

UNIFORM LAW CONFERENCE OF CANADA
 CONFÉRENCE POUR L’HARMONISATION DES LOIS AU CANADA

PROJECT PROPOSAL

PROJECT NAME

Uniform Charity Act

(as close as possible to what the ultimate legislation might be)

OUTLINE OF THE PROPOSAL:

- *A brief outline of the Project Proposal*

Canadian common law jurisdictions have either enacted no legislation in the charity area or, as in Ontario, have enacted legislation that fails to modernise the law and reflect a range of current issues. By contrast, the four jurisdictions that make up the United Kingdom have modern and contemporary charity legislation. England and Wales, for example, passed overhauling legislation in 1960, 1992 and 2006, culminating in the *Charities Act, 2011*, dealing with the subject-matter that we discuss in ‘Issues to be Addressed’ below. In Canada, the *Constitution Act, 1867*, gives primary legislative authority over charity law to the provinces but, in the main, the provinces historically have left the regulation of the charitable sector to the federal authority. The federal authority possesses jurisdiction solely under its taxing power. It has no mandate or power to preserve or protect property devoted to charity. This power belongs to the provincial Crown as *parens patriae*, may or may not be exercised in a particular province and, if exercised, may not be on a formal basis.

In a few provinces (notably Ontario), the Public Trustee has a degree of jurisdiction over charities. However, the jurisdiction is different in each of these provinces, and the other provinces and territories have not delegated the Crown’s power. Since the federal authority has only taxing authority, the matters we outline in ‘Issues to be Addressed’ are dealt with differently among the provinces and territories, or not at all. Further, in the provinces and territories with no provision for charities, charity maladministration, whether wrongful or innocent, can only result in *Income Tax Act* penalties. This process merely diverts funds from charity into the federal revenue fund.

Recognizing the state of the law, the CBA Charities and Not-for-Profit Law Section appointed a Committee on Provincial Initiatives to investigate this problem. In the opinion of the Committee, a ULCC project to develop a *Uniform Charity Act* is critical to the future viability of the Canadian charitable sector. We envisage that the Act would deal with the problems outlined in ‘Issues to be Addressed’. Indeed, after considering how to secure reform, recall of the ULCC’s *Uniform Charitable Fundraising Act*, and observation of charity law reforms in the recent *Uniform Trustee Act*, encouraged the CBA Committee to appeal for the interest of the Uniform Law Conference and its demonstrated expertise.

The project would encompass the common law jurisdictions in Canada. We omit Quebec from this project because its charity law is the civil law tradition, most lately revised in the Quebec recodification of the 1990s.

ISSUES TO BE ADDRESSED

- ***What is the problem that needs to be addressed?***
- ***What are the main issues to be addressed?***

The first issue is whether the proposed *Uniform Charity Act*, concerning both gifting and organizations, would present reforms in a 'codification' of charity law, or set out recommendations for reform only. Second, as charity law encompasses both trusts for charitable purposes, and the objects of charitable corporations, we envisage that, so far as the consideration of charity law requires, both property management vehicles (i.e., trust and corporation) would be included in the Act. This reflects the impact of the *Christian Brothers of Ireland* litigation which, culminating in the decision of the Ontario Court of Appeal, turns largely on the relationship of corporate purposes and corporately-administered trust purposes. British Columbia statutorily reversed the authority that decision might have had in B.C. The composition of corporate law and trust law in a charity context is, in our view, a primary need that calls for the skills of the ULCC.

The Act should address the appointment, retirement and removal of trustees, and establish at least the basic administrative powers of trustees and corporate directors. The manner in which trustees and corporate directors are monitored with regard to the effectiveness of charity administration is an area of concern, as is the broader issue of fiduciary accountability (including for wrongdoing) in the charity context. Also calling for attention is how best directors and trustees, often drawn from the public at large, may be advised and assisted in the discharge of charity administration, without the public authority being overly obtrusive. This could form part of the role of the Public Trustee, or other publicly appointed person in each province or territory, and the Act might seek to harmonise for the provinces and territories the duties and powers of this role.

Expanding the availability of information to the public on gifting and existing charities, and a means of handling public inquiries, should be considered. The powers of the courts should be addressed. The courts' inherent jurisdiction to approve administrative schemes and *cy-près* schemes, should be clarified, made complementary with each other, and be expanded by the proposed statute. The relationship between administrative and *cy-près* scheme-making powers is at present unclear because of conflicting opinions in Canadian courts. The severance of charitable from non-charitable purposes within a trust instrument needs updating. While the law requires a trust, so far as it contains purposes, to be 'exclusively charitable', the only severance that current provincial legislation permits is when purposes are connected by conjunctives or disjunctives.

