

PROPOSED NEW UNIFORM PUBLIC APPEALS AND CROWDFUNDING ACT

*By Terrance S. Carter and Luis R. Chacin**

A. INTRODUCTION

A Working Group of the Uniform Law Conference of Canada (the “ULCC”) released the “Consultation Paper on a *Uniform Informal Public Appeals and Crowdfunding Act*” (the “Consultation Paper”),¹ in September 2019. As its title implies, the Consultation Paper includes a proposed *Uniform Informal Public Appeals and Crowdfunding Act* (the “Proposed Model Act”). The Working Group is seeking comment by January 15, 2020 on the Proposed Model Act which, if adopted by the ULCC, would replace the *Uniform Informal Public Appeals Act* previously adopted by the ULCC in 2011 (the “2011 Model Act”).² The ULCC is a conference that brings together appointees from all the governments of Canada, academics, members of the bench and bar, as well as representatives from law reform commissions or similar bodies, for the purpose of promoting harmonization among the legislation of the provinces and territories.

The Consultation Paper states that the term “informal public appeals” refers to the type of informal fundraising usually carried out in response to a specific event or concern and frequently led by persons

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¹ Working Group of Uniform Law Conference of Canada (Civil Section), “Consultation Paper on a Uniform Informal Public Appeals and Crowdfunding Act” (September 2019), online: <http://unilaw.ca/data/documents/Consultation-Paper-2019.pdf>. See also Terrance S. Carter, “New Model Crowdfunding Legislation from the Uniform Law Conference of Canada”, in *Charity & NFP Law Update* (September 2019), online: <http://www.carters.ca/pub/update/charity/19/sep19.pdf>.

² *Ibid.* See also Uniform Law Conference of Canada (Civil Section), “Uniform Informal Public Appeals Act” (2011), online: https://www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0011.pdf; Quebec version available online: https://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0016.pdf. For additional commentary on this model legislation, see Terrance S. Carter, “ULCC Adopts Revised Draft of Uniform Informal Public Appeals Act” in *Charity Law Bulletin* No. 270 (1 December 2011), online: <http://www.carters.ca/pub/bulletin/charity/2011/chylb270.pdf>.

with limited experience in fundraising and administering funds. An example of this type of informal fundraising was the online crowdfunding campaign for the benefit of the victims of the April 6, 2018 accident involving members of the Humboldt Broncos junior hockey team. In the case of the Humboldt Broncos crowdfunding campaign, Saskatchewan's *Informal Public Appeals Act*,³ which had been based on the 2011 Model Act, was applied to the administration and distribution of the funds raised from donors all over the world for the benefit of the affected victims and their families.⁴

In this regard, the Consultation Paper states that the purpose of the Proposed Model Act is to provide an appropriate legal framework to assist in the creation and administration of funds from an informal public appeal in order "to ensure that trust law applies evenly to all appeals."⁵ The legal framework described in the Consultation Paper would continue to exempt public appeals carried out by qualified donees within the meaning of the *Income Tax Act* (Canada),⁶ as currently exempt in the 2011 Model Act. However, the Consultation Paper and the accompanying Proposed Model will still be of interest to registered charities and other qualified donees relying on supporter-driven crowdfunding campaigns or third-party fundraising agreements in which the funds are not paid directly to the registered charity or qualified donee, but are instead collected and held by a third party to be delivered at a later time to a qualified donee.

B. BACKGROUND

The Consultation Paper recognises that with the emergence of online crowdfunding platforms, anyone with access to the internet is able to start a crowdfunding campaign to raise funds for specific causes, projects or ventures, such as providing relief to the families of the victims of a disastrous motor vehicle accident, supporting a specific community project, or the launch of a new gadget, business model or

³ SS 2014, c I-9.0001 (assented to on March 12, 2014 and in force since January 1, 2015).

⁴ For information on the first case involving this legislation, see Jacqueline M. Demczur, "Final Order Involving the Humboldt Broncos' Crowdfunding Campaign" in the January 2019 *Charity & NFP Law Update*, online: <http://www.carters.ca/pub/update/charity/19/jan19.pdf>. See also Jacqueline M. Demczur, "Initial Order Involving the Humboldt Broncos' Crowdfunding Campaign" in the October 2018 *Charity & NFP Law Update*, online: <http://www.carters.ca/pub/update/charity/18/oct18.pdf>.

⁵ *Supra* note 1 at 11. See also, for example, section 52 of Nova Scotia's *Trustee Act*, RSNS 1989, c 479, which provides that with regard to funds raised from appeals for donations from the public, "the person or persons who receive and hold the funds shall be trustees thereof and there shall be a trust to which this Act applies".

