

ULCC RECOMMENDS THAT PROVINCES ENACT CHARITABLE FUNDRAISING LEGISLATION

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A. INTRODUCTION

The past five years have in some respects been a difficult time for charitable organizations in Canada. Despite the continued generosity of Canadians – to the tune of \$8 billion in 2003 alone for both charities and non-profit organizations according to Statistics Canada¹ – the charitable sector hit a public relations disaster earlier in this decade. This came in the form of a series of print and television news reports detailing various abuses by a number of charities and fundraising businesses, and two egregious cases in 2001 and 2002 where Ontario's Public Guardian and Trustee was forced to step in and obtain a court order for the "charitable" organizations to pass accounts.

What came to light was a disturbing picture. In the absence of any rigorous government regulation, approximately 15 percent of the over 80,000 registered charities in Canada routinely spent more money on fundraising and administrative expenses than they did on their charitable works. A few of these organizations were predatory charities that traded on the good will of legitimate charitable organizations, while others were simply inefficient at fundraising.

¹ Michael H. Hall, Margaret L. de Wit, David Lasby and David McIver, *Cornerstones of the Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Ottawa: Statistics Canada, 2004) at 9.

Although the fundraising practices of “the overwhelming majority of charities and charitable fundraisers are ethical and beyond reproach,”² the unsavoury practices of the minority was prejudicing the reputation of the vast number of legitimate charitable organizations in Canada. It was within this context that the Uniform Law Conference of Canada (“ULCC”) stepped in to help move the sector forward. At their 2005 meeting in St. John’s, Newfoundland, the ULCC passed a resolution adopting a *Uniform Charitable Fundraising Act*, and recommended that it be enacted by both the provincial and territorial governments.³ This *Charity Law Bulletin* reviews the legislation and compares it to similar initiatives in other jurisdictions.

B. BACKGROUND TO DRAFT LEGISLATION

The abuses highlighted in the various newspaper articles and television programs in the early part of this decade were clearly demonstrated in two Ontario cases in which the Public Guardian and Trustee obtained a court order for the organizations to pass their accounts. In both the *AIDS Society*⁴ and the *National Society* cases,⁵ the organizations had raised close to \$1 million with little or none of the funds going to their intended causes. Further, fundraising businesses had been used in both cases and had taken between 75 and 80 percent of the funds raised in fees and expenses, a fact that was harshly criticized by the courts. Out of the ashes of these cases came important judicial guidelines with respect to charities, namely that directors of charitable organizations stand in a fiduciary relationship toward the public for all moneys collected; that fundraising businesses have a duty to account for the gross receipts collected; and that fundraising contracts may be void as contrary to public policy if the fundraising costs are extreme, i.e. 75 to 80 percent of the funds received.

Despite these important pronouncements by the court, the cumulative effect of the revelations was to prejudice the overall reputation of legitimate charitable organizations in Canada. Further, it pointed to the dearth of regulations in the sector. Although Canada Revenue Agency (“CRA”) may have effective tools to regulate registered charities under the federal *Income Tax Act*, its grasp does not extend to organizations that

² Albert H. Oosterhoff, *Charitable Fundraising Research Paper* (London: Uniform Law Conference of Canada, Civil Law Section, 2004) at 5.

³ Both the report of the Working Group and a draft of the *Uniform Charitable Fundraising Act* are available online at <http://www.ulcc.ca/en/poam2/index.cfm?sec=2005&sub=2005g>.

⁴ *Ontario (Public Guardian and Trustee) v. The AIDS Society for Children (Ontario)*, [2001] O.J. No. 2170 (Sup. C.J.) [*Aids Society*]. See Terrance S. Carter, “Ontario Court Declares Fundraising Contract Void and Imposes Penalty” in *Charity Law Bulletin No. 17* (11 October 2002), available at www.charitylaw.ca, for more details.

⁵ *Ontario Public Guardian and Trustee v. National Society for Abused Women and Children*, [2002] O.J. No. 607 (Sup. C.J.) [*National Society*]. See Terrance S. Carter and Jacqueline M. Connor, “Ontario Court Finds Third Party Charitable Fundraising Arrangement Unconscionable” in *Charity Law Bulletin No. 13* (29 April 2002), available at www.charitylaw.ca, for more details.

choose not to be registered, and it constrains CRA's ability to share information with the provinces that are constitutionally empowered to regulate charities. At the provincial level, there is very little regulation. Currently, only four provinces — Alberta, Saskatchewan, Manitoba and Prince Edward Island — have legislation to regulate the charitable sector and charitable fundraising.⁶ At the same time, research indicates that most charitable organizations are small, and lack sufficient resources to comply with complex regulatory regimes.

