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UNIFORM LAW CONFERENCE OF CANADA

A REVISED UNIFORM INFORMAL PUBLIC APPEALS ACT

REPORT OF THE WORKING GROUP

**Presented by
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The Origins of the Project and the Working Group

[1] This project was added to the program of the Uniform Law Conference of Canada [ULCC] by the Advisory Committee on Program Development and Management [ACPDM] in 2018. Briefly stated, the aim of the project is to revisit the *Uniform Informal Public Appeals Act [UIPAA]* promulgated by the ULCC in 2011. Since 2011 there have been major changes in the way that informal *ad hoc* public appeals are conducted. These changes mainly reflect the growth of internet- based fundraising – usually referred to as “crowdfunding”.

[2] Early in 2019 a Working Group was assembled to carry this project forward. The members of the Working Group are:¹

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)

[3] Members Close, Cumyn, Blue and Oosterhoff were also members of the 2011 Working Group that developed the *Uniform Informal Public Appeals Act*.

About the *Uniform Informal Public Appeals Act*

[4] To appreciate what is involved in developing revisions to the *Uniform Informal Public Appeals Act [UIPAA]* it is necessary to discuss public appeals generally, the legal problems associated with them and how the *UIPAA* addressed them.

Ad Hoc Appeals Generally in 2011

[5] 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 such fundraising.

[6] 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. Until recently, the fundraisers would simply issue a message asking for donations, open a bank account to hold the fund and enlist the help of the press and the electronic media to

publicize the appeal. This pattern of *ad hoc* fundraising carries with it two potential problems:

Surpluses

[7] The first concerns the possibility of a surplus and how to deal with it. Some appeals carry substantial emotional impact, and the generosity of donors can be 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 but substantial amounts may already have been collected. Occasionally the opposite situation arises – too little may be raised to be of any use at all.

[8] 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 donation.

[9] 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.

[10] If the purpose of the fund falls within the legal definition of “charity,”² returning the contributions would probably amount to a breach of trust. It would also be legally incorrect for the fundraisers to turn over the unused funds to an equally worthy cause without the permission of the court. People who issue spontaneous appeals for donations out of public-spiritedness or humanitarianism rarely appreciate the complexities of the law of charity. In an emergency there is little or no time to get legal advice on the subject.

[11] 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 difficulties in doing so. Many donations will be anonymous or otherwise be void of contact information. Some portion of a non-charitable fund is almost sure to be unreturnable for this reason. 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.

[12] 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 shocking answer is that 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*.³

Inadequate Documentation

[13] The unsatisfactory state of the law was the subject of a report of the British Columbia Law Reform Commission that was submitted in 1993. This Report also identified a second difficulty in relation to public appeal funds – their creation is seldom well documented. As the Commission observed, this leads to disputes and misunderstandings in connection with a trust if the rights, powers and duties involved are not spelled out clearly in a written document.⁴

[14] Both the difficulties in relation to surpluses and documentation were addressed by recommendations included in the BCLRC Report.

The Approach of the 2011 Working Group

[15] The 2011 Working Group took the work of the BCLRC as an appropriate point of departure for its own deliberations. In particular, it adopted the overall strategy to reform taken in the BCLRC Report as suitable for the development of uniform law. The outcome of the 2011 Working Group's deliberations and consultation was legislation that embodies the following features:

- The legislation 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 Act should be narrow in scope so as to exclude the fund-raising activities of established bodies for their usual purposes.
- The Act should confirm that money raised through a public appeal is held in trust for the object of the appeal.
- The Act should be largely default in character and capable of being displaced by more specific documents and rules created to govern a particular appeal.
- The Act should confirm a power in the court to direct the application of surplus funds raised for non-charitable objects.
- The Act should provide a mechanism for the disposition of small surpluses.
- The Act should include, as a schedule, a model trust document that would provide a default governance structure for the trust created by the appeal. Where a governance structure otherwise exists, the model trust document would apply only to the extent that it did not conflict with the existing structure.