⁶ RSC 1985, c 1 (5th Supp).

artwork.⁷ When the organizer of the crowdfunding campaign is a registered charity or other qualified donee raising funds for its own purposes, members of the public can generally rely on strict tax, corporate and trust legislation, as well as long-established common law rules governing how such funds may be administered and distributed. However, when the organizer is an individual or a business raising funds for a family affected by a natural disaster, for example, there may be issues with how the funds raised through the crowdfunding campaign are applied to the proposed cause, project or venture and ensuring that otherwise unused or excess funds are dealt with appropriately.

Under the 2011 Model Act, funds raised through a “public appeal”, including funds from a crowdfunding campaign, would be held in trust for the benefit of the object for which the public appeal was conducted,⁸ with the administration of the resulting trust account being carried out through the execution (or deemed execution) of a trust document.⁹ The 2011 Model Act also includes a “Schedule” with a model trust document providing for the governing statute, name and objects of the trust fund, as well as the donation of surplus funds to a registered charity with similar objects as those of the trust fund.¹⁰ 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 the terms of the public appeal, and such terms of the public appeal, as well as the circumstances in which the appeal is made, are also deemed to be part of the trust document.¹¹

These provisions of the 2011 Model Act, including section 8 regarding court proceedings for the enforcement of the trust by a trustee, donor, beneficiary (or their representative), the Attorney General, or any person with sufficient interest, remain substantially the same in the Proposed Model Act.

⁷ Generally, there are two broad types of crowdfunding: non-equity crowdfunding (*e.g.* donation-based or reward-based crowdfunding) and equity crowdfunding. The 2011 Model Act, as well as the proposed amendments in the Consultation Paper would not apply to equity crowdfunding. If the crowdfunding involves an offering of securities (*i.e.* equity crowdfunding), it will be subject to securities laws. Securities regulators, including those in Manitoba, Ontario, Quebec, New Brunswick and Nova Scotia, have adopted a crowdfunding exemption under Multilateral Instrument 45-108 (MI 45-108), which exempts equity crowdfunding of an “eligible security”, as defined therein, from the prospectus requirements otherwise applicable to the distribution of securities to the investing public in those provinces. See MI 45-108 online: https://www.osc.gov.on.ca/en/SecuritiesLaw_mi_20160114_45-108_crowdfunding.htm; as well as its Companion Policy 45-108CP. MI 45-108 also imposes various requirements on online platforms. See also CSA Staff Notice 45-324 Update on the Start-up Crowdfunding Registration and Prospectus Exemptions (21 February 2019), online: https://www.osc.gov.on.ca/documents/en/Securities-Category4/csa_45-324_prospectus-exemptions.pdf

⁸ *Supra* note 3, s 3.

⁹ *Ibid*, ss 4-5.

¹⁰ See *ibid*, s 1(1), in which “surplus” is defined to mean assets remaining in a public appeal fund that are no longer needed or cannot be used for the object described in the appeal to the public.

¹¹ *Ibid*, s 5(3).

C. PROPOSED REVISIONS

The Consultation Paper proposes to change the name of the model legislation from *Uniform Public Appeals Act* to *Uniform Public Appeals and Crowdfunding Act*, acknowledging that the term “crowdfunding”, which was missing from the 2011 Model Act, would more clearly convey the content and purpose of the Proposed Model Act.¹² As well, the Consultation Paper proposes to amend the 2011 Model Act by changing the regime’s scope of application, amending a few key definitions, introducing new rules regarding the jurisdiction and choice of law applicable to an appeal, and revisions to the terms of an appeal, all of which is discussed below.

1. Scope of the Proposed Model Act

For the most part, the Proposed Model Act largely mirrors the 2011 Model Act – the Consultation Paper indicates that “approximately 90% of the draft legislation consists of provisions and commentary carried forward from the [2011 Model Act] with little or no change.” However, the Consultation Paper states that although online crowdfunding campaigns may have a much wider variety of objects than the public appeals previously envisioned in 2011, the focus of the Proposed Model Act will continue to be “appeals for a humanitarian or public purpose”,¹³ excluding certain fundraising activities from the scope of the model legislation. As such, the proposed amendments in the Consultation Paper would continue to exempt any public appeals carried out by qualified donees, as contemplated by both the 2011 Model Act and Saskatchewan’s *Informal Public Appeals Act*.¹⁴ The proposed amendments would also exempt the following public appeals from the Proposed Model Act:

- 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) (note that the term “intermediary” is defined as either a savings institution that holds a fund, or an internet platform that assists in organizing a public appeal and holds or transmits a fund raised through a public appeal, *e.g.* GoFundMe);¹⁵

¹² *Supra* note 1 at 5.

