UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

CHARITABLE FUNDRAISING

REPORT

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1. Introduction

[1] At its August 2004 meeting, the Uniform Law Conference of Canada adopted the recommendations I made in my paper, ***Charitable Fundraising[:] Research Paper***, dated April 15, 2004.[1] The Conference directed me, together with the Working Group, to complete the Charitable Fundraising project by preparing a draft Uniform Charitable Fundraising Act.

2. Working Group

[2] The Working Group, established earlier, continued with one replacement and one addition. It comprised the following persons:

André Allard, a lawyer with the Office de la protection du consommateur du Québec, replaced Frédérique Sabourin, who took a position with the Faculty of Law, University of Sherbrooke.

Peter D. Broder, Corporate Counsel & Director, Regulatory Affairs, Imagine Canada.

W.G. Tad Brown, Finance and Development Counsel, University of Toronto, and director of the Association of Fundraising Professionals of Canada.

Terence S. Carter, Carter and Associates, Orangeville, Ontario, practicing primarily in the area of charities, not-for-profit organizations, trade marks, and gift planning.

Arthur Close, a member of the British Columbia Law Institute and a British Columbia Commissioner to the Uniform Law Conference of Canada, was added to the Working Group

Terry de March, Director, Policy and Communication, Charities Directorate, Canada Revenue Agency.

Kenneth R. Goodman, Team Leader of the Litigation Department and the Charitable Property Program, Office of the Public Guardian and Trustee, Ministry of the Attorney General of Ontario (co-chair).

John D. Gregory, General Counsel, Policy Division, Ministry of the Attorney General of Ontario, and former Ontario Commissioner to the Uniform Law Conference of Canada.

Scott Hood, Policy Advisor, Alberta Government Services, Consumer Programs, with responsibility for administering Alberta's ***Charitable Fund-raising Act***.[2]

Susan M. Manwaring, Miller Thomson LLP, Toronto, with a practice focusing on providing tax and general counsel advice to charities and not-for-profit organizations.

Albert H. Oosterhoff, Professor, Faculty of Law, The University of Western Ontario (co-chair).

C. Lynn Romeo, General Counsel and leader of the Corporate, Commercial and IT team at Manitoba Justice, Civil Legal Services.

Andrea Seale, Crown Counsel, Legislative Services Branch, Saskatchewan Department of Justice and responsible for overseeing the drafting and enactment of Saskatchewan's ***Charitable Fund-raising Businesses Act***.[3]

John Twohig, Senior Counsel, Policy Division, Ministry of the Attorney General of Ontario, an Ontario Commissioner to and chairperson of the Civil Section of the Uniform Law Conference of Canada.

3. Activities of the Co-Chairs and the Working Group

[3] The Working Group held two face-to-face meetings on October 29-30, 2004 and January 28-29, 2005. Both meetings were held at the Office of the Public Guardian and Trustee of Ontario, with some of the members taking part in the meetings by teleconference. In addition, the Working Group conferred by conference call on November 18, 2004 and May 5, 2005.

[4] Last summer, in preparation for the October meeting, we sought and obtained comments from members of the Working Group on the content of a draft Act based on the issues included in the Research Paper. I prepared Notes for Discussion for the October Working Group Meeting, which contained a summary of these comments and of my own views on the issues.

[5] At the October meeting, Michael Hall, Vice President Research, Canadian Centre for Philanthropy, gave a presentation on two recent surveys, namely, "Talking about Charities: 2004[:] Canadians' Opinions on Charities and Issues Affecting Charities", done by Ipsos Reid for the Muttart Foundation, and "National Survey of Nonprofit and Voluntary Organizations", done by StatsCan for the Canadian Centre for Philanthropy. I reported on a conversation I had, the purpose of which was to obtain a non-governmental perspective on the Alberta Act. The conversation disclosed that the Alberta Act has not worked as well as it could because insufficient resources have been devoted to its enforcement. In consequence, not many charities and fundraising businesses are registered under the Act. The opinion that uniform legislation is desirable was expressed,

but it should be structured in such a way that charities do not have to register in 13 different jurisdictions. John Walker of the Canada Revenue Agency attended the meeting in place of Terry de March. Dana De Sante, a lawyer in the Charitable Property Program of the Ontario Public Guardian and Trustee's Office attended as an observer.

