

UNIFORM LAW CONFERENCE OF CANADA
CIVIL SECTION

Consultation Paper

on a

**Uniform Informal Public
Appeals and
Crowdfunding Act**

PLEASE SUBMIT YOUR COMMENTS

NO LATER THAN January 15, 2020

A copy of this Consultation Paper can be downloaded at:

www.unilaw.ca

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About the Consultation

This document outlines proposals by a Working Group of the Uniform Law Conference of Canada for a *Uniform Informal Public Appeals and Crowdfunding Act*.

The proposed uniform Act is a revised version of the *Uniform Informal Public Appeals Act* which was issued by the Conference in 2011. The recent growth of public appeals conducted through the internet, popularly known as “crowdfunding” has prompted the Conference to revisit this topic.

Before finalizing its recommendations to the Conference, the Working Group is anxious to hear from interested persons and organizations concerning the proposed uniform Act—hence this Consultation Paper.

The Working Group is particularly anxious to receive comments on the proposed revisions to the 2011 UIPAA, and the manner in which they address internet-based fundraising. That said, submissions concerning all aspects of the proposed Act are also invited.

Responses should be submitted no later than January 15, 2020.

Shorter comments can be sent using the contact form on the home page at:

www.unilaw.ca

The preferred method for response is by email directed to the project leader at:

consult@unilaw.ca

A lengthy submission can be sent as an email attachment in one of the standard text formats.

Responses can also be sent by ordinary mail to:

Executive Secretary
Uniform Law Conference of Canada
15 Ettrick Crescent
Barrhaven, Ontario
K2J 1E9 Canada

Part I - The Background to a Proposed Uniform Act

Informal Public Appeals

Appeals to the public for donations are a feature of everyday life. Those 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. Most often, such appeals are begun by a single person or a small group. For many years they followed a typical pattern: the fundraisers would simply issue a message asking for donations, open a bank account to hold the fund and enlist the aid of the press and the electronic media to publicize the appeal.

These informal public appeals were the subject of a project launched in 2009 by the Civil Section of the Uniform Law Conference of Canada. The Conference [hereafter ULCC] has operated continuously since its formation in 1918. Its Civil Section brings together government policy lawyers and analysts, lawyers in private practice, law teachers and representatives of Canada's law reform bodies, all of whom serve on a volunteer basis. They consider areas in which provincial and territorial laws would benefit from harmonization. The main work of the Section is reflected in "uniform statutes", which the Section develops and recommends for enactment by all relevant governments in Canada. Further information about the ULCC and its work can be found at its website: www.ulcc.ca

The ULCC concluded that the legal framework within which informal public appeals operate was deficient in a number of ways:

- Technical distinctions flowing from charity and trust law can make it difficult to characterize a fund generated by an informal appeal.¹
- These distinctions create special difficulties when an appeal generates a surplus – where the amount raised is more than is needed to satisfy the object of the appeal.
- Their creation is seldom well-documented. This leaves room for disputes and misunderstandings in connection with a fund if the rights, powers and duties involved are not spelled out clearly in a written document.
- The courts have only limited powers to assist appeal organizers in dealing with a fund if difficulties arise.

¹ 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. In this technical sense, most informal appeals are not charitable.

Consultation Paper on a Uniform Informal Public Appeals and Crowdfunding Act

The response of the ULCC was, in 2011, to develop and promulgate the *Uniform Informal Public Appeals Act* [UIPAA] which embodied the following features:

- The *UIPAA* should be in the form of a stand-alone act dedicated to public appeal funds rather than as an amendment to an existing *Trustee Act*.
- The application of the *UIPAA* should be narrow in scope so as to exclude the fund-raising activities of established bodies for their usual purposes.
- The *UIPAA* should confirm that money raised through a public appeal is held in trust for the object of the appeal.
- The *UIPAA* should be largely default in character and capable of being displaced by more specific documents and rules created to govern a particular appeal.
- The *UIPAA* should confirm a power in the court to direct the application of surplus funds raised for non-charitable objects.
- The *UIPAA* should provide a mechanism for the disposition of small surpluses.
- The *UIPAA* should include, as a schedule, a model trust document that would provide a default governance structure for the trust created by the appeal.

A fuller description of the *UIPAA* is beyond the scope of this document. Readers seeking further information should consult the text of the Act, its commentaries and the 2011 report of the Working Group. These may be downloaded at:

<http://www.unilaw.ca>

The 2011 report sets out, in much greater detail, the problems the *UIPAA* is intended to address and its approach to them.

Relevant extracts from the 2011 Report may be viewed on line here:

<http://unilaw.ca/data/documents/Report-2011-Extracts.htm>

The focus of the current project is to revise and update the *UIPAA*. The Act and the report provide necessary context for the current project and those wishing to comment are urged to familiarize themselves with them.²

² Also helpful may be the French language version of the Act and report as well as the version of the Act framed with Quebec law in mind using concepts and terminology to ensure that it operated harmoniously with the Civil Code. They may be found in both official languages for downloading at www.unilaw.ca.

Why Revisit the Uniform Informal Public Appeals Act ?

Developments Since 2011 - The Growth of Crowdfunding

The paradigm that drove the creation of the *UIPAA* was the locally based appeal, usually in aid of benevolent or humanitarian assistance to an identifiable person or group or other community “cause”. While the paradigm of the local appeal may still exist, the machinery available to appeal organizers has changed dramatically. The Internet has brought new ways of amassing public support for objects that had typically been the focus of local appeals and objects for which mass funding or participation was not previously possible. “Crowdfunding” has become the catchword. Of particular significance is the emergence of a number of internet platforms devoted to fund-raising for a variety of objects and purposes. Much of the fundraising now facilitated by these internet platforms has replaced appeals that formerly would have been locally-focused.

Developments Since 2011 - The Humboldt Broncos Disaster

Saskatchewan was the first jurisdiction to implement the Uniform Act and, as it turns out, its *IPAA* was in place where and when it was most needed. The disastrous highway accident involving a bus carrying the Humboldt Broncos junior hockey team resulted in significant loss of life and injuries. An appeal, with extremely general objects, carried out through an internet platform (GoFundMe), raised approximately \$15 million and how it should be distributed constituted a major test of Saskatchewan’s *IPAA*. Fortunately, the provisions of the Act gave the organizers and the court all the tools they needed to craft a distribution scheme that commanded almost unanimous support of the victims and their families. The existence of the Act averted what had the potential to be an extremely divisive issue within the community.³

Although the Act in its present form proved its worth in the Humboldt case, it cannot be safely assumed that its application will be equally straightforward in other cases involving appeals conducted using an internet platform. On slightly different facts the application of the Act might well have been in doubt.

Conclusion

The growth of internet-based crowdfunding has added a significant new dimension to fundraising that takes place outside the usual channels of campaigns by established bodies and charities. The reach of the internet means that the appeal is directed to a worldwide body of potential donors rather than a mainly local community. The amount of money that can be raised can far outstrip what might be raised in a purely local appeal. The stakes have been raised to a degree unthinkable 10 years ago as the Humboldt Broncos appeal demonstrates. It is increasingly important that the fundraisers and the courts have the tools necessary to deal with and oversee funds raised in this new environment.

³ See *Humboldt Broncos Memorial Fund Inc. (Re)*, 2018 SKQB 341 (CanLII); available for download at www.unilaw.ca.

Much has changed since the *UIPAA* was created. The evolving fundraising environment and the experience to date with the *UIPAA* and internet-based fundraising prompted the ULCC to initiate this project. It is not a new project in the sense that it starts with a clean slate. The Working Group⁴ formed to carry it forward was given a clear mandate:

- The starting point for the project should be the *UIPAA*.
- Revisions and additions to the *UIPAA* should focus on responding to issues arising out of changes to the machinery of fundraising described above.

To employ a somewhat tired metaphor, the aim is not to re-invent the wheel. Rather, it is to take a wheel designed a generation ago for local roads and local conditions and ensure that it runs smoothly on the new superhighway.

Part II - Revising the Uniform Informal Public Appeals Act

An Overview

Part III of this paper sets out draft legislation, with a commentary, that reflects the provisional views of the Working Group concerning desirable revisions to the *UIPAA*. Readers will note that approximately 90% of the draft legislation consists of provisions and commentary carried forward from the 2011 *UIPAA* with little or no change. The focus of this part is to highlight the 10% of the Act that is significantly changed from its predecessor. The changes are discussed on an issue-by-issue basis and tied to specific provisions in the draft legislation in Part III. The Working Group is expressly seeking comment on these revisions.

The views and proposals set out are solely those of the Working Group members and have not been adopted by the ULCC. They are tentative only and will be reviewed by the Working Group in the light of the response to this paper before submitting its final recommendations to the Conference.