¹³ *Ibid* at 6.

¹⁴ *Supra* note 3.

¹⁵ *Supra* note 1, s 2(2)(b).

- 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 any applicable legislation regulating investment and securities in the province;¹⁶
- a public appeal whose object is to support partisan political activity if such fundraising is otherwise governed by any applicable Federal or Provincial legislation regulating political fundraising;¹⁷ or
- a public appeal that provides for an economic benefit to donors other than a benefit that is an opportunity for public recognition of the donation, or a gift or reward that is of token value only.¹⁸

The Consultation Paper states that in most cases it would be “clear” whether a particular appeal to the public is excluded from the model legislation.¹⁹

2. Amended Definitions

The Consultation Paper proposes to amend various definitions from the 2011 Model Act, including the definition of “public appeal”, for consistency with the amended scope of application of the Proposed Model Act, as described above. As well, the terms “intermediary” and “internet platform” would be defined under the proposed amendments in reference to entities that facilitate fundraising and hold funds in that capacity.

Of note, the definition of “governing authority” would also be amended to explicitly include the terms of the appeal. Further, the definition of “terms of the public appeal”, defined under the 2011 Model Act as “the information given to the public on which a decision to donate to the appeal may be based,” would also be amended to include “information provided by an internet platform in relation to the conduct of the appeal.”²⁰ In this regard, paragraph 6(2)(d) of the Proposed Model Act would allow for the terms of the appeal to be embodied in a user agreement with an internet platform. There would also be a corresponding amendment to the “Schedule” containing the model trust

¹⁶ *Ibid*, s 2(2)(c). This would exempt equity crowdfunding from this model framework.

¹⁷ *Ibid*, s 2(2)(d).

¹⁸ *Ibid*, s 2(2)(e).

¹⁹ *Ibid* at 6.

²⁰ *Ibid*, s 1(1).

document included within the Proposed Model Act such that the internet platform, and therefore any applicable user agreement, are clearly identified by the organizers in the trust document.

3. Jurisdiction and Choice of Law

The Consultation Paper states that issues relating to jurisdiction and choice of law are probably the most challenging because online crowdfunding campaigns may reach donors across the world, may have more than one organizer each of whom may be located in different jurisdictions, and the object of the appeal may also be located in more than one jurisdiction. In this regard, the Proposed Model Act proposes new subsections 2(1), 3(4), 3(5) and 3(6) with new rules for the determination of the governing jurisdiction, including a consideration of the “closest connection” to the object of an appeal.²¹

Of note, the Consultation Paper states that for situations where the user agreement of an internet platform based outside Canada contains a jurisdictional clause that would displace the model legislation (once enacted) where it should otherwise apply, the Proposed Model Act would include a new subsection 3(4) to override such jurisdictional clause unless there is no real and substantial connection to the location of the ordinary residence of the organizer or the object of the public appeal.

4. Revisions to the Terms of the Appeal

The Consultation Paper states that many internet platforms allow the organizers of a crowdfunding campaign to update or revise the terms of an appeal while it is in progress and after donations have been received, which may arguably be reasonable and well-intentioned attempts to deal with a change in circumstances, but may also be contrary to the expectations of the original donors. As such, the Consultation Paper states that the proposed subsection 6(1) would strike a balance between these competing interests by allowing revisions to the terms of an appeal when, subject to a user agreement with an internet platform, the terms are revised to (i) provide for the disposition of a surplus, where such surplus is the result of shifting circumstances not previously foreseen at the time the appeal was launched; (ii) provide a new or modified fundraising goal where the initial terms of the appeal set out a fundraising goal that proved to be unrealistic; or (iii) provide for new or modified means for the delivery of relief to one or more identifiable individuals or groups, where such relief

²¹ *Ibid* at 6-7.

was the object of the appeal. However, in all cases, the revised terms of the appeal must be consistent with the spirit of the original appeal.

D. CONCLUDING COMMENTS

The proposed amendments included in the Consultation Paper and the accompanying Proposed Model Act reflect a timely response to the increasing prevalence of online crowdfunding campaigns and other types of informal public appeals. For those organizations that are interested in the work of the ULCC in this regard, it will be important to remember that January 15, 2020 is the deadline to provide comments.