



# Unincorporated Non-profit Associations - Progress Report 2007

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## CIVIL LAW SECTION

**A JOINT PROJECT OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, THE UNIFORM LAW CONFERENCE OF CANADA AND THE MEXICAN CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS TO CREATE A HARMONIZED LEGAL FRAMEWORK FOR UNINCORPORATED NONPROFIT ASSOCIATIONS IN NORTH AMERICA**

### STATUS/ PROGRESS REPORT

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*Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the*

## ***Conference at the Annual meeting.***

**Charlottetown, Prince Edward Island, September, 2007**

### **INTRODUCTION**

[1] A defining feature of the Uniform Law Conference of Canada (ULCC) is its cordial relationship with other organizations having similar functions and aims. ULCC's relationship with its American counterpart, the National Conference of Commissioners on Uniform State Laws (NCCUSL), goes back many years. Representatives from ULCC and NCCUSL have regularly attended each other's annual meetings. This pattern continues with the newly created Mexican Conference of Commissioners on Uniform State Laws (MCCUSL), which is now sending a representative to the two annual meetings. At the ULCC annual meeting held in St. John's in 2005 a decision was made by the three uniform law organizations to take their relationship beyond the observer stage by exploring the potential for joint projects that may involve harmonizing laws across the national boundaries.

[2] One of the areas identified as a potential joint project concerned unincorporated nonprofit associations. A suggestion that ULCC commence a project on this topic had been brought forward by British Columbia. Coincidentally, NCCUSL was in the process of revising its Uniform Unincorporated Nonprofit Associations Act (1996) and had just created a drafting committee for this purpose. It was agreed by the officers of ULCC and NCCUSL that active steps should be taken to explore its potential as a joint project. Arthur Close, Q.C., of the British Columbia delegation was asked by the Executive to take this matter in hand on behalf of ULCC.

### **MEMBERS OF THE ULCC TEAM**

[3] There has been one addition to the Canadian members (the ULCC Team) of the project committee: Jake Harms, a legislative drafter, who was added to the ULCC Team in January 2007. As of the date of this report, the ULCC Team consists of:

- Arthur Close, Q.C. (British Columbia Law Institute), ULCC Team leader;
- Kevin Zakreski (British Columbia Law Institute), reporter to the ULCC Team;
- Prof. Michelle Cumyn (Faculté de droit, Université Laval), member;
- Prof. Thomas Telfer (Faculty of Law, University of Western Ontario), member;
- Jake Harms (Department of Justice, Government of Manitoba), member.

[4] A full roster of ULCC, NCCUSL, and MCCUSL members of the project committee (collectively, the joint drafting committee) is attached to this report.[1]

### **DEFINING THE JOINT PROJECT**

[5] Discussions in 2005–2006 between representatives of ULCC, NCCUSL, and

MCCUSL led to three important developments and understandings.

[6] The joint project would proceed. This topic would be treated as involving a clean slate, with no predetermined point of departure. For NCCUSL this decision involved a departure from its usual approach as well its original plan for a project on updating the Uniform Unincorporated Nonprofit Associations Act (1996), which would have involved using this Act as a starting point. Instead, the Uniform Unincorporated Nonprofit Associations Act (1996) would be treated as a source to draw on in identifying issues and solutions, but it would not define the project.

[7] It was agreed that the methodology of NCCUSL, used in the development of its Uniform Acts, would be adopted. This methodology involved the creation of a joint drafting committee that would hold a series of face-to-face meetings to move the project forward. NCCUSL generously agreed to defray the reasonable traveling expenses of up to four ULCC representatives who would be attending these meetings. This agreement removed what would otherwise have been a significant barrier to ULCC participation.

[8] MCCUSL formally indicated its wish to participate in the joint project.

### **UNINCORPORATED NONPROFIT ASSOCIATIONS**

[9] Lawton L.J. of the English Court of Appeal has formulated a good summary of the elements of an unincorporated nonprofit association:[2]

“ . . . two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will.”