⁴ Members of the Working Group are: Arthur L. Close, Q.C. (Chair), Prof. Michelle Cumyn, Gregory G. Blue, Q.C., Prof. Albert Oosterhoff, Cynthia (Tia) Spencer, Julie McDonald, Laura Buckingham, Jordyn Allan, Jane Chapco, Clark Dalton (ULCC Project Coordinator) Mr. Close is a Past President of the ULCC and participated in the development of many uniform acts. 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. He also participated in the development of the *Uniform Trustee Act*. Prof. Cumyn teaches at Laval and has assisted the ULCC with its projects on Unincorporated Associations, Illegal Contracts and Commercial Tenancies. 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. Ms. Spencer is with the office of the Ontario Public Guardian and Trustee, Ms. McDonald is with the Alberta Ministry of Health, Ms. Buckingham is Counsel with the Alberta Law Reform Institute, Ms. Allan is in practice with the Saskatoon office of Miller Thompson, Ms. Chapco is with Saskatchewan Justice and Mr. Dalton is ULCC Project Coordinator. Members Close, Cumyn, Blue and Oosterhoff were also members of the 2011 Working Group that developed the *Uniform Informal Public Appeals Act*.

The Language of the Act

Clarifying the application of the UIPAA to fundraising conducted through the internet requires a reconsideration of some of the language and vocabulary used to describe the participants and circumstances.

Title of the Act

The existing title of the Act would cease to convey its content and purpose. A new title that contains the word “crowdfunding” would do so more clearly. The Working Group has adopted the *Uniform Informal Public Appeals and Crowdfunding Act* as a working title.

New and Revised Definitions

Definitions of terms and expressions found in the Act are set out in section 1. Many are carried forward from the 2011 Act either unchanged or with slight modifications. Some newly defined terms simply provide greater clarity to concepts already implicit in the Act while others are expressly included to reflect the way in which the Act embraces internet fundraising.

In most cases the definitions are self-explanatory and the reader is referred to the definitions themselves. There are, however, three that call for special comment:

“governing authority”

The “terms of the appeal” have been added to the list of items that constitute a governing authority. “Contract” has been extended to include a user agreement (a defined term) to the extent that it embodies the terms of an appeal.

“public appeal”

The definition of this term has been narrowed. Unlike the 2011 definition it no longer includes proceeds of rummage sales and the like and benefit concerts. This is consistent with section 2(2)(e) which excludes from the Act appeals that provide an economic benefit to the donor.

“intermediary”

This definition is most relevant to section 4(2) which relieves most intermediaries from being characterized as trustees under the Act. In the 2011 Act it applied only to banks and “near banks”. This new definition would extend the section to internet platforms that facilitate fundraising and hold funds in that capacity.

What Funding Objects Should the Act Cover?

In 2011, *ad hoc* appeals were almost entirely limited to objects with a benevolent, philanthropic or humanitarian flavour or objects that were primarily local or community “causes”. Today internet

fundraising embraces a much wider variety of objects that were not previously possible – things like investment opportunities or backing a particular project (often linked to a merchandising initiative). Thus the potential reach of a revised *UIPAA* is much greater.

The Working Group has concluded that the focus of the legislation should continue to be appeals for a humanitarian or public purpose. But an attempt to define the scope of the Act in those terms would be an overwhelming task. The Act's approach to achieving that focus is to identify certain fundraising activities that should be expressly excluded from the Act. These include fundraising as an investment opportunity (see section 2(2)(c)) and fundraising for partisan political purposes (see section 2(2)(d)) which, in any event, are regulated by other legislation. Also excluded are appeals that provide a benefit to donors other than a reward of token value or public recognition of the donation (see section 2(2)(e)).

The Act would continue to exclude appeals conducted by registered charities and other qualified donees that are subject to oversight by the Canada Revenue Agency (see section 2(2)(a)). This exclusion would also extend to appeals conducted through an intermediary if the proceeds are to be paid directly to a qualified donee (see section 2(2)(b)).

In most cases it will be clear whether or not a particular appeal is excluded from the Act.

Jurisdiction and Choice of Law

These concepts essentially define the application of the Act and are probably the most challenging issues to be confronted. In 2011, in most cases, the appeal would be local with the object of the appeal, the organizers and the donors all located in the same jurisdiction. The application of the *UIPAA* would be relatively straightforward. Today, internet based appeals can be much more geographically diffuse:

- An appeal may have two or more organizers all located in different jurisdictions.
- The object of the appeal may not be located in a single jurisdiction and, even if it is, that jurisdiction may not be where any appeal organizer is located.
- Donors to the appeal may be located any place worldwide.

How should the *UIPAA* be modified to provide guidance on its application in the age of internet-based appeals?⁵

Residence of the Appeal Organizer

One basis for its application is already implicit in the *UIPAA* - the residence of the trustee/organizer. The proposed revisions to the Act would make this explicit through the combined effect of sections 2(1)(a) and 3(6)(b). The revisions go on to provide guidance if the organizers are two or more

⁵ If a governing authority such as a trust document created expressly for the appeal sets out a choice-of-law rule that would ordinarily determine the application of the Act. See section 3(3) but note the exception in section 3(4).

individuals or entities (section 3(6)(c)) and if the organizer is an entity that is not an individual (section 3(5)).

Closest Connection

While the *UIPAA* worked well in fashioning an outcome in relation to the fund generated by the Humboldt Broncos appeal, the case also illustrated a potential limitation of the legislation. If the appeal organizer had been located in a province other than Saskatchewan the application of the Act would have been problematic unless the organizer took active steps to bring the fund within the Act.

The view of the Working Group is that in a case like this, where the enacting jurisdiction has the closest connection to the object of an appeal, that jurisdiction has an overriding interest in the application of its legislation to the resulting fund and this should be the primary basis on which a revised Act should apply.

This principle is reflected in the revised Act in sections 2(1)(b) and 3(6)(a).

Revision of the Terms of the Appeal

Another significant issue concerns actions by the appeal organizer to revise the terms of the appeal. In the Act, “terms of the appeal” is defined to mean the information made available to the public on which a decision to donate will be based. Today, this is usually the information posted on an fundraising internet platform setting out, often in very general language, the background to the appeal and how the funds raised are to be dealt with.

Changing the terms of a public appeal was not a significant issue in 2011. Once an appeal had been publicized through the usual channels it was difficult to revise. Today, many internet platforms permit appeal organizers to revise the terms of an appeal while it is in progress. Many examples of such revisions are reasonable and well-intentioned attempts to cope with a change in circumstances.

The *UIPAA* currently prohibits altering the terms of the appeal once donations have been received. The Working Group has considered whether the prohibition should:

- be retained in its current form,
- not be carried forward, or
- be retained but in a modified form

The underlying reason for the prohibition is to protect expectations of the original donors that may be thwarted by changes in the object of the appeal, resulting in their donations being used for purposes which they do not support. But later donors will also have expectations based on purported revisions to the terms of the appeal that may later be held to be ineffective. The challenge is to identify an appropriate balance.

Consultation Paper on a Uniform Informal Public Appeals and Crowdfunding Act

To retain the prohibition would be to ignore the reality that most appeal organizers will not be aware of the Act or its provisions. To the extent that an internet platform permits revisions to the appeal, organizers will do so when it seems appropriate. One should be slow to stigmatize, as being in breach of the Act, organizers who, in good faith, attempt to implement reasonable and supportable changes to the terms of an appeal. On the other hand, organizers should not be given a blank cheque to revise the terms of the appeal in any way they see fit.

The Working Group has adopted a compromise solution, guided by the kinds of revisions that are actually occurring and which deserve the support of the Act. These revisions tend to focus on two things. The first is to respond to shifting circumstances which are likely to result in a surplus where none was foreseen at the time the appeal was launched. In these cases the alteration takes the form of providing for the disposition of a surplus if one occurs. The second is where the terms of the appeal set out a fundraising goal that proves to be unrealistic and a new goal is provided.

The Working Group has provisionally concluded that alterations of this kind to the terms of an appeal should be permitted by the Act. This is done in section 6(1) and modifications to the language of section 10(2) that allow the permitted changes to function as an exception to the prohibition.

The ability to introduce a scheme for the disposition of a surplus is subject to two conditions: First, it must conform to the rules set out in section 10 which applies to surplus schemes generally. Second, the specific scheme set out in relation to a surplus must be consistent with the spirit of the original appeal.

Other Revisions to the UIPAA

Clarification

A few of the provisions carried forward from the current Act have been slightly revised to achieve greater clarity in their application or operation. No change in substance is intended. In some cases the marginal notes and the commentary to the Act have been modified for the same reason.