[6] The meeting then engaged in a wide-ranging discussion of the content of the draft Act. The Working Group concluded, subject to further discussion, that the draft Act should apply only to charities, not to other voluntary organizations. In addition, the draft Act should apply to fundraising businesses and donor fundraisers. A more descriptive term should be adopted in place of "donor fundraiser". The Group also concluded, again subject to further discussion, that: (a) the draft Act should not contain a refund provision during a possible cooling-off period; (b) it was too soon to adopt accounting standards, but the power to impose them should be available in the regulation-making power; (c) we should propose adoption of a core set of fundraising standards of practice by regulation, that would, ideally, be adopted by all jurisdictions; (d) the draft Act should state that the enforcement authority has power to disclose information to assist potential donors in determining whether to make contributions to a particular charity; (e) the Act should authorize the enforcement authority to share information about abuses and investigations with other jurisdictions and the Charities Directorate, but an accompanying note should state that such a provision can be inserted in a jurisdiction's privacy legislation instead; (f) we should not adopt special jurisdiction and choice of law rules for charitable fundraising; (g) it may be inappropriate to deal with the sale of donor lists and telemarketing, since those matters are within the jurisdiction of the CRTC; (h) a jurisdiction should have the power to accept the registration of a charity in another jurisdiction if that jurisdiction follows a similar regulatory regime, which power can be exercised by a regulation listing "approved" jurisdictions, but that an extra-jurisdictional charity is required to follow additional requirements imposed by the jurisdiction; (i) smaller charities should be exempt from registration, but the threshold should be kept low to avoid abuse; and (j) the exemption for solicitation from members of a charitable organization should be revised, but so that a member is entitled to request information and to waive disclosure. There was also some discussion about the content of the disclosure requirement, but no decision was reached on this issue.

[7] The teleconference of November 18 continued the discussion of the above issues. In particular, it was suggested that the collection of information should be harmonized with the procedure already in place under the ***Income Tax Act***.[4] Thus, for example, a charity should be able to comply with the reporting requirement if it provided the T3010

required under that Act. It was also noted that the definition of "member" in the Manitoba ***Charities Endorsement Act***[5] may be useful. Some members of the Working Group continued to favour licensing only fundraising businesses and not charities.

[8] Following the November 18 teleconference, we were able to engage the services of Cornelia Schuh, of the Ontario Legislative Counsel office to prepare a draft Act. In December 2004 I prepared a set of instructions for the drafter and the two co-chairs met regularly with Ms Schuh to provide input on the drafts.

[9] The January 28-29 meeting of the Working Group considered the third draft of the Act. The meeting concluded that the draft Act should accept registration of charities under the ***Income Tax Act*** as fulfilling provincial concerns so as to avoid a duplicate registration system. The provinces should work with the Charities Directorate to see if questions can be added to Form T3010 that would be of assistance to the provinces. Charities would be responsible for observing any additional requirements that may be imposed by the Act. Any charities not registered federally would have to register under the Act. In addition, it was decided that we should use the term "charity", rather than "charitable organization", since the latter has a specific meaning under the ***Income Tax Act***. Further, the definition of "charitable purpose" should be restricted to any purpose the law regards as charitable. We also agreed that the term "donor fundraiser" should be changed to "retail incentive donor" as more descriptive of the concept.

[10] The meeting then considered the sections of the third draft in great detail and gave directions for changes to the draft. These directions included the following: (a) the definition of "fundraising business" should include "canvassers" or "representatives", as well as "volunteers" and possibly event planners hired by a charity; (b) certain parts of the Act should apply regardless of the type of solicitation; (c) hours of solicitation should be determined according to the time zone of the person being solicited; (d) specific information must be provided during solicitation; (e) there should be a cooling-off period when a solicitation is made by telephone or door-to-door by a fundraising business; (f) charities can make information available on their web sites; (g) a receipt must be provided on demand for any contribution of $10 or more; (h) there should be a requirement to provide changes in information within a specified time; (i) the provisions regarding ownership of donor lists should be clarified so that a fundraising business must destroy a donor list when a fundraising agreement ceases to be in force; (j) the provisions regarding requests to refrain from making solicitations should be clarified; (k) the section regarding the holding of contributions in trust should be clarified; (l) the section listing

the requirements of fundraising agreements should be clarified; (m) the provisions respecting retail incentive donors should be clarified; and (n) the inspection and enforcement provisions of the Act should be revised.