[10] The unincorporated association is the default form of nonprofit activity: it applies if no steps are taken to substitute another form, such as a corporation or a trust. It is similar, in this respect, to the partnership, which is the default for-profit form. Examples of unincorporated nonprofit association range from small-scale charities, clubs, neighbourhood groups, and athletic teams and associations to larger bodies such as political parties, trade unions, religious organizations, and professional sports leagues. Statistics Canada estimates that there are “thousands” of unincorporated nonprofit associations that are active in this country.[3]

[11] In the common law provinces of Canada, the law governing unincorporated nonprofit associations is largely derived from a series of nineteenth- and early twentieth-century English court decisions. The key point in these decisions is that an unincorporated nonprofit association is to be treated as an aggregate of individual members and not as an entity in its own right with a separate existence from those members. This point has important implications for such topics as the ownership of property, liability for torts and

for contractual debts, and the ability to sue and be sued. The Canadian courts have recently shown a willingness to reform these older English rules, but only in a piecemeal fashion relating to specific types of unincorporated nonprofit associations, such as labour unions<sup>[4]</sup> and political parties.<sup>[5]</sup>

[12] The legal background in the United States is similar to that of common-law Canada, as it shares the same historical starting point in the English court decisions that defined unincorporated nonprofit associations under the aggregate theory. But the United States has also seen enactment of numerous state statutes that address discrete subjects touching on unincorporated nonprofit associations (such as service of legal process or the holding of property). And twelve American states have enacted the Uniform Unincorporated Nonprofit Associations Act (1996).

[13] Québec has provisions in its Civil Code that directly govern unincorporated nonprofit associations in that province.<sup>[6]</sup> The treatment of unincorporated nonprofit associations under the Québec Civil Code differs from their treatment under the law of the other Canadian provinces. An unincorporated nonprofit association in Québec is considered an entity in its own right, separate and distinct from its members, although not a full legal person. A notable feature of the project has been the deference accorded to the way in which the law of Québec treats unincorporated nonprofit associations. The joint drafting committee has found useful guidance on many issues from the Québec approach. In several instances, however, the joint drafting committee's deliberations have shown that Québec law would also benefit from amendments being brought to the codal provisions governing associations, in particular by recognizing that associations are full legal persons.

[14] Mexico, which also adheres to the Civil Law, treats unincorporated nonprofit associations in a manner similar to Québec.

## **GENERAL APPROACH TO THE PROJECT**

[15] A number of important decisions on how to organize and approach the topic were made early on in the project. These decisions were:

[16] The organization of the project would follow a project strategy and workplan, which was adopted at the first meeting of the joint drafting committee.

[17] Given that the project involves four legal traditions (common law, United States; common law, Canada; civil law, Québec; and civil law, Mexico) and three languages (English, French, and Spanish), it was recognized early on that setting a goal of producing a single Uniform Act would be unrealistic. Instead, the joint drafting committee adopted the model used by the European Union in its legal harmonization projects. This model involves the establishment of common principles that must be incorporated into the

statutory and regulatory framework of each of the member jurisdictions. The goal is consistency of principles with the statutory drafting conventions of each jurisdiction, which may not necessarily result in identity of statutory language.

[18] The harmonized principles deal with: (1) definition of the types of organizations covered; (2) the relation of the principles to other existing law; (3) the capacity of an unincorporated nonprofit association to own and dispose of property and to sue and be sued in its own name; (4) the contract and tort liability of an unincorporated nonprofit association and its members and executive committee, directors, governors, or trustees (this latter group has been given the generic name “managers” for the purposes of the project); (5) internal governance, fiduciary duties, and agency authority; and (6) dissolution, amalgamation, and conversion or transformation into other legally recognized bodies.[7]

### **MEETINGS HELD IN 2006–2007**

[19] The joint drafting committee has held two in-person meetings in the past year.

#### **Meeting at Arlington, VA, 8–9 September 2006**

[20] The meeting at Arlington was largely taken up with a comprehensive review of the first draft of the harmonized principles. This first draft was prepared by Harry Haynsworth, the reporter to the joint drafting committee, and was circulated in advance of the meeting along with relevant background material. The draft contained brief statements of principle along with more expansive commentary. The ULCC Team met by Teleconference on 6 September 2006 to discuss initial perceptions of the draft principles.