Segregated Account

A new section 24(1) places a duty on a trustee/organizer that has custody or control of a fund to hold it in a separate trust account.

General Offence Provision

See section 25 and commentary.

Model Trust Document

Paragraph 3.(3) has been added to the Model Trust Document. It calls for the identification the internet platform (if any) that assisted with the conduct of the appeal.

Conclusion

Bilingual and Bijural Issues

This draft of a revised version of the *UIPAA* has been developed primarily for implementation in the common law provinces of Canada. While a French language version of the 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. It is also planned to create, in a format yet to be determined, a Quebec-specific statute drafted in the style normally used there and more closely aligned with civil law concepts and the *Civil Code* of Quebec.

In Quebec, the issues currently raised by public appeals and crowdfunding are somewhat different from those stated in part III (below), because an appeal is unlikely to be characterized as a trust. The Québec version of the UIPAA was designed to apply the law of trusts to a public appeal conducted in Québec. The working group considers that the most appropriate vehicle for an informal public appeal or crowdfunding campaign in Québec continues to be the trust. It is expected that the modifications set out in this consultation paper may appropriately be carried over to the Québec version of the UIPAA.⁶

Response

The Working Group is interested in receiving your response to the draft *Uniform Informal Public Appeals and Crowdfunding Act* and the policies that it embodies. The contents of the draft legislation are tentative only and are subject to revision following consideration of the responses received. The draft Act represents the views of the Working Group only and have not been formally adopted by the Civil Section of the Uniform Law Conference of Canada.

⁶ Au Québec, les enjeux que soulèvent les appels aux dons et le sociofinancement diffèrent en partie de ceux qui sont identifiés dans la partie III (ci-dessous). En effet, il est peu probable qu'un appel réalisé au Québec soit qualifié de fiducie, en droit actuel. La version québécoise de la LAIDP a d'ailleurs été conçue pour que l'appel informel réalisé au Québec soit qualifié de fiducie. Le groupe de travail considère que la fiducie demeure le véhicule approprié pour encadrer un appel informel ou une campagne de sociofinancement au Québec. Il s'attend à ce que les modifications envisagées dans le présent document puissent être transposées de manière opportune dans la version québécoise de la LAIDP.

Part III – A Proposed UNIFORM INFORMAL PUBLIC APPEALS AND CROWDFUNDING ACT

Sources

Parts 1 to 3 - The provisions in these Parts are a mixture of:

- a current *UIPAA* provision carried forward with no change in content or numbering and identified with the note *[Source - UIPAA]*,
- a current *UIPAA* provision carried forward with no change in content but with different numbering and identified with the note *[Source - UIPAA s. n(m)(o)]*,
- a current *UIPAA* provision carried forward with a significant change in content and possibly different numbering and identified with the note *[Source - UIPAA modified s. n(m)(o)]*,
- a new provision identified with the note *[Source - New]*.

Part 4 and Part 5 - The provisions in these Parts concern the powers and duties of trustees. Only sections 24(1) and 25 are new. The remainder have been carried forward from the *Uniform Informal Public Appeals Act* virtually unchanged with no particular identifier of the source.

Schedule - Apart from the addition of clause 3.(2) to the Model Trust Document, the Schedule to the *UIPAA* has been carried forward without any changes.

UNIFORM INFORMAL PUBLIC APPEALS AND CROWDFUNDING ACT

Commentary/Introduction: The expression “informal public appeal” is meant to distinguish between the fundraising efforts carried out by organized charities and similar bodies on a continuing basis and the kind of informal fundraising with which this Act is concerned. An informal public appeal will usually arise in reaction to a specific event or concern. A familiar example is an appeal for funds to provide relief in relation to a misfortune that has struck an individual, family or community. Such appeals are frequently led by persons with limited experience in fundraising and in the administration of funds that are the proceeds of the appeal.

Although appeal organizers may not be aware of it, their public appeal is at the centre of a complex web of trust and charity law, much of which is obscure and inaccessible. So long as nothing unexpected arises in the course of the appeal or the administration of the fund this may not pose a problem. However, unforeseen questions can arise. Often these questions can be answered if the organizers have appropriately and clearly recorded the circumstances that led to the appeal and its objects. In reality, however, this is seldom done. Nor does the general law provide a clear legal framework to guide the organizers. This gap may subject them to legal liability or cause the appeal to fail to fulfill its objects.

A recurring issue concerns informal public appeals that result in a surplus. A surplus may occur where more money is raised than is needed to satisfy the objects of the appeal or, sometimes, too little is raised to be of any real use. The law governing the proper way to distribute a surplus is particularly unsatisfactory. This is a reflection of a distinction the law draws between objects of an appeal that are “charitable” and those that are not. This distinction can be highly technical and elusive with the result that some objects that might reasonably be described as “philanthropic” or “benevolent” fail to satisfy the strict legal definition of “charitable”. An example would be an appeal to send an ailing child to an out-of-province hospital for necessary surgery – not “charitable”.

The purpose of the *Uniform Informal Public Appeals and Crowdfunding Act* is to provide an appropriate legal framework to assist in their creation and administration. It reforms some aspects of the general law to ensure that trust law applies evenly to all appeals; it provides special guidance in relation to surpluses; it contains a list of powers available to the fundraisers to properly administer the fund raised by the appeal; it provides for judicial oversight where appropriate; it recognizes the importance that internet-based crowdfunding platforms have come to play in the conduct of such appeals. Also, set out as a Schedule to the Act, is a simple model trust document that can be adapted to properly document most informal public appeals.

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PART 1

DEFINITIONS AND APPLICATION

Definitions

1(1) The following definitions apply in this Act

“appeal organizer” means a person that initiates a public appeal and specifies how donations are to be made to the fund. *[Source - New]*

“court” means the *[insert the name of superior court of the enacting province or territory]*, except in the definition “governing authority” and in paragraph 6(a). *[Source - UIPAA]*

Commentary: Matters involving trusts are dealt with by the superior trial court of the enacting jurisdiction.

“fund” means a fund of money or other property raised through a public appeal. *[Source - UIPAA]*

“governing authority”, in relation to a trust referred to in subsection 3(1), means

- (a) the constitution, charter, incorporating document or bylaws of an incorporated body or foundation;
- (b) the terms of the appeal;
- (c) a contract, including a user agreement to the extent that it embodies the terms of the appeal;
- (d) an order of a court; or
- (e) a trust document

that governs or regulates the trust or the public appeal associated with it. *[Source - UIPAA modified s. 1(1)]*

Commentary: The definition of “governing authority” covers various sources of authority that may constitute the basis of a public appeal and which, in conjunction with this Act, stipulates the characteristics and purposes of the appeal.

“intermediary” as the circumstances of a public appeal may require, means

- (a) a savings institution that holds a fund, or
- (b) an internet platform. *[Source - New]*

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“internet platform” means an internet site that,

(a) assists in organizing a public appeal, and

(b) holds or transmits a fund raised through a public appeal. *[Source - New]*

“public appeal” means a message directed at the public generally, or at a section of the public, requesting donations to a fund that is intended to be used for a specified object, whether charitable or non-charitable, but does not include a message communicated as part of a fundraising effort carried out on a permanent or continuing basis. *[Source - UIPAA modified s. 1(1)]*

Commentary: This definition sets out what must be contained in a fundraising message for it to be a “public appeal.” It must mention the reason why the fund is being raised. That reason need not be charitable in the technical sense of that term. The definition of “public appeal” also restricts the application of the Act to *ad hoc*, informal appeals.

“savings institution” means a bank, credit union, trust company or similar entity that holds a fund. *[Source - New]*

Commentary: The interpretation legislation of enacting jurisdictions should be reviewed for a definition that includes “near banks” that might be used in this Act in preference to this defined term.