Complementary provision, with the above in mind, should be made for charitable corporations. Decisions need to be made on the constitutional relationship between federal and provincial powers in relation to charitable giving and charities.

'Charity' is a term of art; the purposes or objects included in the term are found in Canadian common law. Canadian courts have traditionally referred to English case law when determining the purposes or corporate objects of a charitable character. However, since 2006, the definition of 'charity' in England and Wales has been statutory. The adoption of a statutory definition in Canada should be the subject of debate and consideration. Additionally, in defining 'charity', whether public benefit is an essential component, and whether a charitable purpose or object that falls within the concept of 'charity' can in fact be contrary to the interests of the public, are issues not yet considered in Canadian case law.

WHO WOULD BE IMPACTED BY THE PROPOSED PROJECT

- ***Who would be interested in the project***
- ***Who would benefit from the project***
- ***Who might be opposed to the project***

The primary direct beneficiary of proposed uniform legislation would be the charities themselves; an indirect benefit would be proffered on the entire charitable giving community in common law Canada, as well as to those who decide court applications and advise charities and the public. Their several hands are strengthened.

The Canada Revenue Agency has dealt with charitable giving and charities for many years. Some CRA personnel may believe that these proposals, if implemented, would intrude on what has been the CRA's domain. At the same time, some provinces may demonstrate limited interest in exercising their sovereign authority to legislate on the subject, preferring to take the view that governing the charitable sector is a federal responsibility, financed by Ottawa. There may be some provincial resistance to the costs of operating offices with provincially salaried officials, or to added costs where offices exist. We underline that we are speculating and have no evidence of any CRA or provincial opposition.

WORKING GROUP COMPOSITION

- **Proposed Chair of the Working Group**
- **Proposed Working Group participants**

(At times there may be a number of potential Working Group participants. A normal Working Group would consist of 4 to 8 members. If more participants are under consideration, consideration might be given to providing for a Core Working Group to assume primary responsibility for steering the Project and formulating recommendations to consider the main issues and a Consultative Working Group for review of the Core Working Group considerations)

All CBA committee members are legal practitioners or academics with expertise in charities and not-for-profit law, and are potential Working Group participants (capacity of our members to chair or participate in the Working Group has not been discussed). We welcome participation from government delegations to the ULCC.

- Aptowitz, Adam - Ottawa, ON
- Broder, Peter - Edmonton, AB
- Bromley, Blake - Vancouver, BC
- Carter, Terry (Chair) - Orangeville, ON
- Chan, Kathryn – Professor, University of Victoria Law School, Victoria, BC
- Chenier, Yvonne - Calgary, AB
- Cooper, Karen - Ottawa, ON
- Glowacki, Peter - Vancouver, BC
- Goldfarb, Cliff - Toronto, ON
- Hoffstein, Elena - Toronto, ON
- Knudsen, Gregg - Halifax, NS
- Manwaring, Susan - Toronto, ON
- Mason, Margaret - Vancouver, BC
- Oosterhoff, Albert - Professor Emeritus, University of Western Ontario Law School, London, ON
- Parachin, Adam – Professor, University of Western Ontario Law School, London, ON
- Stevens, David - Toronto, ON
- Waters, Donovan - Professor Emeritus, University of Victoria Law School, Victoria, BC

CBA Liaison: Sarah MacKenzie, Staff Lawyer

CONSULTATION PLAN

- **Steps to be taken on consultation**
- **Who is to be consulted**

The committee would play a consultation role, if requested. Parties to be consulted might include: provincial/territorial government departments with oversight of the charitable sector; provincial/territorial Attorney-General or Public Trustee as

applicable; Canada Revenue Agency; lawyers practising charities and not-for-profit law.

PROPOSED TIMELINES FOR THE PROJECT

- *Typically a project life cycle is three years proceeding from a project overview, to a review of the principles, to draft legislation with commentaries. In some cases this process may be truncated or in others elongated, depending on the project.*

Timelines to be determined by the ULCC.

POTENTIAL COSTS

- *Some typical potential costs may include teleconferencing and other costs*

A limited amount of funding is available from the CBA, amount to be determined if the project is accepted by ULCC.

TRANSLATION

- *All of our projects are required to be in both official languages. Is there potential in the Working Group for translation of materials to the Conference?*

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