
ULCC WORKING GROUP INTRODUCES DRAFT UNIFORM INFORMAL PUBLIC APPEALS ACT

*By Terrance S. Carter**

A. INTRODUCTION

Public appeals for donations are commonplace in today's society. Often these appeals are made by registered charities and other organizations, such as not-for-profits, with the experience and organizational structure to allow them to receive donations from a large number of donors. However, many public appeals are made not by well-established organizations, but by inexperienced or newly assembled groups or individuals, often in response to a recent event or tragedy, with the goal of quickly raising funds for a specific person or purpose. Such appeals are often described as informal or sporadic public appeals. These sorts of appeals and the common legal issues that arise from them are the subject of a recent consultation paper by a working group of the *Uniform Law Conference of Canada (ULCC)*¹. The consultation paper can be accessed online at <http://ulcc.weebly.com>.

B. CONTEXT FOR CONSULTATION PAPER

Aside from the amount of organizational experience, a key difference between an informal, sporadic appeal and that of an established organization's ongoing fundraising efforts, is the law which applies to each situation. Registered charities and not-for-profits operate within an existing regulatory scheme and as such they should already be familiar with their responsibilities to donors and to their own purposes and objects

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¹ Consultation Paper on a Uniform Informal Public Appeals Act, *Uniform Law Conference of Canada Civil Section*, available online: <http://ulcc.weebly.com>.

with regards to fundraising proceeds. Sporadic public appeals, on the other hand, are often established very quickly in response to a recent occurrence, by a single person or small group of people, and with little or no knowledge of what legal obligations they may encounter as a consequence of their benevolent undertaking. Often, the circumstances giving rise to a sporadic or informal appeal are highly emotional, and as such can lead to very successful campaigns. These very positive results can unfortunately lead to difficult or complicated legal scenarios, which present unwanted and unexpected problems given the relative lack of sophistication of the groups that commonly organize these campaigns.

One such problem occurs where an informal appeal generates more money than is required for its cause or where another charity or government agency offers its assistance, rendering the informally raised funds unnecessary. In these cases the organizers of the appeal will have to determine what to do with the surplus. Normally in an informal appeal there is no plan in place or prior indication to donors regarding how any surplus funds will be spent, as a surplus of funds is often unanticipated. The choices that would appear to be available to the organization are to apply the funds to a different cause, or to return the money to the donors. However, what may not be known is that both of these alternatives amount to breaches of some of the basic tenants of trust law.

Where funds are donated for a charitable purpose, a trust results wherein those in charge of the fund are treated as trustees. The trustees are bound to distribute the funds in accordance with the terms of the trust, for the benefit of the cause, purpose, or person for which the funds were donated. As such, applying the funds to a different purpose (including a refund to the donor), would be a breach of the basic terms of the charitable trust. This situation can be avoided where a trust is crafted at the outset to allow the trustees some discretion in these applications of the trust funds, but such is rarely the case in an informal or sporadic appeal. An additional problem with regards to issuing refunds to donors is that there are often insufficient records of what was donated by whom, and it is unlikely that receipts were issued, particularly for smaller donations.

The question of what can be done with surplus funds in these situations is answered in the 1958 English case *Re Gillingham Bus Disaster Fund*.² in which the court determined that the only way in which the trustees could appropriately dispose of the surplus was to keep the funds in a trust account, where they would accumulate interest indefinitely, or deposit the funds into the court. The consultation paper recently produced

² [1958] Ch. 300, *aff'd* [1959] Ch. 62 (C.A.).

by the working group for the *Uniform Law Conference of Canada* is aimed at avoiding such impractical results in these types of situations. The draft legislation which is proposed by the group, outlined below, is meant to confirm and clarify the trust relationship that arises in the course of informal public appeals, and the responsibilities of trustees and the options available to them when they are faced with a surplus of trust funds. The draft legislation also attempts to expand upon the powers available to the court to direct the distribution of surplus funds.

C. BACKGROUND AND HISTORY OF THE PROPOSAL

The project to develop a *Uniform Informal Public Appeals Act* was added to ULCC's program in 2009 in recognition of problems with the current law and the substantial amount of work already done on this topic by the *Law Reform Commission of British Columbia* (BCLRC)³. In 1993, BCLRC published its report on informal public appeal funds, much of which has been implemented in the ULCC working group's proposal.

The current version of the ULCC consultation paper is the work of the working group only and has yet to be adopted by the ULCC. The working group is currently soliciting input from interested persons and groups. More information is provided below, along with a link to the consultation paper.

D. THE APPROACH TAKEN BY THE ULCC WORKING GROUP

Using the BCLRC report as a jumping off point, the goal of the ULCC working group was to create a proposal for uniform legislation that would bring some certainty to this area of the law. The working group developed the following set of principles to guide their work:

- Reform should be pursued through a stand-alone Act dedicated to public appeal funds rather than as an amendment to existing trustee legislation;
- The application of the Proposed Act should be narrow in scope so as to exclude the fund-raising activities of established bodies for their usual purposes;

³ Report on Informal Public Appeal Funds (LRC 129 1993), available online: http://www.bcli.org/sites/default/files/LRC129-Informal_Public_Appeal_Funds.pdf.