“surplus” means the assets remaining in a fund that are no longer needed, are insufficient to satisfy or that otherwise cannot be used for the object of the public appeal. *[Source - UIPAA modified s. 1(1)]*

“terms of the public appeal” means the information given to the public on which a decision to donate to the appeal may be based including information provided by an internet platform in relation to the conduct of the appeal. *[Source - UIPAA modified s. 1(1)]*

“trust document” means a trust document executed or deemed to be executed under section 5. *[Source - UIPAA]*

“trustee” means a trustee of a fund. *[Source - UIPAA]*

“user agreement” means an agreement between an appeal organizer and an intermediary. *[Source - New]*

1(2) Unless the context requires otherwise, a reference in this Act to a “public appeal” includes a reference to a fund raised through a public appeal and the trust associated with the fund. *[Source - UIPAA]*

Application of this Act

2(1) Subject to subsections (2) to (5), this Act applies to the following:

- (a) any public appeal for which the associated fund is subject to a trust pursuant to subsection 3(1) that is governed by the law of *[the enacting jurisdiction]*, and
- (b) any public appeal for which the associated fund is subject to a trust pursuant to subsection 3(1) that is not governed by the law of *[the enacting jurisdiction]*, but that has an object most closely connected with *[the enacting jurisdiction]*. **[Source - New]**

Commentary: This provision sets out two alternative bases on which the application of the Act to a particular appeal may rest. The first, paragraph (a), is where the choice of law rules in section 3 point to the application of the law of the enacting jurisdiction. Here, a connection between an appeal organizer and the enacting jurisdiction may be relevant. The second, paragraph (b), is where the object of the appeal has the closest connection with the enacting jurisdiction. The application of the Act can rest on either or both. For greater certainty, section 3(6)(a) restates the closest connection test as a basis for the application of the law of the enacting jurisdiction.

2(2) Despite subsection (1) this Act does not apply to

- (a) a public appeal conducted by a body that is a qualified donee within the meaning of the *Income Tax Act* (Canada), **[Source - UIPAA]**

Commentary: Paragraph (a) makes it clear that fundraising campaigns and appeals conducted by registered charities and similar organizations recognized by the Canada Revenue Agency are unaffected by this Act.

- (b) a public appeal conducted through an intermediary where the user agreement stipulates that the fund is to be paid directly by the intermediary to a qualified donee within the meaning of the *Income Tax Act* (Canada), **[Source - New]**

- (c) a public appeal whose object is to provide an investment opportunity to the donor, including, without limitation, any other commercial or investment activity governed by *[here the enacting jurisdiction should insert the title of any applicable legislation regulating investment and securities]*, **[Source - New]**

- (d) a public appeal whose object is to support partisan political activity if such fundraising is otherwise governed by *[here the enacting jurisdiction should insert the title any applicable legislation regulating political fundraising (including Federal legislation)]*, **[Source - New]**

- (e) a public appeal that provides for an economic benefit to donors other than a benefit that is

- (i) an opportunity for public recognition of the donation, or
- (ii) a gift or reward that is of token value only. **[Source - New]**

2(3) The following provisions of this Act apply to a public appeal to which this Act applies

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regardless of the terms of the public appeal or its governing authority:

- (a) subsection 4(1) (trustees);
- (b) section 7, to the extent that it sets a fund's maximum duration;
- (c) subsection 10(2) (distributing a surplus). *[Source - UIPAA s. 2(2)]*

Commentary: Despite the default role of this Act (see commentary to subsection (4)) there are a handful of provisions that should not be capable of being overridden by a an otherwise applicable authority or the terms of the appeal. See also section 24(7).

2(4) The remaining provisions of this Act apply to a public appeal only to the extent that they do not conflict with the terms of the public appeal or its governing authority. *[Source - UIPAA s. 2(3)]*

Commentary: Many appeals are issued informally with little planning, especially at the local level. Usually, the rights and obligations that attach to them are poorly understood by fundraisers and donors alike. This draft legislation is intended to establish a "default" scheme to apply only to the extent that a public appeal fund is not regulated under some other legal structure, such as other legislation or a formally created trust. When money is raised by an incorporated society or foundation for its normal purposes, its use will generally be governed by the organization's constitution.

2(5) This Act does not apply to a public appeal initiated before this section comes into force.. *[Source - UIPAA s. 2(4)]*

Commentary: Jurisdictions that have adopted the *Uniform Informal Public Appeals Act*, and are enacting this Act to replace it, should revise this provision to provide for an appropriate transition.

PART 2

THE TRUST

Trust of public appeal fund

3(1) A fund is subject to a trust for the benefit of the object for which the public appeal was conducted. *[Source - UIPAA]*

Commentary: Subsection (1) confirms that a public appeal fund is subject to a trust. It restates the effect of case law, but in so doing it highlights the nature of the rights and obligations surrounding the fund. A trust is a relationship in which a person or entity (the trustee) has legal ownership of certain property, but also has a duty to administer the property for the benefit of another person (the beneficiary) or so that a legally permissible purpose is served. It is important to note that a trust relationship can not arise where there is only one trustee and one beneficiary and they are the same person. Thus, if an appeal

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organizer seeks donations for the organizer's sole benefit those donations may, depending on the specifics of the appeal, take effect as a gift to the organizer and this Act would not apply.

3(2) The trust is enforceable regardless of whether a trust with the same object would be enforceable under the general law. *[Source - UIPAA]*

Commentary: Subsection (2) allows a public appeal fund to be protected by a trust even if a valid, enforceable trust with the same object would be legally impossible in another context. (The persons whom or the purposes which a trust is intended to benefit or sustain are called its "objects.") Generally speaking, an enforceable trust must have as its object specific persons or an identifiable class of persons, or else the furtherance of a purpose the law regards as charitable. Formerly, trusts for non-charitable purposes were invalid apart from a few exceptions. Combinations of charitable and non-charitable objects were not permitted. The present law still affords them only limited recognition such as where a jurisdiction has enacted legislation comparable to section 20 of the *Uniform Perpetuity Act*.

Subsection (2) recognizes that appeals are often launched spontaneously, without prior legal advice on their wording. For example, an appeal might be launched for "the relief of the X and Y families, left homeless after a flood. Any excess will go for other local causes." Apart from statutory validation, this combination of objects could not give rise to a valid trust for a number of technical reasons. The effect of subsection (2) would be to permit this appeal to take effect as a valid trust.

3(3) The trust is governed by the law of the jurisdiction stipulated in the governing authority. *[Source - UIPAA]*

3(4) Subsection (3) does not apply if the stipulated jurisdiction is contained in a provision of a user agreement unless the stipulated jurisdiction has a real and substantial connection to the location of

(a) the ordinary residence of an appeal organizer, or

(b) if paragraph (a) does not apply, the object of the public appeal. *[Source - New]*

Commentary: This subsection addresses a concern that the user agreement of a non-Canadian based internet platform might contain a jurisdictional stipulation that would displace the Act where it should otherwise apply.

3(5) In this section, if an appeal organizer is an entity that is not an individual, the location of its ordinary residence must be determined in accordance with the *[Uniform Court Jurisdiction and Proceeding Transfer Act]*. *[Source - New]*

Commentary: This subsection incorporates by reference rules respecting ordinary residence provided in the *Uniform Court Jurisdiction and Proceeding Transfer Act [UCJPTA]*. The relevant provisions are:

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7 A corporation is ordinarily resident in [the enacting jurisdiction], for the purposes of this Part, only if

(a) the corporation has or is required by law to have a registered office in [the enacting jurisdiction],

(b) pursuant to law, it

(i) has registered an address in [the enacting jurisdiction] at which process may be served generally, or

(ii) has nominated an agent in [the enacting jurisdiction] upon whom process may be served generally,

(c) it has a place of business in [the enacting jurisdiction], or

(d) its central management is exercised in [the enacting jurisdiction].

8 A partnership is ordinarily resident in [the enacting jurisdiction], for the purposes of this Part, only if

(a) the partnership has, or is required by law to have, a registered office or business address in [the enacting jurisdiction],

(b) it has a place of business in [the enacting jurisdiction], or

(c) its central management is exercised in [the enacting jurisdiction].

9 An unincorporated association is ordinarily resident in [the enacting jurisdiction], for the purposes of this Part, only if

(a) an officer of the association is ordinarily resident in [the enacting jurisdiction], or

(b) the association has a location in [the enacting jurisdiction] for the purpose of conducting its activities.

Those enacting jurisdictions that have not adopted the *UCJAPTA* may wish to incorporate these provisions directly into subsection (5).

3(6) If a jurisdiction can not be identified under subsection (3)

(a) the trust is governed by the law of [*the enacting jurisdiction*] if the jurisdiction most closely connected to the object of the appeal is [*the enacting jurisdiction*].

(b) if paragraph (a) does not apply, the trust is governed by the law of the jurisdiction in which the ordinary residence of the appeal organizer is located, or

(c) if the appeal organizer is composed of

(i) two or more individuals, or

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(ii) two or more entities that are not individuals, or

(iii) any combination of individuals and entities that are not individuals

and any of the individuals or entities is ordinarily resident in *[the enacting jurisdiction]* the trust is governed by the law of *[the enacting jurisdiction]*.

