “intermediary”	--	--
1(1) “terms of the public appeal”	4	“terms of the crowdfunding campaign”: 5
1(1) “appeal organizer”	--	--
1(1) “online platform”	--	“crowdfunding platform”: 8
1(1) “court”	--	--
1(2)	--	--
1(3)	--	--
2(1)	--	--
2(2)	3	1, 3
2(3)	--	--
2(4)	4, 6	4, 5
2(5)	33	36
<b>Part 2 - Trust</b>	<b>Chapter II – Constitution of a trust and legal regime applicable</b>	<b>Chapter II – Constitution of a trust and legal regime applicable</b>
3(1)	4	4
3(2)	--	--
3(3)	--	--
3(4)	--	--
3(5)	--	--
3(6)	--	--
3(7)	--	--
3(8)	--	--
	<b>Chapter III Administration of the trust</b>	<b>Chapter III Administration of the trust</b>
4(1)	8	7
4(2)	9	8
5(1)	5, 6	4, 5
5(2)	5, 6	4, 5
5(3)	5, 6	4, 5
5(4)	15	14
6(1)	--	21
6(2)	--	--
6(3)	--	--

6(4)	7	6
7(1)	22	25
7(2)	27	30
7(3)	--	--
7(4)	--	--
8	21	20
		<b>Chapter IV – Revision of the terms of the campaign</b>
<b>Part 3 – Surpluses and Refunds</b>	<b>Chapter IV – Termination of the trust and disposal of the residue of the trust</b>	<b>Chapter V – Termination of the crowdfunding campaign, termination of the trust and disposal of the residue of the trust</b>
9	--	--
10(1)	29	32
10(2)	30	33
10(3)	--	--
10(4)	--	--
10(5)	31	34
10(6)	29	32
10(7)	31	34
10(8)	--	--
10(9)	28	31
11(1)	24	27
11(2)	24	27
11(3)	24	27
11(4)	26	29
11(5)	27	30
12(1)	25	28
12(2)	26	29
12(3)	27	30
<b>PART – 4 Trustee’s Powers</b>		
13(1)	17	16
13(2)	--	--
14(1)	13	12
14(2)	--	--
14(3)	--	--
14(4)	--	--
15(1)	12	11
15(2)	11	10
16(1)	--	--
16(2).	--	--
17(1)	19	18
17(2)	19	18
18	--	--
19	--	--
20(1)	--	--
20(2)	--	--
20(3)	14	13
21	--	--
22(1)	20	19
22(2)	--	--
22(3)	--	--
23(1)	--	--
23(2)	--	--
23(3)	--	--



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23(4)	--	--
23(5)	6	5
24(1)	--	--
24(2)	16	15
24(3)	18	17
24(4)	23	26
24(5)	27	30
24(6)	6	5
<b>Part 6 - General</b>		
25(1)	--	22
25(2)	--	22
25(3)	--	22
25(4)	--	22
25(5)	--	24
25(6)	--	--
26	--	--
27	--	--
<b>APPENDIX</b>	<b>APPENDIX</b>	<b>APPENDIX</b>

<sup>1</sup> Uniform Law Conference of Canada, Uniform Benevolent and Community Crowdfunding Act, August 2020, online, [https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Benevolent-and-Community-Crowdfunding-\(1\)](https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Benevolent-and-Community-Crowdfunding-(1)) (accessed June 20, 2022).

<sup>2</sup> Uniform Law Conference of Canada, *Uniform Informal Public Appeals Act*, Winnipeg, August 2011.

<sup>3</sup> Uniform Law Conference of Canada, *Uniform Informal Public Appeals Act*, Whitehorse, August 2012, online, <https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Informal-Public-Appeals-Act> (accessed June 20, 2022).

<sup>4</sup> Final Report of the Working Group on a Uniform Benevolent and Community Crowdfunding Act, August 2020, *supra* note 1.

<sup>5</sup> The Trustee Acts of the common law provinces and territories are based for the most part on similar legislation adopted in the United Kingdom during the 19th century.