- The Proposed Act should confirm that the money raised through a public appeal is held in trust for the objects of the appeal;
- The Proposed Act should be largely default in character and capable of being displaced by more specific documents and rules created to govern the appeal;
- The Proposed Act should create a power in the court to direct the application of surplus funds raised for non-charitable objects;
- The Proposed Act should provide a mechanism for the disposition of small surpluses;
- The Proposed Act should 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.

E. KEY FEATURES OF THE PROPOSAL

The consultation paper includes a copy of the Proposed Act, tentatively titled the *Uniform Informal Public Appeals Act* (“the Proposed Act”) Some key features of the proposed legislation are discussed below.

1. Scope of the Application of the Act

One of the key features of the draft legislation is a definition of “appeal”, which is intended to limit the scope of activity to which the Proposed Act would apply. It is intended that the Proposed Act should apply to a broad range of fundraising and/or soliciting activities that might be undertaken in a sporadic or informal way to raise funds for a charitable purpose. The definition of “appeal” in the Proposed Act is drafted so as to exclude a message that is “communicated as part of a permanent or continuing fundraising effort.” In that way, it is intended that only sporadic or informal appeals are included.

The application of the Proposed Act is limited in two additional ways by section 2 of the draft legislation. Section 2 (2) states that the Proposed Act does not apply to funds collected by a registered charity as recognized by CRA, or by any other incorporated body for the advancement of its usual

objects. Section 2(1) says that the Proposed Act only applies the extent that its provisions do not conflict with certain documents which might be in place to govern an appeal fund, such as a contract, constitution, or trust instrument for example.

2. Confirming the Creation and Terms of a Trust

The Proposed Act confirms that money collected for a fund through an appeal falling within the scope of the Proposed Act is subject to a trust for the benefit of the stated objects (ie. the person or purpose for which the funds are being collected). The Proposed Act dictates that the trustees are those who are responsible for the management and disbursement of the collected funds. This trust is deemed to be enforceable regardless of whether the purpose is considered to be a charitable purpose.

The terms of the trust are set out within the “Model Trust Document”, which is included in the Proposed Act. While the appeal may have its own trust document already in place, the Model Trust Document will apply to the extent that it does not conflict with that instrument. Where there is no other document, the entirety of the Model Trust Document and all of its terms will apply.

3. Dealing with Surplus Funds

The following definition is provided in the Proposed Act for “surplus funds”: “money or other property remaining in a public appeal fund that ceases to be needed or cannot be used for the object described in the appeal.” When it comes to dealing with these funds, the Proposed Act creates a mechanism which resembles an expanded application of the *cypres* doctrine, by which a court can direct the distribution of the surplus to other charitable purposes. The trustees will be bound by the court’s instructions. The list of parties that may apply to the court for an order for directions includes trustees, donors, beneficiaries, the Attorney General, and other persons with “sufficient interest” in the enforcement of the trust.

The Proposed Act also provides alternatives to relying on the power of the court to redirect surplus funds to charitable purposes. First, in a case where the amount of the surplus is \$10,000 or less, and it would therefore be uneconomical to bring an application before the court, the trustees may distribute the surplus funds among charitable bodies approved under the Proposed Act and its regulations without the prior approval of the court. Second, where a person has donated an amount of \$100 or

more, and the fund is left with a surplus, section 6 of the Proposed Act sets out how a gift can be refunded to the donor with certain limitations, including the possibility that the refund will be pro-rated.

4. Accumulations

While it is already well established that the law against perpetuities does not apply to charitable trusts, such is not the case with most other types of trust funds. The Proposed Act is intended to regulate sporadic and informal appeals whether or not the objects of the appeal are, by legal definition, “charitable.” In order to protect non-charitable donor funds that are solicited within the scope of the Proposed Act, section 7(1) stipulates a perpetuity period of 80 years, greatly extending the normal 21 year period which applies in most provinces.

F. NEXT STEPS FOR THE PROPOSAL

It is hoped that the recommendations contained in the consultation paper, as they are manifested within the draft legislation, will bring greater certainty to the law applicable to informal public appeals and that the greater powers afforded to the court under the Proposed Act will prevent any future occurrences of a *Gillingham* scenario in which surplus funds are rendered as useless charitable gifts to be held in perpetuity with no objects. As mentioned above, the working group is currently soliciting feedback and input on the current consultation paper. The deadline for responding to the current proposal was stated as being September 7, 2010, but it appears that subsequent submissions can continue to be made after that date for a reasonable time. The preferred method of response is by email to aclose@shaw.ca.