(d) if paragraphs (a), (b) and (c) do not apply the trust is governed by the law as determined without reference to this Act. **[Source - New]**

Commentary: Subsection (6) sets out a hierarchy of criteria that may link the appeal to the law to be applied to the trust created by subsection (1). Uppermost is the case where the enacting jurisdiction is the one having the closest connection to the object of the appeal. Ranked next are criteria based on the ordinary residence of the appeal organizer. Note particularly that where there are multiple organizers the residence of any one of them in the enacting jurisdiction is sufficient to trigger the Act. Note also the use of “an”, with reference to an organizer, in section 3(4)(a).

3(7) *[A provision similar to section 20 of the Uniform Perpetuity Act]* does not apply to a trust referred to in subsection (1).. **[Source - UIPAA s. 3(5)]**

Commentary: Section 20 of the *Uniform Perpetuity Act* provides that “[A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital” for a period no longer than 21 years. Subsection (7) was included out of an abundance of caution to ensure that, as a matter of statutory interpretation, the policy of subsection (2) and section 7(1) is not overridden by a provision similar to section 20. In those jurisdictions that do not have such a provision, subsection (7) can safely be omitted.

Trustees

4(1) A person who directs the management and disbursement of a fund, or who has the authority to do so, is a trustee of the fund. **[Source - UIPAA]**

Commentary: Subsection (1) states who is a trustee of a public appeal fund.

4(2) An intermediary that holds a fund only for the purpose of collecting the fund and transmitting it to the appeal organizer is not, for that reason only, a trustee of the fund. **[Source - UIPAA modified s. 4(2)]**

Commentary: See the definition of “intermediary”. An intermediary that is a savings institution which merely holds the public appeal fund on deposit is not treated as a trustee. Section 437 (3) of the *Bank Act* (Canada) exempts chartered banks from having to ensure that a trust attaching to a deposit is carried out. Legislation governing provincially regulated bodies such as credit unions and trust companies may also provide a similar exemption. An intermediary that is an internet platform and is passive in relation to the management and distribution of the fund is treated similarly.

Trust document

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5(1) A trustee of a fund, or a person intending to become a trustee, may execute a trust document for the administration of the trust. *[Source - UIPAA]*

5(2) A trust document may be in the form of the Schedule, adapted to meet the circumstances. *[Source - UIPAA]*

Commentary: Normally the source of trustees' powers over the trust property, and their duties in respect of it, is a formal trust document. When a trust comes into being through creation of a fund by means of an appeal, the persons in charge of the fund should enter into a trust document, so that the rights and obligations surrounding the fund are made clear. While present law allows fundraisers to sign a document of this kind, it is rarely done – particularly when an internet platform is used in the conduct of an appeal. The Schedule to the Act contains a Model Trust Document which could be adapted to most situations.

5(3) If a trust document has not been executed in respect of a fund, every trustee of the fund is deemed to have executed a trust document containing as much of the Schedule as does not conflict with

- (a) the terms of the public appeal; or
- (b) any other governing authority of the trust;

and the terms of the public appeal and the circumstances in which it is made form the contents of paragraphs 2 (name of trust fund), 3 (reason, time and intermediary in relation to trust fund) and 4 (objects of trust fund) of the Schedule and, if the terms of the public appeal include a scheme for the distribution of a surplus, paragraph 5 of the Schedule. *[Source - UIPAA modified s. 5(3)]*

Commentary: In order to clarify the rights and duties surrounding the fund, subsection (3) makes the terms of the Model Trust Document apply to every public appeal fund, except to the extent that they are inconsistent with any express provision of a governing authority or the terms of the public appeal. Such express provisions will prevail over any inconsistent terms in the Model Trust Document. Because the Model Trust Document is specific to the appeal, its provisions are to be inferred from the terms of the appeal and the surrounding circumstances.

5(4) A trustee who has custody of a trust document must allow it to be inspected by any person who establishes to the trustee's satisfaction that he or she has made a donation to the fund of an amount provided for in subsection 11(1). *[Source - UIPAA]*

Commentary: Major donors are permitted to inspect the trust document.

Terms of the appeal and governing authority

6(1) If a public appeal is conducted through an internet platform that sets out the terms of the appeal the appeal organizer may, subject to a user agreement, revise those terms in relation to any of the following:

- (a) the provision or modification of a scheme to distribute a surplus that conforms to section 10,
- (b) the provision or modification of a fundraising goal,
- (c) if the object of the appeal is the relief of one or more identifiable individuals or an identifiable group of individuals, the provision or modification of the means by which the relief is to be delivered

but the revised terms of the appeal take effect only if the spirit of the public appeal is not affected by the revision. *[Source - New]*

Commentary: Some internet platforms permit appeal organizers to update or modify the information made available to potential donors. They may wish to do this to meet changing circumstances such as increased need to meet the object of the appeal (perhaps by increasing a stated fundraising goal) or to deal with decreased need that might result in the need for a scheme for to deal with a surplus. The latter presents a particular problem – balancing the interests of the early (pre surplus scheme) donors and the later (post scheme) donors who may have quite different perspectives on the surplus issue. The approach of section 6(1) is to authorize a limited group of modifications to the terms of the appeal which maintain the spirit of the sourceal (unmodified) appeal. The organizer who purports to introduce modifications that are outside the scope of section 6(1) runs the risk of a proceeding under section 8 to enforce the trust according to the terms of the appeal.

6(2) If there is a conflict or incompatibility among governing authorities applicable to a public appeal, or between a governing authority or authorities and the terms of the public appeal, the conflict or incompatibility must be resolved in favour of the earliest listed item that gives rise to the conflict or incompatibility:

- (a) a governing authority that is a court order;
- (b) the terms of the public appeal;
- (c) a governing authority that is a trust document;
- (d) a governing authority that is a contract except those provisions that set out the terms of the public appeal;
- (e) a governing authority that is the constitution, charter, incorporating document or bylaws of an incorporated body or foundation. *[Source - UIPAA modified s. 6]*

Commentary: Occasionally there may be a conflict between or among the terms of the appeal and a governing authority. Section 6 sets out a hierarchy that stipulates which is to prevail in case of a conflict. Paragraph (d) recognizes that the terms of the appeal may be embodied in a user agreement with an internet platform.

Duration of the fund and accumulations

7(1) If a fund is held in trust for a non-charitable object, the maximum permitted duration of the fund is 80 years, beginning on the day the first donation was received in response to the first public appeal or, if a shorter period is set out in the trust document, that shorter period. *[Source - UIPAA]*

Commentary: While a fund for charitable objects has always been permitted to endure for an unlimited period, some limitation in relation to non-charitable objects is appropriate. In subsection (1) the outside limit is set at 80 years which is consistent with perpetuity legislation.

7(2) If a fund is held in trust for a non-charitable object, any property remaining in the fund when the maximum permitted duration expires is deemed to be a surplus, which the trustee must distribute in accordance with Part 3. *[Source - UIPAA]*

7(3) Subsection (1) applies despite any other law to the contrary. *[Source - UIPAA]*

7(4) *[Any enactment similar to the (now withdrawn) Uniform Accumulations Act]* does not apply to a trust to which this Act applies. *[Source - New]*

Commentary: The “rule against accumulations” is a feature of the common law that limits the time during which a fund is permitted to accumulate. The rule has been restated in legislation both in Canada and England. A modern Canadian restatement is found in the *Uniform Accumulations Act* which has been adopted, for example, in Ontario (*Accumulations Act*). The accumulation period permitted by the rule may be too short to allow the objects of the public appeal fund to be fully realized so the application of the rule against accumulations is abrogated for public appeal funds. For greater certainty, subsection (4) expressly targets legislation of the enacting jurisdiction. The modern trend is to abrogate the rule generally, as evidenced by Part 9 of the *Uniform Trustee Act* and the withdrawal of the *Uniform Accumulations Act* in 2012. In those jurisdictions that have legislated to abrogate the rule against accumulations, subsections (3) and (4) may be omitted.

Enforcement of the trust

8 Any of the following persons may commence a proceeding in court to enforce a trust to which a fund is subject or to enforce a duty imposed by this Act:

- (a) a trustee;
- (b) a donor;
- (c) a person or a member of a class of persons for whose benefit a public appeal is conducted, in whole or in part, or their legal representative;
- (d) the Attorney General;

(e) any person the court considers to have a sufficient interest in the enforcement of the trust;

and the court may make any order in respect of the trust that it considers just in the circumstances.

