
ULCC ADOPTS REVISED DRAFT OF UNIFORM INFORMAL PUBLIC APPEALS ACT

*By Terrance S. Carter**

A. INTRODUCTION

In August 2011, the Uniform Law Conference of Canada (“ULCC”) adopted model draft legislation called the *Uniform Informal Public Appeals Act* (“UIPAA”) that it recommended for enactment by the provinces and territories.¹ The purpose of the recommended model draft legislation is to assist individuals and organizations who raise donations for charitable and non-charitable purposes by informal appeals to the public in disposing of surplus or unused donations. For example, surplus funds may be generated when more money than is required is raised. In those cases, organizers unfamiliar with their legal obligations may be unaware that returning the money or applying the funds to a different cause may amount to a breach of trust.

This bulletin provides a brief overview of the UIPAA’s provisions. Although the UIPAA has not been enacted by any province or territory, it is still worthwhile for organizers of informal public appeals to review the UIPAA so that they can familiarize themselves with the legal issues that they face in dispensing surplus or unused donations. For more information concerning the consultation paper on the UIPAA, reference can be made to *Charity Law Bulletin* No. 224, which is available online at <http://www.carters.ca/pub/bulletin/charity/2010/chylb224.htm>.

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¹ Uniform Law Conference of Canada, “Uniform Informal Public Appeals Act” online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/Appendix%20D1%20UIPAA%20and%20Commentary%20English.doc>.

B. DEALING WITH SURPLUS OR UNUSED FUNDS

Individuals and organizations that informally fundraise may be unaware that if there is a surplus or any unused portion of donations, those amounts must be dealt with in a specific manner. If a surplus results in relation to a charitable purpose fund, and the monies cannot be used, the court may rely on the doctrine of *cy près* in order to apply the remaining surplus to another charitable purpose only if it can find that the donors (many of whom may be anonymous) had a general charitable intention and did not limit their gifts to the specific project to which the informal public appeal was directed. If the doctrine does not apply, then the court cannot vary the terms of the trust for which the funds are subject. In comparison, if the purpose of a public appeal is not charitable, the surplus will be subject to a resulting trust in favour of the settlor(s) or donor(s).

Where, in either situation, the donations cannot be returned because the donors cannot be identified, it is possible for the donations to linger in limbo for years, as illustrated in the case of *Re Gillingham Bus Disaster Fund*². In that case, the court determined that the only way that 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. Since informal appeals to the public for funds can arise spontaneously in reaction to a tragedy or another unexpected event, they may fail to adequately record the contact information for donors. The UIPAA attempts to avoid the situation where donations cannot be used.

C. SUMMARY OF THE UIPAA

1. Scope and Application of the UIPAA

The UIPAA applies to a “public appeal.” A “public appeal” is defined as a message directed at the public generally or a section of the public, requesting donations to or indicating that proceeds of fundraising activities will be applied towards a fund that is intended to be for a specified object, regardless of whether the object is charitable at law or not. A message communicated as part of a fundraising effort carried out on a permanent or continuing basis is not a public appeal.³ Subsection 2(1) provides that the UIPAA does not apply to a “qualified donee” within the meaning of the *Income Tax Act*⁴ (Canada), which includes registered charities.

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

³ *Supra* note 1 at ss. 1(1).

⁴ R.S.C., 1985, c. 1 (5th Supp.)

There are three mandatory provisions that apply to every fund which cannot be overridden. First, a person who directs the management and disbursement of a fund is a trustee.⁵ Second, the maximum duration of a fund with non-charitable objects that is stipulated in the UIPAA cannot be overridden.⁶ In that regard, all funds that are held in trust for a non-charitable object are subject to an eighty year ceiling on their duration, beginning on the day the first donation was received in response to the first public appeal.⁷ If a shorter period is set out in a trust document, then the shorter period is the maximum permitted duration of a non-charitable fund. Upon the expiry of the maximum permitted duration, any property remaining in the fund is deemed to be surplus and must be distributed by the trustee in accordance with the UIPAA, as discussed below.⁸ The third provision that cannot be overridden is the requirement in ss. 10(2) that certain conditions must be met before a surplus that is provided for in a trust document can be distributed without court approval,⁹ (e.g. a scheme to distribute a surplus that is provided in a trust document must be part of the terms of the public appeal to be effective).

With regard to the default provisions which can be overridden, they apply only to the extent that other legislation does not apply and there is no conflict with the terms of the public appeal or its governing authority

2. Overview of the Operation of a Fund and the Model Trust Document

A fund is subject to a trust for the benefit of the object for which the public appeal was conducted.¹⁰ To administer a trust, a trustee may execute a trust document that may be modelled on the standard form trust declaration, the Model Trust Document, located in the schedule to the UIPAA.¹¹ If a trust document is not executed, then a trust document containing as much of the Model Trust Document is deemed to be executed to the extent that the provisions of the schedule do not conflict with the terms of the public appeal or the governing authority of the trust.¹²

⁵ *Supra* note 1 at ss. 2(2)(a) and ss. 4(1).

⁶ *Ibid.*, ss. 2(2)(b) and s. 7.

⁷ *Ibid.*, ss. 7(1).

⁸ *Ibid.*, ss. 7(2).

⁹ *Ibid.*, ss. 2(2)(c) and ss. 10(2).

¹⁰ *Ibid.*, ss. 3(1).

¹¹ *Ibid.*, ss. 5(1)-(2).

¹² *Ibid.*, ss. 5(3).