<sup>6</sup> *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

<sup>7</sup> For more information, see Michelle CUMYN and Wend-Nongdo Justin ILBOUDO, “L’encadrement juridique du sociofinancement au Québec” (2019) 60 *Les Cahiers de droit* 699 at paras. 17ff.

<sup>8</sup> See the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, s. 31, which creates a presumption to that effect: **31.** A corporation owns any property of any kind that is transferred to or otherwise vested in the corporation and does not hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.

The Act also provides as follows:

**33.** Subject to the limitations accompanying any gift and the articles or by-laws, a corporation may invest its funds as its directors think fit.

See also: *Les Coopérants, société mutuelle d’assurance vie (Liquidation de)*, [2002] R.J.Q. (C.A.) at para. 43; *Samson c. Fondation Joie d’enfants*, J.E. 94-794 (S.C.).

Claxton, however, has expressed the contrary view: In his opinion, if a foundation raises funds for a given purpose, it holds such funds subject to a trust: John B. CLAXTON, “Language of the Law of the Trust”, (2002) 62 R. du B. 273 at para. 81.

<sup>9</sup> This actually occurred in British Columbia. A campaign organizer launched a fundraising campaign to help a family who had lost everything in a house fire. He deposited the donations into his personal bank account, where they were seized by the Canada Revenue Agency in payment of his back taxes. See Julie NOLIN, “Concerns raised after \$12K in GoFundMe donations disappear,” CTV Vancouver, August 22, 2018, <https://bc.ctvnews.ca/concerns-raised-after-12k-in-gofundme-donations-disappear-1.4064329?%20autoPlay=true> (accessed June 20, 2022).

<sup>10</sup> Furthermore, under Québec law, a contract of gift must be drawn up before a notary unless there is delivery and immediate possession of the property (art. 1824 C.C.Q.). Such gifts are known as manual gifts. See: *Spina c. Sauro*,

[1990] R.L. 232 (C.A.). Possession might once more be obtained through a mandate; however, the existence of such mandate could be difficult to prove in practice.

<sup>11</sup> See articles 1400, 1401 and 1836 *et seq.* C.C.Q.

<sup>12</sup> See: *Les Coopérants*, *supra*, note 8.

<sup>13</sup> For further discussion, see CUMYN and ILBOUDO, *supra* note 7, paras. 35ff.

<sup>14</sup> See: Jacques BEAULNE, *Droit des fiducies*, 2d ed. (Montréal: Wilson & Lafleur, 2005) at 157, para. 167; Madeleine CANTIN CUMYN, “L’acte constitutif d’une fiducie” in Benoît MOORE (ed.), *Mélanges Jean Pineau*, (Montréal: Thémis, 2003) 649 at 657. Dean Brierley has expressed the view that the trust act cannot be a contract of gift. Rather, he considers it a specific juridical act: John E.C. BRIERLEY, “The Gratuitous Trust: A New Liberality in Quebec Law”, in *Mélanges offerts par ses collègues de McGill à Paul-André Crépeau* (Cowansville: Yvon Blais, 1997) 119 at 141ff.

<sup>15</sup> See Donovan W.M. WATER, Mark R. GILLEN & Lionel D. SMITH, *Waters’ Law of Trusts in Canada*, 3d ed., (Toronto: Thomson Carswell, 2009) at 1358-1359; John B. CLAXTON, *Studies on the Quebec Law of Trust* (Toronto: Thomson Carswell, 2005) at 78, paras. 4.10ff and at 266, paras. 13.42ff; *contra*: J. BEAULNE, *ibid.* at 153, para. 163 (the trust cannot be created verbally), at 158, para. 168 (a trust created by way of gift must be in notarial form), and at 160, para. 170 (a trust cannot be created by manual gift).

<sup>16</sup> J. BEAULNE, *ibid.*, at 136, paras. 152ff; M CANTIN CUMYN, *supra* note 14 at 657.