[11] The co-chairs met with our drafter on a number of occasions since then and provided extensive comments on successive drafts of the Act.

[12] The Working Group considered the seventh draft during their teleconference on May 5, 2005. At that conference it was clear that the Working Group continued to be divided about the desirability of regulating the fundraising activities of charities in addition to those of fundraising businesses. A majority favoured the regulation of both and the Act has been drafted accordingly. The Group agreed that we should recommend only one version of the Act, but draw attention to the possibility that jurisdictions that wish to regulate only fundraising by fundraising businesses can readily adapt the Act for that purpose. The Group made a number of suggestions for changes to the draft. These included the following: (a) affinity agreements should be excluded from the definition of retail incentive donors; (b) three draft Regulations should be appended to the Act in an effort to ensure uniformity, namely, the calculation of gross contributions, the minimum threshold of gross contributions a charity must meet before being subject to important provisions of the Act, and the standards of practice to which charities and fundraising businesses must adhere; (c) the standards of practice were broadened to exclude percentage-based compensation; (d) charities registered under the ***Income Tax Act*** should be deemed to be registered under the Act, thus allowing the deemed registration to be suspended or cancelled, just like an actual registration; and (e) an internal review, short of cancellation or suspension, as under the ***Income Tax Act***, should be added to the Act.

[13] After the teleconference, the drafter prepared two further drafts of the Act. The last of these was circulated to the Working Group, together with this Report and comments by members of the Group were incorporated. This was followed by draft 10. It is appended to this report.

4. Overview of the Draft Act

[14] The Act follows the basic structure of the Alberta ***Charitable Fund-raising Act***. However, the Working Group has also had regard to the Saskatchewan ***Charitable Fund-raising Businesses Act*** and, when appropriate, to the Manitoba ***Charities Endorsement***

Act and the Prince Edward Island ***Charities Act***.[6] Moreover, we have diverged significantly from the Alberta model whenever that was warranted.

[15] The Act differs significantly from the Alberta Act in that it recognizes the registration of charities under the ***Income Tax Act*** as the equivalent of complying with the registration requirements imposed by the Act. Thus, only charities that are not registered federally must comply with the registration requirements of the Act. However, federally registered charities must nonetheless comply with the other requirements of the Act. For this reason, they are deemed to be registered under the Act, thus permitting their deemed registration to be suspended or revoked when appropriate.

[16] Apart from that, the Act is similar in content and scope to the Alberta Act. Thus, it requires licensing of fundraising businesses and also makes provision for retail incentive donors. The inspection and enforcement provisions of the Act are more extensive than those in the Alberta Act.

[17] As noted above, jurisdictions that do not wish to regulate fundraising by charities, but only fundraising by fundraising businesses can adapt the Act for that purpose.

[18] We were advised to put the purposes of the Act in section 1, as this is now common drafting practice. Section 2, the definition section, defines "charitable purpose" as any purpose that the law recognizes as charitable. Thus, the definition is not as wide as that in other statutes, which include non-charitable purposes in their definitions. The term "retail incentive donor", as defined in s. 2, replaces the term "donor fundraiser" used in the Alberta Act.

[19] Section 3 makes clear that a solicitation takes place in a jurisdiction if, for example, the person being solicited is in the jurisdiction but the fundraiser is not. Section 4 ensures that the Act does not apply to a solicitation made to a member of the charity, or a close relation of the member, nor to a solicitation made under a statute authorizing gaming. Section 5 is intended to catch persons who raise funds for charitable purposes when not connected to any charity, such as solicitations for tsunami relief.

[20] Sections 6 – 13 deal with solicitations. They regulate the hours and kinds of solicitation, oblige the solicitor to provide prescribed information, provide a cooling-off period for telephone and in-person donations, and require the giving of receipts for donations of $10 or more. Sections 11 – 13 require fundraising businesses and charities

that raise gross contributions of the prescribed amount or more in any year to maintain financial and other prescribed records, require charities to prepare audited financial statements or financial information returns as prescribed, and require charities to provide information upon request in defined circumstances. The amount prescribed by s. 2 of the appended Regulation is $25,000.