A trustee that has custody of a trust document is required to allow any person who establishes to the former's satisfaction that he or she made a donation of at least \$500 to inspect the trust document.¹³ Among others, donors may commence a court proceeding to enforce a trust to which a fund is subject or to enforce a duty imposed by the UIPAA.¹⁴ This provision is a departure from the common law, which entitled the beneficiaries of the trust, and not the donors, to enforce the trust.

3. Disposition of Surpluses

The UIPAA employs several measures to avoid a Gillingham-like situation (i.e., a situation where a surplus cannot be used because the donors cannot be identified). First, no resulting trust in favour of the donor is formed when a surplus exists, subject to the requirement to refund or return an unused donation under certain circumstances.¹⁵ In the absence of this provision, a resulting trust would exist because trustees cannot re-allocate the surplus to a purpose other than the original purpose of the fund or refund the donation to the donor. A second measure is the extension of the equitable doctrine of *cy prè*s to trusts for non-charitable purposes. Pursuant to this doctrine, a court may reform a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail.

As mentioned above, a distribution scheme in a trust document will be effective without court approval as long as the scheme formed part of the terms of the public appeal when the donations were made and the surplus is distributed in accordance with the rules relating to a fund's object.¹⁶ If the object of a public appeal is charitable, the surplus may only be used for a charitable object. If the object of a public appeal is non-charitable, the surplus may be used for either a charitable object or a non-charitable object that is consistent with the spirit of the public appeal.¹⁷ In the alternative, court approval is required to approve a distribution scheme, regardless of whether the object of the public appeal was charitable or not.¹⁸

However, court approval is not required to distribute a surplus of \$20,000 or less if the trustee distributes the surplus to one of more "qualified donees" within the meaning of the *Income Tax Act*

¹³ *Ibid.*, ss. 5(4).

¹⁴ *Ibid.*, s. 8

¹⁵ *Ibid.*, s. 9

¹⁶ *Ibid.*, ss. 10(2).

¹⁷ *Ibid.*, ss. 10(5).

¹⁸ *Ibid.*, ss. 10(3)

(Canada) whose objects are consistent with the spirit of the public appeal.¹⁹ This provision reflects a balance between avoiding an expensive court application for a *cy prè*s order and allowing the trustees free rein to donate a surplus to whatever cause they wish irrespective of the donors' wishes.

4. Refunds and Returns of Donations

A person who donates at least \$500 to a fund with a non-charitable object or personal property of equivalent value may request that the trustee, in the event of a surplus, refund the money according to the formula provided for in the UIPPA or apply that amount as the donor directs.²⁰ According to the commentary, a refund should be available where a substantial donation is made because donors are often motivated to give only for the specific purpose of a particular public appeal. As well, this provision would not apply to funds raised pursuant to a charitable purpose, as they would have to be dealt with by a *cy prè*s order. In order for a request for a refund to be granted, the request must have been made in writing at the time the donation is made.²¹ The rationale for this requirement is that a belated demand for a refund may create major administrative problems for trustees (e.g. they would be prevented from knowing the extent of the balance of available funds).

In the case of a donation of real property to a fund with a non-charitable purpose, the real property must be returned or disposed as directed by the donor where it is no longer needed or cannot be used for the object and it has not been converted into money or another form of property.²²

If a trustee has made all reasonable efforts and cannot locate the donor, then the trustee may dispose of the donations and deal with the proceeds as if they were surplus for which a return or refund was not required.²³

5. Trustee's Powers and Duties

The UIPAA sets out default powers for trustees, which may be overridden by a trust document or another governing authority.²⁴ Default trustee powers include the ability to invest part of the fund, as

¹⁹ *Ibid.*, ss. 10(6).

²⁰ *Ibid.*, ss. 11(1).

²¹ *Ibid.*, ss. 11(2).

²² *Ibid.*, ss. 12(1).

²³ *Ibid.* ss. 11(4) and ss. 12(2).

²⁴ *Ibid.*, Commentary on Part 4.

permitted by the *Trustee Act* of the jurisdiction,²⁵ and to make engage in further fundraising and make additional public appeals.²⁶ Consistent with the *Trustee Act*, a trustee may receive professional advice and services in relation to any matter concerning a fund.²⁷

With regard to their duties, trustees are required to hold the fund for the duration of the trust and use the income and capital for the object of the fund.²⁸ In the event that a portion of the donations remain unused, the trustee must periodically consider whether the surplus is still needed or can be used for the fund.²⁹ If the trustee determines that the remainder is no longer needed or cannot be used for the object(s) of the fund, then the trustee is required to set out his or her reasons for coming to that decision in writing and declare the trust to be at an end.³⁰ This process allows the trustee to forgo a costly application to the court and empowers the person who actually administers the fund to determine whether the fund is still performing a useful function.

D. CONCLUSION

The UIPAA highlights the unsatisfactory state of the law pertaining to disposing of surplus or unused donations involved in informal public appeals for charitable and non-charitable purposes. Organizers of informal public appeals would be well advised to review the terms of the model legislation and the accompanying commentary in order to familiarize themselves with the legal challenges that could be faced in the absence of remedial legislation when dealing with informal public appeals.

²⁵ *Ibid.*, ss. 14(1).

²⁶ *Ibid.*, ss. 15(1).

²⁷ *Ibid.*, ss. Ss. 16(1).

²⁸ *Ibid.*, ss. 24(1)

²⁹ *Ibid.*, ss. 24(2)

³⁰ *Ibid.*