It was within this climate that the Uniform Law Conference of Canada entered the discussion in 2003 by commissioning a report from Professor Albert Oosterhoff of the Faculty of Law, The University of Western Ontario, who recommended in 2004, among other things, that the Conference adopt a *Uniform Charitable Fundraising Act*, which would apply only to charitable organizations, and that consideration be given to changes to the federal *Income Tax Act* that would allow for closer integration between the two levels of government, thereby allowing for the sharing of information. At its 2004 meeting, the Conference adopted the recommendations and directed Prof. Oosterhoff and a working group to prepare a draft *Uniform Charitable Fundraising Act* ("ULCC Act"). The legislation, together with a recommendation that all provinces enact the same, was adopted by the ULCC at its August 2005 meeting in St. John's, Newfoundland.

C. THE PURPOSE OF THE ULCC ACT

The threefold purpose of the ULCC Act mirrors the concerns raised in the background report: ensuring members of the public have sufficient information to make informed decisions when contributing to charities; protecting the public from fraudulent, misleading or confusing solicitations; and establishing standards for charities and fundraising businesses in making solicitations. The ULCC Act borrows significantly from the legislation enacted in Alberta, and to a lesser degree the other three provinces of Saskatchewan, Manitoba and Prince Edward Island that have enacted such legislation, benefiting from their experience.

In addition to raising the spectre of uniform charities regulation across Canada, the ULCC Act introduces six areas of focus:

- the regulation of solicitations;

⁶ *Charitable Fund-raising Act* (Alberta), R.S.A. 2000, c. C-9; *Charitable Fundraising Businesses Act* (Saskatchewan), S.S. 2002, c. C-6.2; *Charities Endorsement Act* (Manitoba), C.C.S.M., c. C60; *Charities Act* (Prince Edward Island), R.S.P.E.I. 1988, c. C-4.

- the registration of charitable organizations;
- the licencing of fundraising businesses;
- the introduction of mandatory fundraising agreements;
- the regulation of retail incentive donors; and
- the inclusion of enforcement resources.

D. SOLICITATIONS

Under the ULCC Act, “solicitation” is given a broad meaning:

- (a) a direct or indirect request for a contribution in which it is stated or implied that the contribution will be used by a charity or for a charitable purpose, or
- (b) a request for a contribution through a direct or indirect offer to sell goods or services in which it is stated or implied that all or a portion of the purchase price will be used by a charity or for a charitable purpose.

Should a charitable organization’s activities amount to solicitation, the ULCC Act would regulate the time and manner in which such solicitations are made, and further provide a cooling-off period for the donor. These regulations would also apply to fundraising businesses or an individual motivated to raise aid for a current need, such as tsunami or hurricane relief.

The ULCC Act provides that solicitations by telephone, fax or in person at an individual’s home can only be done during the hours of 8 a.m. and 9 p.m. When making such a solicitation, the charity’s representative must provide:

- their name;
- the name of the fundraising business and details of the remuneration to be received by the fundraising business, if applicable;
- details of the cooling-off period and instructions for obtaining a refund;
- the name of the charity, or details of the charitable purpose if there is not a charity; and
- details of how to obtain prescribed records of the charity.

Donors, who make a contribution as a result of a phone or personal visit by a fundraising business, can obtain a full refund from the fundraising business if they make such a request within three business days of making

the contribution, and mail or return the receipt. Contributions by cheque or credit card are not to be deposited or processed prior to the cooling-off period's expiration.

Under the ULCC Act, donors are entitled to receipts for monetary donations of \$10 or more.

The ULCC Act also requires the charity or fundraising business to maintain financial records for a period of six years and prepare audited financial statements or financial information returns for every financial year in which solicitations are made by or on behalf of the charity. The financial statements, as well as information with respect to the portion of gross contributions used directly for charitable purposes, and fundraising agreements are to be made available for inspection by any person making such a request.

Recognizing the burden these administrative requirements would place on smaller organizations, section 10 of the ULCC Act provides an exemption from the duty to maintain and produce records for charities who intend to raise less than \$25,000 annually.

Solicitations made by a charity to a person who is a member of the organization at the time of the solicitation, or the spouse or child of the member, does not qualify as a solicitation for the purposes of the ULCC Act. Neither are solicitations made in respect of a licenced gaming activity.

E. REGISTERING CHARITIES

Sections 14 and 15 of the ULCC Act prohibit charitable organizations from either soliciting donations or using a fundraising business unless the charity is registered or deemed to be registered under the ULCC Act. In order to be deemed to be registered under the ULCC Act, the charitable organization must be a registered charity under the *Income Tax Act*. A charity that intends to raise less than \$25,000 is exempt from the registration requirement unless they use a fundraising business. The registration requirement also does not apply to unincorporated charities, branches or divisions of another charity, or charities for which another charity controls the distribution of contributions.

