

**UNIFORM LAW CONFERENCE OF CANADA
CIVIL SECTION**

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

**Loi uniforme sur les appels
informels aux dons du public**

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

**Winnipeg Manitoba
August 2011**

REPORT OF THE WORKING GROUP ON A UNIFORM INFORMAL PUBLIC APPEALS ACT

OVERVIEW

About the Project

[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 [ACPD] in October 2009. The topic commended itself to the ACPD as a Civil Section project because it responded to a demonstrated need and a considerable amount of work had already been done on it by both the former Law Reform Commission of BC and by the BC Law Institute. Thus 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.¹

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

[3] The preliminary work of the Group was described in a Status Report made to the Civil Law Section at its meeting in August 2010.² That Report described the background to the project, the need for legislation, the issues to be addressed and Group's approach to them. A short time earlier the Group had issued and distributed a Consultation Paper³ setting out proposed draft legislation and a call for comment. The proposals in the Consultation Paper provided the basis for substantive discussion at the 2010 meeting that was most helpful to the Working Group.

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, frequently, 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.

UNIFORM LAW CONFERENCE OF CANADA

[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,”⁴ returning the contributions to those who gave them 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 is surprising. *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*.⁵ The law is clearly unsatisfactory with regard to surpluses or unusable balances in informally created public appeal funds.

[11] A second difficulty in relation to public appeal funds was noted by of the British Columbia Law Reform Commission in a Report submitted in 1993. Their creation is seldom well documented.⁶

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.

[12] The uniform legislation proposed by the Working Group is designed to address both of these difficulties.

The Approach of the Working Group

[13] Early in the project, the Working Group concluded that uniform legislation in this area was called for and proposed the creation of a uniform *Informal Public Appeals Act*. It then developed the features that should be embodied in the proposed Act:

REPORT OF THE WORKING GROUP ON A UNIFORM INFORMAL PUBLIC APPEALS ACT

- Reform should be pursued through a stand-alone act dedicated to public appeal funds rather than as an amendment to an existing *Trustee Act*.⁷
- The application of the proposed Act should be narrow in scope so as to exclude the fundraising activities of established bodies for their usual purposes. In particular, charities and other qualified donees registered under the *Income Tax Act* (Canada)⁸ should be excluded.
- 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, in conjunction with the Act, would provide a default governance structure for the trust created by the appeal. Where a governance structure otherwise exists, the default structure would apply only to the extent that it did not conflict with the existing one.

[14] These principles were reflected in a preliminary draft act that formed part of the Consultation Paper and which was discussed by the Civil Law Section at its 2010 meeting. That discussion along with the response to the Consultation Paper informed the contents of the *Uniform Informal Public Appeals Act* [hereafter *UIPAA*] proposed in this Report.

Features of the Proposed *UIAPP*

[15] The main features of the Act are described below in broad outline only. Greater detail may be found in the commentaries to its individual provisions.

Scope

[16] A starting point in assessing the scope of the Act is its core concept - the “public 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 fundraising effort carried out on a permanent or continuing basis” Thus, for the purposes of the Act “public appeal” is confined to sporadic, informal appeals.

[17] 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 other qualified donee.⁹ The reference to CRA registration constitutes a bright line test that will clarify the applicability of the Act in many otherwise problematic cases.

[18] The other provision that limits the application of the Act states that it is displaced by a number of more specific features of a governing authority or the terms of the appeal that may conflict with the Act.¹⁰

UNIFORM LAW CONFERENCE OF CANADA

The Trust

[19] The Act confirms that a public appeal fund is subject to a trust for the benefit of the object for which it is raised and is enforceable whether or not the object is charitable.¹¹ 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.¹² Persons entitled to enforce the trust include a trustee, donor, beneficiary, the Attorney General and any person having a “sufficient interest” in enforcement.¹³

Terms of the Trust

[20] The Act confirms the role of a formal trust document. It also refers to the model trust document [MTD] in the Schedule to the Act as one that trustees may wish to adopt. The approach to the MTD in this Report differs somewhat from that taken in the Consultation Paper. The version of the MTD set out in the Consultation Paper contained an extensive list of trustee powers with a trust document created for the purposes of the appeal deemed to include as much of the MTD as does not conflict with its other provisions or the terms of the appeal.

[21] On further reflection it was the conclusion of the Working Group that the MTD should, as far as possible, be kept short and simple by confining its contents to information concerning the background and objects of the appeal and relocating the provisions on trustee powers into the Act itself. Thus, Parts 4 and 5 of the proposed Act set out trustee powers and duties that were part of the MTD in the previous draft.

Surplus Funds

[22] “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. First, it stipulates that where a surplus occurs there is no resulting trust in favour of a donor.¹⁴ Second the principle of *cy pres* is extended to trusts for non-charitable objects.¹⁵ The Act permits a distribution of a surplus whether or not the appeal that led to the surplus was charitable. If the appeal that led to the surplus was charitable, a distribution of surplus may be made for a charitable object only. If the appeal was for a non-charitable object a distribution of surplus may be made for a charitable object or for another non-charitable object that is consistent with the spirit of the original appeal.