[Source - UIPAA]

Commentary: Section 8 allows for the enforcement of the trust affecting a public appeal fund. Allowing a donor to enforce the trust is a departure from existing law, which generally does not give the right to enforce the trust to the person who creates it by providing the trust property. Instead, the right to do so belongs to the beneficiary. Since a public appeal fund is created by many different donors and the trustee of such a fund is not necessarily under the same degree of scrutiny by a beneficiary as those of a trust created under a will, for example, a donor should be able to seek the court's aid to ensure that the fund is used properly. The section also confirms that anyone for whose specific benefit a public appeal fund is raised has the same right of access to the court to ensure that the trust is carried out as other trust beneficiaries do. In this respect, it restates what probably is the present law regarding the ability of a person named in an appeal to enforce the trust attaching to the appeal fund, but confirms that ability expressly. It also extends it to the legal representative of a person under disability, such as a minor, and the Attorney General. The Attorney General is included because there is a public interest in the proper administration of a fund that is created by public donation. Finally, provision is made for any other sufficiently interested party to act where no other person otherwise entitled to do so is able or willing to enforce the trust.

PART 3

SURPLUSES AND REFUNDS

No donor rights in a surplus

9 Subject to the requirement to refund or return an unused donation under section 11 or 12, a trust does not arise in favour of a donor in relation to a surplus. *[Source - UIPAA]*

Commentary: Trustees may be left with surplus funds on their hands for a number of reasons. More may have been collected than was needed to achieve the purpose of the appeal, or perhaps the need was satisfied from some other source. In other cases too little may have been collected to be of any use. The trust of the fund is said to fail with respect to the remaining balance, since the balance cannot be used for the sourceal purpose of the fund. The trustees cannot act unilaterally to re-allocate it, nor can they give the donors their money back. Under a power known as *cy-pres* the court, in some cases, may order the re-allocation of charitable funds. If the purpose of the fund was non-charitable (such as assistance to specific persons) and the purpose cannot be fulfilled, the balance is said to be held on a resulting trust in favour of the donors. This requires the balance to be returned *pro rata* to the donors. Often it is impossible to return the money, because the donors may have given anonymously or money may have been collected in a way which does not allow one donation to be distinguished from another. Both of these problems may be present if funds are raised informally. This subsection reverses the rule that a resulting trust arises on the failure of a non-charitable

trust, insofar as public appeal funds are concerned. Section 11 provides for refunds to donors who formally request them with respect to a donation over a stipulated threshold amount.

Scheme to distribute a surplus

10(1) A trust document or the terms of an appeal may provide for a scheme to distribute a surplus.*[Source - UIPAA modified s. 10(1)]*

Commentary: See the definition of “trust document” which includes a document deemed to have been executed under section 5. Where the terms of the public appeal include a scheme for the distribution of a surplus, in the absence of a formally executed document, that scheme will be imported into the deemed trust document as the contents of paragraph 5.

10(2) A scheme to distribute a surplus that is provided for in a trust document or that forms part of the terms of an appeal is effective without court approval only if that scheme

- (a) is consistent with the spirit of the public appeal;
- (b) forms part of the terms of the public appeal; and
- (c) complies with subsections (4) and (5).*[Source - UIPAA modified s. 10(2)]*

Commentary: The trustees of a public appeal fund may contemplate the possibility of a surplus and expressly provide a scheme for its distribution in the trust document or as part of the terms of the appeal. Subsection (1) confirms that they may do so. There are, however, limits on the schemes that are permissible.

First, the scheme must provide that the surplus is used in a way that is in keeping with the underlying spirit leading to the appeal. This gives donors some assurance that their gifts will not be used in ways they would not have intended.

Second, the distribution scheme must, at some point, be made known to potential donors as part of the “terms of the appeal” (see definition of that expression). In some cases, a distribution scheme may be provided or modified through a revision of the terms of the appeal under section 6(1) after some donations have been made. Early donors who are not satisfied that the revisions conform to the spirit of the appeal would have an opportunity to challenge the revisions under subsection (7).

Third, the scheme must comply with to subsections (4) and (5). See the commentary to those subsections. Compliance with subsection (4) may require the appeal organizer to determine whether or not the appeal is charitable or non-charitable. As pointed out in the introduction to this Act, The distinction can sometimes be highly technical and elusive and in some cases legal advice may be helpful

Where a distribution scheme fails to meet these requirements or where no such scheme is provided any distribution scheme proposed by the trustees must be approved by the court. The requirement for court approval of reallocation of surplus balances is subject to the trustees' powers in relation to small surpluses under subsection (6) and to a donor's rights under section 11.

The words "or that forms part of the terms of an appeal" in the opening flush doubly ensure that surplus schemes created or modified under section 6(1) conform to section 10.

10(3) If court approval is required to distribute a surplus, it is required whether the object of the appeal that resulted in the surplus was charitable or non-charitable. *[Source - UIPAA]*

Commentary: Subsection (3) extends the principle of *cy-pres* to non-charitable public appeal funds.

10(4) A scheme to distribute a surplus in a fund with a charitable object must require the surplus to be used only for a charitable object that is consistent with the spirit of the public appeal. *[Source - UIPAA modified s. 10(4)]*

Commentary: Usually, once money or other property has been given to charity, it must be used only for charitable purposes. Subsection (4) restates this principle in relation to public appeal funds raised for purposes that are legally charitable.

10(5) A scheme to distribute a surplus in a fund with a non-charitable object may allow the surplus to be used for an object, charitable or non-charitable, that is consistent with the spirit of the public appeal. *[Source - UIPAA]*

Commentary: Many worthwhile purposes fall outside the legal concept of charity. Subsection (5) indicates that a distribution scheme may provide for a re-allocation of a balance in a non-charitable public appeal fund to a purpose that may not be legally charitable. It must, however, be used in a way that is consistent with the spirit of the appeal. The term "object" is used here in the sense in which it is used in trust law. It refers to the person for whom or the purpose for which the trust is created and must not allow for any benefit to a trustee or a donor from the money or other property.

10(6) Despite subsection (2), court approval is not required to distribute a surplus of \$20,000 or less, or another amount prescribed by regulation, if the trustee distributes the surplus to one or more qualified donees within the meaning of the *Income Tax Act* (Canada) whose objects are consistent with the spirit of the public appeal. *[Source - UIPAA]*

Commentary: If the surplus is small, an application to the court for approval of a *cy-pres* scheme would be uneconomical. But if the trustees are given free rein to donate it to whatever cause they wish, donors may be dissatisfied with the way their money is being used. Subsection (6) creates a compromise by

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allowing trustees to donate a surplus under \$20,000 (or other prescribed amount) to a charity or other qualified donee without having to apply to the court for approval. The charity selected must be one whose objects are consistent with the spirit of the public appeal. If no such charity can be identified, the trustees remain free to devise an alternative distribution scheme and seek court approval under subsection (7).

10(7) Any person who can commence proceedings to enforce a trust under section 8 may:

(a) apply to the court to approve or dispute a scheme to distribute a surplus, whether court approval is otherwise required under this section or not; and

(b) appear, make submissions or propose an alternative or amended scheme in an application for approval made by another person. *[Source - UIPAA]*

Commentary: It is desirable for donors and others connected with a public appeal fund to be able to express their views before a decision is made on how to distribute the unused balance.

10(8) In distributing a surplus in a fund with a charitable object or under subsection (6), it is not necessary to demonstrate that any donor had a general charitable intent. *[Source - UIPAA]*

Commentary: It is a condition of the court's exercise of its *cy-pres* powers (see commentary to section 9) in relation to funds with a charitable object that the donor be shown to have had a "general charitable intent." This is an elusive concept which has the potential to cause an otherwise appropriate disposition of a surplus to fail. Subsection (8) ensures that this limitation has no application to a distribution under this Act whether the object of the fund was charitable or non-charitable.

10(9) This section does not apply if the object of a public appeal was for the relief of a specified person or persons who would be regarded as a beneficial owner of the surplus under general trust law. *[Source - UIPAA]*

Commentary: If the surplus belongs beneficially to the person for whose benefit the fund was raised under general trust law, the court will not have the power to approve a scheme to re-allocate it without that person's consent.

Refund of unused donation

11(1) A person who donates at least \$500 to a fund with a non-charitable object, or such other amount as may be prescribed by regulation — or personal property of equivalent value — may request the trustee, in the event of a surplus:

(a) to refund an amount calculated in accordance with subsection (3); or

(b) to apply that amount as the donor may direct. *[Source - UIPAA]*

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Commentary: 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. Subsection 11(1) allows such a donor to claim a refund or call for a reapplication of a *pro rated* share of the surplus. It applies only to non-charitable public appeal funds, since charitable ones are subject to the doctrine of *cy-pres*. See the commentary to subsection 10(4).

11(2) A request must be made in writing at the time the donation is made. *[Source - UIPAA]*

Commentary: The possibility that a belated demand might be made for refunds would be a major administrative problem for trustees. It would prevent them from knowing the extent of the balance available for other worthwhile purposes. For this reason, subsection (2) requires that a donor declare an intention to claim a refund at the time the donation is made.