#### **Meeting at Portland, OR, 23–24 February 2007**

[21] A second draft of the principles, based on the comments received at the Arlington meeting, was prepared by Harry Haynsworth and circulated to the joint drafting committee in advance of the Portland meeting. The second draft was an almost complete re-working of the first draft that was considered in Arlington. Once again, the ULCC Team was able to meet by teleconference before the meeting, on 16 February 2007.

[22] The Portland meeting was largely taken up with a comprehensive review of the second draft of the principles. The topics canvassed in the meeting included recognizing unincorporated nonprofit associations as a legal entity, formulating the duties and liabilities of the managers of unincorporated nonprofit associations, and defining the relationship between the proposed legislation and other statutes. Although a few issues remain for discussion, a tentative consensus on most of the principles was reached by the end of the meeting.

[23] As was the case at previous meetings, both meetings benefited from the active

participation of NCCUSL's President, Howard J. Swibel. Mr. Swibel has joined in the deliberations of the joint drafting committee as an *ex officio* member. His participation is a significant indication of the importance that NCCUSL attaches to this project. The ULCC Team gratefully acknowledges Mr. Swibel's contribution as well as the personal support he has given to proceeding with the project in a co-operative fashion.

### **DEVELOPMENTS SINCE THE LAST MEETING**

[24] A number of developments have occurred that build on the tentative consensus of the Portland meeting:

[25] A third draft of the principles, incorporating points discussed at the Portland meeting, was completed by Harry Haynsworth and circulated to the joint drafting committee.[8] The NCCUSL Team has prepared and circulated a draft Uniform Act for implementation in the United States.

[26] The ULCC Team has begun work on its uniform legislation. An initial draft of a standalone Uniform Act has been prepared and it was the subject of a teleconference among members of the ULCC Team on 15 May 2007. A revised version is being shared with the NCCUSL and MCCUSL participants.

[27] A decision was taken by the ULCC Team that a second Uniform Act should also be prepared. This would involve a legislative statement of the principles in a form that could be adopted directly as amendments to the Civil Code of Québec. ULCC Team member Michelle Cumyn is guiding this aspect of its work. The creation of a Québec-specific version of a Uniform Act will be a first for the Conference. This work will also aid the Mexican participants, who also face the challenge of implementing the principles in the context of a legal tradition based on a civil code. As of the date of this report, a first draft of these amendments to the Civil Code has been prepared and circulated to the ULCC Team for comment.

[28] The second draft of the principles has been translated into French, and work is in progress on a translation of the third draft. These translations will be of assistance in preparing the Québec-specific version of the Uniform Act.

### **NEXT STEPS IN THE PROJECT**

[29] The NCCUSL Uniform Act will be formally presented to the NCCUSL annual meeting, which is scheduled to be held 27 July–3 August 2007. NCCUSL's bylaws require Uniform Acts to be read at two consecutive annual meetings before approval. The first reading of the NCCUSL Uniform Act will allow the project to conform to those bylaws. A meeting of the joint drafting committee will take place in fall 2007. (The date and location are yet to be determined.) At this meeting, the members of the joint drafting committee will have an opportunity to review the draft Uniform Acts prepared by the

ULCC, NCCUSL, and MCCUSL Teams and to discuss their approaches to implementing the principles. This discussion will also provide an opportunity to explore harmonizing the language used in and commentary to the Uniform Acts, to the extent that this harmonization is possible.

## CONCLUSION

[30] This project constitutes something of a test case that will give all the participating organizations an opportunity to develop strategies for achieving, so far as possible, cross-border harmony. We all have much to learn from one another. All participants in this project are working hard to meet the challenges inherent in this project and to pave the way for future joint efforts.

## FOOTNOTES

[1] This document, along with other project documents referred to later in this report, is contained in a supplementary package of documents distributed separately from this report.

[2] *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)*, [1982] 1 W.L.R. 522 at 525, [1982] 2 All E.R. 1 (C.A.).

[3] Michael H. Hall et al., *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Ottawa: Statistics Canada, 2004) at 56.

[4] See *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, 211 D.L.R. (4th) 651.

[5] See *Ahenakew v. MacKay* (2004), 71 O.R. (3d) 130, 241 D.L.R. (4th) 314 (C.A.).

[6] Arts. 2267–79 C.C.Q.

[7] See the supplementary documents for a copy of the latest version of the principles.

[8] See the supplementary documents.

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