[16] This was the *Uniform Informal Public Appeals Act*. A detailed description is beyond the scope of this status report. Readers seeking further information should consult the text of the Act, its commentaries, the 2011 Report of the Working Group and other relevant documents. Equally important is 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*. All can be found at the ULCC website. Links to

these documents are set out in the Appendix to this report.

Why Revisit the Uniform Informal Public Appeals Act?

Developments Since 2011 - The Growth of Crowdfunding

[17] 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”.

[18] 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

[19] After its promulgation, the *UIPAA* did not gain much traction. Only the province of Saskatchewan implemented it. 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. 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.

[20] The existence of the Act averted what had the potential to be an extremely divisive issue within the community.

[21] 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.

Developments Since 2011 - Quickening of Interest in the United States

[22] The Uniform Law Conference of Canada has an American counterpart, the National Conference of Commissioners on Uniform State Laws known informally as the Uniform Law Commission (ULC). In 2018 it initiated a project to develop a uniform act now titled *Fundraising through Public Appeals Act*. It continues to be a work in progress and the ULC draft Act will receive “first reading” in July 2019 when the ULC meets in Anchorage, Alaska.

[23] We have established a relationship with the ULC drafting committee and have arrangements in place to keep each other up-to-date with the progress and decisions made concerning our respective projects. In particular, the Chair and Reporter of the ULC have sat in on meetings of our Working Group as observers.

Conclusion - Why Revisit This Topic?

[24] 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 world-wide 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 Humboldt Broncos appeal demonstrates this. 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.

[25] Moreover, the development of the *UIPAA* in 2011 was very much a pioneering effort with little to draw on other than work carried out by B.C. law reform bodies. This has changed and there is now a wider range of thought and analysis concerning crowdfunding available.

[26] The evolving fundraising environment and the experience to date with the *UIPAA* and internet-based fundraising prompted the initiation of this new project. The Working Group has not been given specific terms of reference for the project; the discussion surrounding its initiation, however, makes it clear that the starting point should be the *UIPAA*. 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.

Progress on the New Project

[27] The current Working Group held its first meeting by teleconference in mid-March 2019 and has met monthly since that time. Its focus has been to identify new issues raised by the emergence of internet-based fundraising and what, if any, legislative response is called for and how it might be expressed.

Some Issues

[28] Set out below are some of the issues the Working Group has under consideration. They will be more fully developed in the light of further deliberations and consultation.

- **Language of the Act** – The growth of internet fundraising raises the need to enlarge the vocabulary of the Act to describe its operation in that context. A revised Act is likely to include some of the following terms and their definitions: “appeal organizer”, “intermediary”, “internet platform”, “savings institution”, “user agreement”. Existing defined terms may be revised as required.

- **Application of the Act: Jurisdiction and Choice of Law Issues** – The worldwide reach of internet fundraising gives rise to complex issues in relation to when the Act should apply. A public appeal may have two or more organizers located in different jurisdictions with the object of the appeal located in yet another different place or places. What connection to an enacting jurisdiction should be sufficient to trigger the application of the Act? A further concern is that, where an appeal is conducted through an internet platform, the provisions of its user agreement may stipulate that the appeal is subject to the law of a jurisdiction that is linked to neither an organizer, the object of the appeal nor the enacting jurisdiction.
- **Application of the Act: Object Issues** – The paradigm of the *UIPAA* is the locally- based appeal, usually for a benevolent purpose or local public “cause”. Internet based crowdfunding now embraces funding in relation to a wider range of objects such as investment opportunities and merchandising. Some of these objects are regulated by more specific legislation and, in any event, should not be caught by a revised *UIPAA*.
- **The Organizer as Beneficiary** - Many appeals conducted through internet platforms are ones in which the appeal organizer is also the sole object/beneficiary of the appeal. How should donations to these appeals be characterized and how should the Act address them?
- **Definition of Surplus** – Many internet platforms require appeal organizers to set out a fundraising goal. Consideration is being given to widening the current definition of “surplus” to include amounts by which a fund exceeds the stated fundraising goal.
- **Revision of the Terms of an Appeal** – 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 such as dealing with an unexpected surplus or extending a fundraising goal. The problem is that such revisions violate the provisions of the *UIPAA* in its current form and may violate the expectations of those who made donations before the revisions. Should an updated Act address such revisions and, if so, how?
- **Title of the Act** – The word “crowdfunding” should form part of the title. “*Uniform Public Appeals and Crowdfunding Act*” has been one suggestion. Are qualifying words desirable to emphasize its focus on benevolent and non-commercial appeals?