Hand-in-hand with the requirement for registration is the ULCC Act's emphasis on compliance with standards of practice. To assist in defining such standards of practice, the ULCC Act provides a model

regulation. The model standard of practice focuses on the maintenance of the charity's integrity by requiring accurate and consistent accounting methods, financial accountability, and promoting respect for the wishes of donors. The ULCC Act requires both employees and volunteers to comply with such standards, and directors, officers and managers of the charitable organization to take reasonable steps to ensure such compliance. Failure to comply with standards of practice is but one ground for the enforcement authority to refuse registration or renewal, or to impose conditions on the registration.

F. FUNDRAISING BUSINESSES

The ULCC Act makes the licencing of fundraising businesses a prerequisite to their solicitation of donations on behalf of any charitable organization. The ULCC Act also clearly delineates the boundaries of the fundraising business, making them a trustee for the contributions received on behalf of the charity. As such, the fundraising business has no power to invest the money received, and must deposit funds raised within three days of receipt into a bank account in the sole control of the charity.

In addition to ensuring fundraising businesses and their employees, officers and directors comply with standards of practice, the ULCC Act prohibits fundraising businesses from making solicitations on behalf of charities when the fundraising business, its officers or directors or others have an interest in the charitable organization. Contravention of this prohibition may result in a refusal to issue or renew a licence, or the enforcement authority placing conditions on the licence.

The ULCC Act also prohibits the retention of donor lists generated by the fundraising business while soliciting donations on behalf of a charity. The donor list becomes the property of the charity and is under the charity's exclusive control. In addition, the ULCC Act requires fundraising businesses to use "best efforts" to comply with a person's request to refrain from making solicitations or to remove the person's name from the donor list.

G. FUNDRAISING AGREEMENTS

Fundraising agreements, one of the primary focuses in the *Aids Society* and *National Society* case decisions, are mandatory under the ULCC Act. Similar to the practices in foreign jurisdictions, like the U.K., the written agreement must set out the rights and duties of both the charity and the fundraising business. It must

establish, among other things, the remuneration to be paid to the fundraising business, the methods of solicitation, and the circumstances and mechanism for termination of the contract.

H. RETAIL INCENTIVE DONORS

A retail incentive donor is a person or company that offers goods or services as part of its normal commercial activities and represents to consumers that the purchase of the goods or services will benefit a charity or charitable purpose. The ULCC Act directs retail incentive donors to donate all or a portion of the purchase price to a charity in accordance with representations made to the consumer. Further, it directs such donors to obtain the written consent of the charity prior to making any representations concerning sponsorship, endorsement or association. This includes any representation that donations will go to an identified charity.

I. INSPECTIONS AND INVESTIGATIONS

Noting that one limitation of the Alberta Act was in relation to enforcement, the ULCC Act empowers the enforcement authority to conduct investigations and to obtain the assistance of the court for the same. This may include an inspection and temporary removal of the charity's or fundraising business' records.

Initiation of an investigation may come as a result of a complaint or on the enforcement authority's own initiative, and may concern the administration of the ULCC Act and regulations, or the circumstances surrounding a solicitation. Contravention of the ULCC Act brings with it the possibility of suspension, cancellation or the imposition of conditions on the charity's registration or the fundraising business' licence. A person found to be in contravention of certain provisions of the ULCC Act may be guilty of an offence and liable, on conviction, to (1) a fine that is not less than \$1,000 and not more than the greater of \$100,000 and three times the amount that the defendant obtained as a result of the offence; and/or (2) up to two years imprisonment.

On application by a donor, the superior court of a province is empowered under the ULCC Act to compel the proper use of contributions if the court is satisfied that the charity is not using the contributions it receives for the charitable purpose stated or implied in the solicitation. The court may require the charity to pay the monies to a charity formed for the same charitable purpose, return the contribution, require the charity to use

the contribution for the charitable purpose for which it was donated, or make a declaration respecting the use or misuse of the contributions by the charity.

J. CONCLUSION

Given the increasing relevance of charities in the day-to-day lives of Canadians, it is time for the provinces and territories to step in and offer much needed protection from the few who would choose to exploit the generosity of Canadians and the goodwill of the vast majority of legitimate charitable organizations across Canada. As Prof. Oosterhof noted, although the infractions are not rampant in the sector, they stand to undermine the integrity of the sector if allowed to continue unchecked. Through the adoption of uniform standards across the country, the charitable organizations, their donors and clients stand to benefit. The ULCC Act is a welcome addition to the Canadian legal landscape but now needs to be acted upon by the provinces as soon as possible.



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