<sup>17</sup> J. BRIERLEY, *supra* note 14 at 143-144; J. CLAXTON, *supra* note 15 at 59, para. 3.17: both authors suggest that the property can be transferred to the trust patrimony after its creation.

<sup>18</sup> Compare: *Mathieu c. Tardif*, REJB 1997-03204, at para. 16 (C.Q.); *Samson c. Talbot*, AZ-50162668, B.E. 2003-295 (C.Q.).

<sup>19</sup> See, however, J. CLAXTON, *supra* note 8 at para. 80.

<sup>20</sup> See: *Bolduc c. Carrier*, 2006 QCCS 5485.

<sup>21</sup> Reference is made to an “association caritative” (in the English versions, a “charity” in two Quebec statutes: the *Act respecting the Autorité régionale de transport métropolitain*, CQLR c A-33.3, s. 12 and the *Act respecting public transit authorities*, CQLR c S-30.01, s. 110.

<sup>22</sup> See: *Regulation 45-110 respecting start-up crowdfunding registration and prospectus exemptions*, CQLR c V-1.1, r 21.03 (in force since September 21, 2021).

<sup>23</sup> The distinction between gratuitous contracts, such as gift, and onerous contracts, such as sale, is a classic distinction under civil law. See art. 1381 C.C.Q.

<sup>24</sup> Regarding investment or presale crowdfunding, see Michelle CUMYN, “Le sociofinancement” in Charlaïne BOUCHARD (ed.), *Droit des PME*, 2d ed. (Cowansville: Yvon Blais, 2021) at 337.

<sup>25</sup> *Regulation 45-110 respecting start-up crowdfunding registration and prospectus exemptions*, *supra* note 22.

<sup>26</sup> The Humboldt Broncos Memorial Fund, for example, was a crowdfunding campaign created to assist the victims of the tragic bus accident that occurred on April 6, 2018, in the small town of Humboldt, Saskatchewan, and which claimed the lives of 16 of the town’s junior hockey league team members. The campaign was launched by Sylvie Kellington, a Humboldt resident, through the GoFundMe platform. The campaign raised \$15 million in less than two weeks. Ms. Kellington appears to have relinquished her position to representatives of the Broncos team and GoFundMe, who created a non-profit corporation and applied the Court of Queen’s Bench for Saskatchewan to authorize a plan to distribute the funds. See: *Humboldt Broncos Memorial Fund Inc. (Re)*, 2018 SKQB 341 See also the court orders issued in this case on April 6, 2018, online: [cdn2.mltaikins.com/wp-content/uploads/2018/07/Filed-Order-Initial-Order-under-the-IPAA.pdf](https://cdn2.mltaikins.com/wp-content/uploads/2018/07/Filed-Order-Initial-Order-under-the-IPAA.pdf) and November 28, 2018, online: [cdn2.mltaikins.com/wp-content/uploads/2018/11/Final-Order.pdf](https://cdn2.mltaikins.com/wp-content/uploads/2018/11/Final-Order.pdf) (Q.B.G. No. 1038 of 2018) (pages accessed on June 20, 2022).

<sup>27</sup> For further information, see the evidence presented by representatives of the GoFundMe and GiveSendGo platforms before the House of Commons Standing Committee on Public Safety and National Security, 44th Parliament, 1st Session, minutes of the proceedings of March 3, 2022, online: <https://www.noscommunes.ca/DocumentViewer/fr/44-1/SECU/reunion-12/temoignages> (accessed June 20, 2022).

<sup>28</sup> Art. 1422 C.c.Q. However, the court may, exceptionally, refuse restitution to certain donors under art. 1699 para. 2 on the basis of the principle that “no one shall be heard, who invokes his own guilt” (*nemo auditer...*). This exception is used to sanction serious misconduct. See: Jean-Louis Baudouin, Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed., (Cowansville: Yvon Blais, 2013) at para. 922.

<sup>29</sup> See *supra* note 27.

<sup>30</sup> See *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, whose result was applied in *Demers v. Yahoo! Inc.*, 2017 QCCS 4154.