11(3) If a donor has made a request and there is a surplus, the trustee must refund an amount calculated in accordance with the following formula, or apply that amount in any way the donor directs:

$$\text{amount} = \frac{\text{(value of the donation)}}{\text{(value of the total of all donations to the fund)}} \times \text{(value of the surplus)}$$

[Source - UIPAA]

Commentary: The refund is simply a *pro rata* share of the surplus.

11(4) If, after making all reasonable efforts, the trustee cannot locate a donor who has made a request, the trustee may deal with the amount as if it were surplus for which no request was made. *[Source - UIPAA]*

11(5) The trustee's obligation to refund or direct an amount under this section applies notwithstanding any scheme to distribute a surplus under section 10. *[Source - UIPAA]*

Commentary: Where a surplus exists, a donor's right to a refund under this section prevails over a distribution scheme.

Return of unused real property

12(1) If real property forming part of a fund with a non-charitable object

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- (a) is no longer needed or cannot be used for the object of the public appeal; and
- (b) has not been converted into money or another form of property;

the trustee must return the real property to the donor, or dispose of it as the donor may direct, unless the terms of the donation provide otherwise. *[Source - UIPAA]*

Commentary: Section 12 provides that if land has been donated and will not be used for the purposes of a non-charitable public appeal fund, it must be returned to the donor rather than become subject to reallocation for other purposes, unless the donor has stipulated otherwise. The reason for this is that land is unique and generally of much greater value than other kinds of property, and it would be reasonable to assume that the donor would want it back if it is not to be used as the donor intended. Because of land registration, it is most unlikely that return of a non-charitable gift of land would be frustrated by the anonymity of the donor. Section 12 would apply in very few cases, since land would seldom be donated and if it were, special conditions would likely be imposed on the gift to protect the donor's interests.

12(2) If, after making all reasonable efforts, the trustee cannot locate a donor to whom real property must be returned, the trustee may dispose of the property and deal with the proceeds as if it were surplus for which a return or refund was not required under this section. *[Source - UIPAA]*

12(3) The trustee's obligation to return real property under this section applies notwithstanding any scheme to distribute a surplus under section 10. *[Source - UIPAA]*

Commentary: A donor's right to a return of real property under this section prevails over a distribution scheme.

PART 4

TRUSTEE'S POWERS

Commentary: The trustee's powers set out in Part 4 cover a variety of matters that one would expect to find in any well-drafted trust document that has been created expressly for most informal public appeals. A majority of the provisions are self-explanatory and require no further comment.

The powers in Part 4 play a default role and will be displaced by express provisions contained in a trust document or other governing authority that address the same issues in a different fashion.

Payments from the fund while the trust continues

13(1) A trustee may make payments from a fund, without having to distinguish between capital and income,

- (a) in the amounts and at the times the trustee considers appropriate for an object of the fund;

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- (b) to pay expenses, taxes or charges for an object of the fund or arising in respect of the fund; or
- (c) to make a refund to a donor or return donated property if required by section 11 or 12.

Commentary: Subsection (1) exempts the Trustees from having to apportion many kinds of receipts and expenses between capital and income for the purpose of making disbursements. The wording of paragraph (a) when read together with section 20, makes the trust discretionary.

13(2) Subsection (1) does not affect the jurisdiction of the court to determine the receipts and disbursements that relate to capital or income.

Commentary: Subsection (2) reflects case law indicating that a discretionary power to adjust between capital and income accounts which purports to oust entirely the jurisdiction of the court to categorize receipts and disbursements as “capital” or “income” will be unenforceable: *Re Bronson*, [1958] O.R. 367 (H.C.).

Investment

14(1) A trustee may invest any part of a fund that is not needed immediately for payments under subsection 13(1) as permitted by *[the Trustee Act of the enacting jurisdiction]*.

14(2) With regard to any property forming part of the fund, a trustee may:

- (a) keep the property uninvested for a reasonable length of time;
- (b) leave the property in a particular form for any length of time;
- (c) convert the property or any part of it to money;
- (d) convert one form of investment into another; or
- (e) authorize securities belonging to the fund to be commingled with other securities in order to facilitate investment and reinvestment, as long as the share of the fund in the commingled pool of securities is accounted for separately.

14(3) A trustee may allow any investments or other property forming part of the fund to be held by or in the names of nominees.

14(4) A trustee may accumulate and add to the capital of the fund any income arising from the fund that is not otherwise used in a manner allowed by this Act or a governing authority, subject to the maximum duration on accumulations set out in section 7.

Further public appeals and donations

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15(1) A trustee may issue further public appeals for donations to the fund and raise money for the fund by any other lawful means whenever the trustee believes it necessary or advisable to do so.

15(2) A trustee may accept any donations to the fund as long as the donations are not made on conditions that are inconsistent with the object of the fund.

Professional advice and services

16(1) In relation to any matter concerning a fund, a trustee may arrange for a person, firm, organization or corporation engaged in any profession, trade or business to give advice or perform services (including the receipt and payment of money) on the trustee's behalf.

16(2) A trustee is not liable for any loss arising from the trustee's reliance in good faith on advice or services obtained under subsection (1).

Transfer of fund to another body

17(1) A trustee may transfer all or part of a fund to a corporation, society, foundation or other entity that has objects similar to the object of the fund, or into another fund with similar objects, if the trustee considers that the object of the fund will be better served by doing so.

17(2) The trustee may form a corporation, society, foundation or other entity for the purpose of transferring a fund.

Other transactions, elections and consents

18 A trustee may enter into any transaction, execute any document, make any election or give any consent concerning the fund or property forming part of a fund if the trustee considers it will better enable the fund to serve its object.

Trustee may make rules

19 A trustee may make rules to govern

- (a) management of a fund generally, including an investment plan or policy;
- (b) criteria for determining if, to what extent and to whom a payment from the fund is to be made to serve its object; and
- (c) meetings of trustees if there is more than one trustee.

Commentary: Paragraph (b) will be relevant if the Fund is for the benefit of a class of persons such as victims of a particular disaster.

Trustee's discretion

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20(1) A trustee's powers must be used to administer the fund effectively in the service of its object and to comply with any relevant law, but not for any other purpose.

20(2) In using the trustee's powers under subsection (1), the trustee has absolute discretion.

20(3) A trustee may seek the opinion of

(a) a person whose welfare is an object of the fund; or

(b) a parent, guardian or legal representative of a person referred to in paragraph (a);

on a matter affecting the administration of the fund or the exercise of the trustee's powers, but the trustee is not bound by the opinion.

Trustees may act by majority

21(1) If there is more than one trustee, a majority of the trustees may validly do anything that the trustees may lawfully do if acting unanimously.

21(2) A trustee who disagrees with a decision or action of the majority may state the disagreement in writing but, unless the decision or action is unlawful, that trustee must join with the majority in doing anything necessary to carry out the decision or action if it cannot otherwise be carried out.

21(3) A trustee who has stated a disagreement with a decision or action is not liable for any breach of trust or any loss resulting from the decision or action even if he or she joined with the majority to carry it out.

Trustee protected from liability

22 A trustee is not liable for any loss incurred in respect of a fund unless the loss is due to that trustee's own

(a) dishonesty; or

(b) willful conduct, which the trustee knows to be inconsistent with this Act or a governing authority.

Retirement and appointment of trustees

23(1) If there are at least two trustees of a fund, a trustee may retire by delivering a signed notice of retirement to the remaining trustees, either personally or by registered mail.

23(2) On the personal delivery or mailing of a notice of retirement, the retiring trustee ceases to be a trustee for all purposes except for any action required to vest any property of the fund in the remaining or new trustees.

23(3) After a trustee retires, the remaining trustee or trustees may appoint, in writing, a person to replace the retiring trustee.

23(4) The appointment of a replacement trustee takes effect when he or she signs a written acceptance of the appointment.

23(5) The provisions of *[the Trustee Act of the enacting jurisdiction]* concerning the appointment, retirement and removal of trustees apply to the fund, except as otherwise provided in this section.

PART 5

TRUSTEE'S DUTIES

Commentary: Part 5 places a duty on trustees to diligently monitor the operation of the trust and the objects for which it was established. Funds should not be allowed to fall into desuetude and to require a periodic review as called for by this Part goes some way to ensure that money collected through a public appeal continues to serve a useful purpose.

Trustee's duties

24(1) A trustee must hold the fund in a savings institution in an account segregated from the personal funds of the trustee and designated as an account held in trust by the trustee. *[Source - New]*

Commentary: This provision is to ensure that a fund is not vulnerable to attachment by creditors of the appeal organizer or other trustee. If a donor responds to an appeal for funds by an organizer who proposes to use the fund for a benevolent purpose, permitting the fund to be held in an account that is vulnerable has the potential to totally frustrate the intent of the donors.

