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Via email: aclose@shaw.ca

Mr. Arthur L. Close, Q.C.
UIPAA Project Leader
Uniform Law Conference of Canada
c/o 15 Ettrick Crescent
Barrhaven, ON K2J 1E9

Dear Mr. Close,

Re: Consultation Paper on a Uniform Informal Public Appeals Act (UIPAA)

I write on behalf of the National Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA Section). The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. Its primary objectives include improvement to the law and the administration of justice. The CBA Section represents lawyers from across Canada who advise, or serve on boards of, charitable and not for profit organizations.

The CBA Section is grateful to the Uniform Law Conference of Canada and its Working Group for the consultation paper on a Uniform Informal Public Appeals (UIPAA). The CBA Section supports and recognizes the importance of the UIPAA, as a tool to encourage and facilitate organized benevolence and to protect Canadian donors.

In general, the CBA Section welcomes the proposal to create a legislative framework to govern informal public appeals. As the consultation paper describes, public appeals for donations are common. While the majority of these appeals are carried out by registered charities as part of their ongoing fundraising efforts, a significant number are informal and unconnected to the activities of the registered charity. The number and scope of informal appeals can be expected to multiply as electronic and online media communication tools become more prevalent and accessible.

While appeals by registered charities are governed by multiple layers of regulation, informal appeals currently exist in a regulatory “grey area” marked by an absence of statutorily enacted rules. These informal appeals are governed by the common law of trusts and charities. This is a complex and technical area of the common law that is not easily understood by the public. As the consultation paper points out, this area of law presents legal and practical pitfalls for the unwary. Considering that most informal appeals are spearheaded by small groups of individuals motivated by generosity and urgency, it would be rare for proponents of an informal appeal to have a

sufficiently sophisticated understanding of the legal framework to avoid falling afoul of existing common law rules.

The UIPAA Working Group seeks to alleviate many of these problems with draft legislation to provide a straightforward set of rules. The CBA Section agrees with the principles set out in the consultation paper and has the following comments on the underlying principles and provisions of the draft uniform act.

Stand-Alone Act

Creating a stand-alone act dedicated exclusively to informal public appeals would be preferable to amending existing trust legislation. Trust statutes currently in place in each Province and territory are technical laws that have developed alongside and in response to the deficiencies in the common law of trusts. These statutes adopt common law terminology and as a result are not easily understood by non-lawyers. In contrast, enacting informal appeals legislation could create a legislative framework that is accessible and comprehensible to non-lawyers. A stand-alone act would provide clear rules and processes for proponents of informal appeals to follow. It could be drafted in accessible language that need not be obscured by language and concepts that have little relation to informal public appeals.

Limited Application

The CBA Section agrees that the scope of UIPAA should expressly exclude fundraising activities by registered charities and other incorporated entities. Fundraising by these entities is already subject to regulation under the federal *Income Tax Act*, related administrative policy and, in some jurisdictions, provincial legislation. The language proposed in section 2(2) is adequate to clarify the legislative intent with respect to charities and incorporated bodies and to exclude fundraising by these entities from the scope of UIPAA.

However, the reference in subsection 2(2)(b) to “unincorporated body” should be removed as this will create considerable uncertainty. An unincorporated body in the majority of cases will not typically have objects in any formal sense. Furthermore, are not the majority of public appeals conducted by unincorporated bodies?

The CBA Section supports the concept of relying upon the UIPAA as default legislation, displaced by and to the extent that it conflicts with another enactment or the express intention of the proponents as evidenced by the terms of the appeal, or other relevant documents.

Funds held in Trust

Central to UIPAA and the primary presumption from which the other provisions are derived is the notion enshrined in section 3(1) that a public appeal fund is held “subject to a trust” for the intended beneficiaries or objects. However, the language of subsection 3(1) should be revised. The words “the person for whom or the object for which” do not address the possibility that a public appeal fund may be raised for more than one individual, or a mix of both individuals and purposes.

The concepts enshrined in the remaining provisions of section 3 are also conceptually important. Several of these provisions represent a departure from the common law of trusts. The CBA Section agrees that these departures are necessary to ensure that a public appeal fund creates an enforceable obligation on the individual(s) who manage the funds, whether or not a trust can be established at common law. In particular, we support the notion that a trust created under UIPAA can be enforced not only by the beneficiaries but by donors and other stakeholders. This notion is of particular importance when the trust is established for an object rather than a person. This is likely to increase public confidence in such appeals.

Model Trust Document as Default

The CBA Section supports the use of the model trust document that will be deemed to apply where no trust document is actually executed. However, the language of subsection 4(3) may be too broad in situations where a formal trust document does exist. It is foreseeable that a situation might arise where a provision from Part 2 of the model trust document is deliberately omitted. Subsection 4(3) may operate to deem Part 2 to apply in any event because the omission does not “conflict” with the provisions of the executed trust document. A better approach in situations where a formal trust document exists would be to presume that no part of the model trust document applies. Accordingly, we suggest the deletion of subsection 4(3) of the draft UIPAA.

Surpluses

The CBA Section agrees with the proposed provisions dealing with surpluses. In particular, we support the expanded jurisdiction of a superior court to apply the cy-pres doctrine to public appeal fund surpluses whether or not the purpose of the appeal was charitable. We agree that any of the interested parties listed in subsection 3(5) should be able to apply for a scheme to distribute a surplus.

With regard to subsection 5(4), we query whether the reference to subsection 3(4) should refer instead to subsection 3(5). We also query whether the reference at the end of subsection 5(4) to subsection (4) should read “subsection (3)”.

We also support the concept behind subsection 5(8) whereby surpluses under a certain threshold may be distributed to a pre-approved list of recipients without application to the court. The more difficult questions are:

- What organizations are privileged to be included on the approved list?
- By what criteria are organizations included on this list? and
- How often would the list be revised?

We appreciate that these would be decisions to be made by each jurisdiction adopting the UIPAA.

Refunds and Accumulations

The CBA Section supports the notion that donors may, by specific request in writing, require the trustees of a non-charitable public appeal fund to return a prorated portion of their donation in the event of a surplus. We agree that funds donated subject to a request for a refund should not be affected by a court approved distribution scheme for a surplus.

The CBA Section also supports abrogation of the common law rule against accumulations, permitting non-charitable public appeal funds an extended lifetime consistent with perpetuities legislation.

Tax Treatment

The CBA Section is concerned about potential tax treatment of trusts created under UIPAA. Pursuant to section 104(2) of the *Income Tax Act*, a trust is deemed to be a separate entity from its trustees, taxable in the same way as an individual. It is likely that the UIPAA would establish a trust within this definition. The trustee would then, at a minimum, be required to file an annual tax return. The trustee could be personally liable for the payment of any tax presumably subject to the trustee’s common law entitlement to be indemnified from the trust. Tax status of trusts created under UIPAA therefore warrants further consideration.

We welcome the further development of UIPAA and look forward to the next communication from the working group.

Yours truly,

(original signed by Rebecca Bromwich for Terry Carter)

Terry Carter
Chair, Charities and Not for Profits Law Section