[21] Except for section 4, sections 3 – 13 apply whether or not a charity is required to be registered in the jurisdiction under s. 14.

[22] Sections 14 – 22 deal with charities. Section 14 makes it clear that, subject to listed exceptions, a charity may not make solicitations unless it is registered under this Act. A charity registered under the ***Income Tax Act*** is deemed to be registered under this Act. Further, section 15 states that no charity may use a fundraising business unless the charity is registered or deemed to be registered under this Act. Sections 16 – 20 deal with the registration of charities under the Act. Section 21 imposes prescribed standards of practice that all charities must adhere to, while s. 22 requires a charity to use its best efforts to comply with a request that the charity refrain from making or causing solicitations to be made of a particular person and to remove the person's name from contributors' lists.

[23] Sections 23 – 34 deal with fundraising businesses. Sections 23 – 29 are concerned with licensing of fundraising businesses. Section 30 stipulates that a donor list compiled by a fundraising business for a charity belongs to the charity and must be destroyed when the fundraising agreement between the charity and the fundraising business ends. Section 31 provides that fundraising businesses hold contributions received for a charity in trust for the charity and must deposit the moneys into the charity's account. Sections 32 and 33 are comparable to sections 21 and 22 and impose similar obligations on fundraising businesses. Section 34 prohibits a fundraising business from fundraising on behalf of a charity in which it, an officer, director, or associate has an interest.

[24] Sections 35 – 36 make fundraising agreements mandatory and prescribe their content.

[25] Sections 37 – 40 regulate retail incentive donors.

[26] Sections 41 – 47 detail the powers to make inspections. Section 46 permits an inspector to obtain a court order to assist the investigation and s. 47 permits the

enforcement authority to obtain a court order to conduct an investigation with the powers of a commission under the Public Inquiries Act.

[27] Sections 48 – 50 confer extensive enforcement powers on the enforcement authority. The powers conferred by s. 49 are based on s. 4 of Ontario's ***Charities Accounting Act***.[7]

[28] Section 51 permits the enforcement authority to suspend or cancel the registration of a charity or the licence of a fundraising business, or impose conditions on the registration or the licence in specified circumstances.

[29] Sections 52 – 61 contain a variety of general provisions. Thus, s. 54 empowers the enforcement authority to make information obtained under the Act public to enable members of the public to make informed decisions about whether to make donations to specific charities. Typically, provincial protection of privacy and freedom of information statutes already permit provinces to disclose relevant information to other Canadian law enforcement agencies.[8] Section 55 provides for appeals. Section 57 prohibits municipalities from passing by-laws regulating or prohibiting solicitations. Section 58 creates offences and establishes penalties.

[30] The appended Regulation contains three sections that, in furtherance of uniformity, the Working Group hopes will be adopted by the several jurisdictions. Section 1 prescribes how gross contributions must be calculated. Section 2 prescribes the amount mentioned in ss. 10 and 14 of the Act. Section 3 prescribes the standards of practice with which charities and fundraising businesses must comply.

5. Recommendation

We recommend that the Uniform Law Conference of Canada approve and adopt the draft Uniform Act and draft Regulations attached to this Report.

APPENDIX

The Uniform Act with appended Regulation is attached as an Appendix to this Report.

ENDNOTES

[1] See http://www.ulcc.ca/en/poam2/CLS2004_Charitable_Fundraising_Paper_En.pdf.

[2] R.S.A. 2000, c. C-9.

[3] S.S. 2002, c. C-6.2, as amended by S.S. 2003, c. 29.

[4] R.S.C. 1985, c. 1 (5th Supp.).

[5] C.C.S.M., c. C60.

[6] R.S.P.E.I. 1988, c. C-4.

[7] R.S.O. 1990, c. C.10.

[8] See, ***e.g.***, ***Freedom of Information and Protection of Privacy Act***, R.S.A. 2000, c. F-25, s. 40(1)(q); R.S.O. 1990, c. F.31, s. 42(f)(ii), (g).