[23] 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, without court approval, to distribute the it among one or more registered charities or other qualified donees having objects similar in spirit to the original appeal. The value of the threshold suggested in the Act is \$20,000.

Refunds

[24] 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 \$500 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

[25] 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”).¹⁶ 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

REPORT OF THE WORKING GROUP ON A UNIFORM INFORMAL PUBLIC APPEALS ACT

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 Act stipulates a much longer permitted period of duration for non-charitable funds (80 years)¹⁷ and the application of the old rule against accumulations is abrogated with respect to them.¹⁸

Trustee Powers and Duties

[26] Part 4 of the Act sets out an array of provisions that would most likely be found in a well-drafted trust instrument created expressly for most informal public appeals. They include 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

[27] The provisions also address the discretion of the trustees in administering the fund; the ability of the trustees to act by majority; and the retirement and appointment of trustees.

[28] Part 5 of the Act places a duty on trustees in the form of a requirement that at least once each year the trustees 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 Model Trust Document

[29] The model trust declaration set out in a schedule the Act is designed to assist trustees in documenting the most important features of the public appeal. 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. It also permits the trustees to deal expressly with the disposition of a surplus should one arise. The MTD provides examples to assist fundraisers in adapting it to their appeal without legal assistance.

[30] 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 hopes that the development of uniform legislation on public appeals funds will stimulate banks to examine their own role in this area. A particular aspect of this is the use of the Model Trust Document. There will be many cases where the leaders of a public appeal seek to open an account but do not appear to have prepared any documentation in relation to the appeal. 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.

Relationship to the Uniform Trustee Act Project

[31] Work on the development of the *Uniform Informal Public Appeals Act* proceeded concurrently with is the development of a *Uniform Trustee Act* [hereafter *UTA*].¹⁹ Since trust law lies at the core of both projects a question naturally arises as to the relationship between the two projects.²⁰

[32] At the time this Report was settled the *UTA* remained a work-in-progress. The comments below reflect the

most

UNIFORM LAW CONFERENCE OF CANADA

recent drafts of the *UTA* and the current thinking of the *UTA* Working Group.²¹

[33] 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 will likely overlap and address the same issue. This is deliberate. There is no assurance that both uniform acts will be adopted in a particular jurisdiction or what the timing of implementation would be. Thus, some changes to the current law are embodied in each act 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] Since the membership of the two working groups partially overlaps, the two acts operate in harmony.

¹ 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*.

² Hereafter “Status Report 2010”. It can be accessed at [http://www.ulcc.ca/en/poam2/2010-14 Informal Public Appeals.doc](http://www.ulcc.ca/en/poam2/2010-14%20Informal%20Public%20Appeals.doc)

³ Hereafter “Consultation Paper.” It can be accessed at <http://ulcc.weebly.com/>

⁴ In its popular sense, “charity” means virtually the same thing as “benevolence.” In law, however, “charity” has 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.

⁵ [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 were entitled 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*, 7th ed. (Toronto: Thomson Reuters/Carswell, 2009), at 599; Donovan W.M. Waters, Mark R. Gillen, and Lionel Smith, *Waters Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson/Carswell, 2005), at 441, note 357. 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.]

⁶ Law Reform Commission of British Columbia, Report on Informal Public Appeal Funds (LRC 129 1993) at 29. Hereafter “BCLRC Report.” See: [http://www.bcli.org/sites/default/files/LRC129-Informal Public Appeal Funds.pdf](http://www.bcli.org/sites/default/files/LRC129-Informal%20Public%20Appeal%20Funds.pdf)

⁷ The *Trustee Acts* of most provinces are basically a re-enactment of trustee legislation enacted at various times during the 19th century in the UK; and see note 20 *infra*.

REPORT OF THE WORKING GROUP ON A UNIFORM INFORMAL PUBLIC APPEALS ACT

⁸ *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

⁹ Section 2(1).

¹⁰ Sections 10 2(2) and 2(3). See the definition of “governing authority.”

¹¹ Section 3.

¹² Section 4.

¹³ Section 8.

¹⁴ Section 9. In some circumstances a donor may be entitled to a refund when there is a surplus or a return of unused property. See sections 11 and 12.

¹⁵ Section 10.

¹⁶ *Accumulations 16 Act, 1800*, 39 and 40 George III, c. 98 commonly known as the *Thellusson Act*.

¹⁷ Section 7(1).

¹⁸ Section 7(3). In those provinces that have legislated to abrogate the rule against accumulations section 7(2) may be omitted.

¹⁹ This project also uses B.C. law reform work as its point of departure. See British Columbia Law Institute, *A Modern Trustee Act for British Columbia* (2004).

²⁰ A threshold question was whether work in relation to public appeal funds should simply be merged with and form part of the larger project. A difficulty with that approach is that a larger *Trustee Act* operates at a much higher level of generality and the legislation in relation to public appeals requires a level of detail that makes it a bad fit with legislation applicable to trusts generally. The Working Group therefore concluded that its goal should be the development of a separate uniform statute.

²¹ Gregory G. Blue, Q.C. and Arthur L. Close, Q.C. are members of the Working Groups for both projects.