Conclusion: Consultation and Next Steps

[29] Work is well advanced on a preliminary draft of a new Act and the aim is to complete it by early autumn 2019. Because of its tentative nature, the draft is not included as a formal part of this written report⁵ although it, and some of the provisional

conclusions contained in it, will be referred to as part of the oral presentation of this Report.

[30] Once settled, this draft will form the basis of a consultation document which should be complete by the end of 2019. It will be distributed by the Working Group to interested persons and organizations. The ULCC’s Jurisdictional Representatives will be requested to assist in informal distribution to their delegates and to others that may wish to respond to the consultation.

[31] Following consultation, the Working Group will review its draft in the light of the comments received and proceed to settle its version of a revised *UIPAA*. It will be recommended to the Civil Law Section for adoption at the Annual Meeting in August 2020.⁶ A French language version will also be prepared. Once the contents of the revised *UIPAA* are finalized by the Civil Law Section, work will commence on the preparation of a “Quebec friendly” version for presentation to the Section in 2021.

Appendix

The links below are to addresses within the ULCC website that access particular documents that form part of the *Uniform Informal Public Appeals Act* “package”.
https://www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0011.pdf (Report and Act – English Language Version)

<https://www.ulcc.ca/fr/reunions-annuelles/589-2011-winnipeg-mb-reunion-annuelle/documents-de-la-section-civile-2011/1003-rapport-du-groupe-de-travail-sur-la-loi-uniforme-sur-les-appels-informels-aux-dons-du-public-avec-loi-uniforme-sur-les-appels-informels-aux-dons-du-public> (Report and Act – French Language Version)

Earlier this report referred to a further version of the *Uniform Informal Public Appeals Act*, promulgated in 2012, and framed using concepts and terminology to ensure that it operated harmoniously with the *Civil Code* of Quebec. This version may be found here:

<https://www.ulcc.ca/fr/reunions-annuelles/605-2012-whitehorse-yk-reunion-annuelle/documents-de-la-section-civile-2012/1268-loi-uniforme-sur-les-appels-informels-aux-dons-du-public-deuxieme-rapport-du-groupe-de-travail> (Report [Québec] - French Language Version)

<https://www.ulcc.ca/fr/reunions-annuelles/605-2012-whitehorse-yk-reunion-annuelle/documents-de-la-section-civile-2012/1269-loi-uniforme-sur-les-appels-informels-aux-dons-du-public-version-droit-civil-powerpoint-en-pdf> (Uniform Act [Québec] French Language Version)

https://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0016.pdf (Uniform Act [Quebec] English Language Version)

https://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0017.pdf (Report [Quebec] Slide Presentation - Bilingual)

¹ 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.

² 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.

³ [1958] Ch. 300, *aff'd* [1959] Ch. 62 (C.A.). For details see document at https://www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0011.pdf note 5.

⁴ Report on Informal Public Appeal Funds (LRC 129 1993) at page 29. Hereafter "BCLRC Report." See http://www.bcli.org/sites/default/files/LRC129-Informal_Public_Appeal_Funds.pdf

⁵ The preliminary draft of a revised UIPAA is being prepared in an English Language version only.

⁶ Exactly how the process unfolds will depend on the drafting resources available. Ideally, the Working Group's version will serve as "instructions" to a legislative counsel who will revise it as may be necessary to produce an English language version of the revised UIPAA that conforms to all applicable drafting conventions. This is the "formal" version that would, in that case, be recommended to the Civil Section for adoption in 2020. .