24(2) A trustee must hold the fund for the duration of the trust and use the income and capital for the object of the fund.

24(3) At least once in each year in which money or other property remains in the fund, the trustee must consider whether the remaining money or property is still needed or can be used for the object of the fund.

24(4) If the trustee decides that money or other property remaining in the fund is no longer needed or cannot be used for the object of the fund, the trustee must set out in writing the reasons that led to that decision and declare the trust at an end.

Commentary: Subsection (4) empowers Trustees to wind up the trust without having to make an application to the court, if they determine the Fund is no longer needed or usable for its stated purposes. Since the Trustees actually administer the Fund, they are better situated to determine if it continues to perform a useful function.

24(5) After the trust is declared at an end, the money or other property remaining in the fund is surplus and the trustee must distribute it in accordance with section 10 (distributing a surplus) or section 11 or 12 (refund or return of unused donations).

Commentary: While the Trustees may have to apply to the court for the approval of a scheme to distribute any surplus (see section 10 of the Act), application for approval of a scheme would normally be much more straightforward and less costly than one in which the continued usefulness of the Fund was in issue. An application that would force the court to make determinations of fact regarding the continued usefulness of the Fund could be expensive and time-consuming.

24(6) The duties imposed by this section are in addition to any other duty imposed by *[the Trustee Act of the enacting jurisdiction]* and the general law of trusts.

24(7) The duties imposed by this section may not be excluded by a trust document.

General offence provision does not apply

25 *[General offence provision, if any, of the enacting jurisdiction]* does not apply to this act.
[Source - New]

Commentary: The legislation of some jurisdictions contains a provision creating a general offence for the contravention of an enactment. For example the following formulation is found in the statutes of British Columbia, Manitoba and the Yukon: “A person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment.”

Frequently the application of a general offence provision is expressly omitted in enactments that have their own provisions concerning contraventions or where its application is otherwise inappropriate. Enacting jurisdictions should review their statutes for general offence provisions and, if they exist, include section 25 to exclude its application.

Schedule to the Uniform Informal Public Appeals and Crowdfunding Act

[Important Information for Trustees - Included with this trust declaration are some examples and notes that will explain some of its features and assist trustees in completing the declaration. They do not form part of the declaration itself.]

TRUST DECLARATION

The persons who have signed this document as Trustees wish to declare the terms on which they [hold] [will hold] ¹ the Fund in trust and will deal with it in order to achieve its objects, and to declare how they will deal with any surplus in the Fund. ²

Governing Statute

1. This Trust Declaration is made pursuant to the *Informal Public Appeals and Crowdfunding Act* (the “Act”) ³

Name of Trust Fund

2. This Trust Declaration concerns a Fund called the _____⁴Trust Fund (the “Trust Fund”).

(name of fund)

How the Trust Fund Came into Being

3.(1) The Trust Fund was created because: ⁵

3.(2) An appeal to the public for donations to the Trust Fund [was made on

_____] [will be made].⁶

(date)

3.(3) [If applicable] The appeal was conducted with the assistance of an internet platform known as _____ and particulars of the appeal may be found at the following internet address _____ [Insert link to appropriate area of the internet platform]. *[Source - New]*

Objects of the Trust Fund

4. The objects of the Trust Fund are:⁷

Surplus Money

5. If any money remains after the purposes of the Trust Fund have been fulfilled as far as possible, that money will be donated to one or more of the following organizations, all of which are registered Canadian charities or qualified donees under the *Income Tax Act*, (Canada) or are bodies that have purposes similar in spirit to the objects of this Trust Fund.⁸

SIGNED by the following persons as Trustees of the Trust Fund on _____⁹(date)

(Print name)
(Signature)

(Address)
(Email [if any])

(Telephone)

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(Print name)
(Signature)

(Address)
(Email [if any])

(Telephone)

[Add additional names and particulars as required]

SIGNED by the following persons as new Trustees appointed to replace
Trustees of the _____

Trust Fund on _____: ¹⁰

(date)

(Print name)
(Signature)

(Address)
(Email [if any])

(Telephone)

(Print name)
(Signature)

Consultation Paper on a Uniform Informal Public Appeals and Crowdfunding Act

(Address)
(Email [if any])

(Telephone)

[Add additional names and particulars as required]

-
- 1 *Strike out and initial inapplicable text in square brackets.*
 - 2 *It is advisable to have at least two, but not more than four trustees.*
 - 3 *Trustees have a number of powers and duties that are set out in the Act. It should be consulted if any question arises concerning the administration of the Trust.*
 - 4 *Insert information in blanks where indicated. Examples of Trust Fund names are : “Doe Family Disaster Relief” Trust Fund, and “Town of XYZ Hurricane Relief” Trust Fund.*
 - 5 *List the reasons for the creation of the Trust Fund, including particular facts and events that led to a need for the Trust Fund. See examples set out in Appendix 1 to this forms for guidance.*
 - 6 *Strike out and initial inapplicable text in square brackets.*
 - 7 *Set out the purpose for which the Trustees are able to make payments from the Fund.. These purposes must be in keeping with the terms of the appeal for donations. See examples set out in the Appendix to this form for guidance.*
 - 8 *See examples in the Appendix to this form for guidance about how to dispose of surplus funds. It is important to note that if the objects of the Trust fund are charitable, surplus moneys **must** be given to registered Canadian charities or other bodies that are “qualified donees” under the Income Tax Act. Trustees should be aware that whether an object is charitable is a highly technical legal question since not all benevolent objects are charitable. If a trustee is in any doubt as to whether the objects of the trust are charitable legal advice should be sought. The safest course for a trustee is, in every case, to stipulate that any surplus should go to a registered charity.*
 - 9 *Each trustee must print his or her name, address, telephone number, and e-mail address, and sign here. See note 2 concerning the number of trustees.*
 - 10 *Any new or replacement trustees should become parties to the declaration. Each should print his or her name, address, telephone number, and e-mail address, and sign here.*

APPENDIX TO SCHEDULED TRUST DECLARATION - EXAMPLES

A. Examples of reasons for creating the Fund

Example No. 1:

The John Doe Special Needs Trust Fund was created because:

- (a) John Doe is a 5-year old boy living in [city or town and province].*
- (b) On July 1, 2020 John Doe was injured in a motor vehicle accident. His left arm was amputated.*
- (c) John Doe needs a state-of-the-art prosthetic arm to enable him to carry out day-to-day tasks. The arm will have to be replaced several times as John grows. It will also have to be serviced regularly to keep it in good working order.*
- (d) The parents of John Doe cannot afford an advanced electronic prosthetic arm.*
- (e) John Doe and his parents will need other special equipment to meet his needs.*
- (f) Many members of the community have offered to help John Doe and his family.*

Example No. 2:

The XYZ Earthquake Relief Fund was created because:

On August 1, 2020 an earthquake devastated the community of XYZ.

- (a) The earthquake destroyed many homes in XYZ, damaged roads, and disrupted communications.*
- (c) Many residents of XYZ were injured and many lost all their belongings.*
- (d) A fund is needed to supplement efforts by government and private agencies to relieve the community of XYZ.*

B. Examples of the Objects of a Trust Fund

Example No. 1:

The objects of the John Doe Special Needs Trust Fund are:

Consultation Paper on a Uniform Informal Public Appeals and Crowdfunding Act

- (a) to purchase a prosthetic arm for John Doe and replace it when the Trustees agree a replacement is needed;*
- (b) to maintain the prosthetic arm and its replacements in good functioning order;*
- (c) to purchase, maintain, and replace other technological aids, which the Trustees think are necessary or desirable to meet the special needs of John Doe;*
- (d) to assist the parents of John Doe to equip their home to accommodate his special needs.*

Example No. 2:

The objects of the Town of XYZ Earthquake Relief Fund are:

- (a) to provide medical treatment, food, clothing, and temporary shelter to victims of the earthquake;*
- (b) to provide supplies and equipment to assist in the effort to rescue and evacuate victims of the earthquake;*
- (c) to assist persons who are in financial need as a result of losses suffered in the earthquake.*

C. Examples of how to dispose of surplus funds

Surplus moneys may be paid, in equal or unequal portions, to one or more charities or other organizations with objects similar in spirit to the objects of the appeal.

Example No. 1:

paid to the XYZ Hospital for Sick Children.

Example No. 2:

distributed equally among the following charities:

the Town of XYZ Foodbank Society

the Town of XYZ Community Improvement Association