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**UNIFORM LAW CONFERENCE OF CANADA**

**CHARITIES PROJECT - PROGRESS REPORT**

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## **CHARITIES PROJECT - PROGRESS REPORT (August 2021)**

[1] In 2018, the Advisory Committee on Program Development and Management (Advisory Committee) of the Uniform Law Conference of Canada (ULCC) received a proposal from the Canadian Bar Association Charities and Not-for-profit national sections. The proposal indicated that the charitable sector would benefit from uniform action in this area. It was suggested that the common law provinces or territories either had legislation that was not modern or lacked any legislation at all. This was contrasted with the recent legislation in the UK which consolidated and modernized the law in the *Charities Act* of 2011.

[2] The proposal was comprehensive, followed the project selection guidelines of the Advisory Committee, and brought together a working group of exceptional knowledge, expertise and experience in the area.

[3] However, the proposal noted two caveats to be addressed:

- (a) Some Canada Revenue Agency (CRA) personnel may believe that these proposals, if implemented, would intrude on what has been the CRA's domain.
- (b) At the same time, some provinces or territories 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 resistance the provinces and territories to the costs of operating offices with provincially or territorial salaried officials, or to added costs where offices exist.

[4] These caveats were the primary reason why the Advisory Committee did not recommend proceeding with the project at that time - potential opposition within CRA; limited provincial interest in the area; reluctance to create new provincial offices or adding responsibility to existing offices.

[5] The Advisory Committee relayed its views to the proposers, but indicated it would keep the item on its radar.

[6] Two years later, after discussions at the Canadian Bar Association (CBA) National Sections meetings, and at National Conferences, it was suggested that the climate might be more amenable to legislation in this area, and the Advisory Committee agreed. This was confirmed by the Civil Section at the 2020 annual meeting.

[7] As a result, it was proposed to work cooperatively with the CBA National Section and to reinvigorate the proposal.

[8] I held discussions with various past and present members of the National Section to obtain better information about the climate, the scope of the project and the key players. The CBA section held a meeting at the midwinter meeting to discuss the project, and further set aside a special half-day meeting to discuss the project on May 25.

[9] In preparation for that meeting, I continued my discussion with Yvonne Chenier, a Calgary lawyer expert in this area, who has been named to head up the project on behalf of the CBA. This was a fortunate combination, since I was very familiar with Yvonne through the CBA, Alberta Branch, and worked closely with her on an Alberta Law Reform Institute project on not-for-profits. We had worked together over many years.

[10] Specific preparation for the May 25<sup>th</sup> meeting revolved around the potential scope of the project. Yvonne arranged for me to have access to all of the CBA background research that led up to the proposal originally. In reviewing that research material, I synthesized the area into three categories, with a list of topics under each. The concept was that dividing the area up in this way would create pockets of specialized knowledge and experience, thus resulting in efficiencies of research and analysis. (See: attachment #1).

[11] The May 25 meeting approved the categories and the assignment of topics within them, also adding several new topics.

[12] The next stage of activity Yvonne and I termed “issue spotting”. We thought that a concise description of each topic would allow us “the management committee”, to assess both the need for uniform action and the priority to be assigned to it. To do that, we required some consistency of description. In order to bring the necessary discipline, I prepared (with Yvonne’s review and assistance) an “Issues Template” which each topic group could follow. (One of the benefits of the special meeting was to confirm the enthusiasm of the group and to get volunteers to do the issue spotting for individual topics).

[13] The Issues Template is attached. It follows the concepts which the Advisory Committee would normally review as it considers and potentially approves a topic. (See: attachment #2).

[14] One important point with respect to ULCC, which is not unique to this project, is that no jurisdiction or individual has self-identified as willing to take a leadership role in either project management or subject matter expertise. Rather, it seems to have been assumed that both responsibilities will somehow be carried out. So far, the work has defaulted to the chair of the Advisory Committee but this is only a short-term solution.

## NEXT STEPS

[15] The next steps will be as follows:

1. Completion of the Issues Templates;
2. Review of relevance and priorities of individual topics;
3. Establish and populate sub groups in each area. (A strong ULCC representation will be necessary at this stage).

[16] So far, the following persons have been suggested as ULCC members of working groups:

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## **ATTACHMENT #1**

### **Charities Project Categories and Topics Email to Yvonne Chenier**

One thing I have struggled with is how to approach such a large collection of topics, and how to organize them into some kind of manageable categories. What I seem to have settled on is as follows, though the headings may well change after a more knowledgeable review. This is based on the project proposal, the background memos, and the list of issues.

The first category is what I have called “substantive law”, and includes:

- (i) the definition of charity;
- (ii) charitable gifts;
- (iii) mixed purposes and charitable purposes;
- (iv) the doctrine of Cy pres

The second category is styled “charitable vehicles” and includes:

- (i) charitable purpose trusts;
- (ii) unincorporated association;
- (iii) non-share corporations.

The general rubric of this category is whether the use of these vehicles for charitable purposes requires any specific treatment in the corporate constating documents.

The third category is styled “regulation”. It includes:

- (i) the body responsible for overall supervision of charities - the courts or a customized provincial agency;
- (ii) fundraising activities and their supervision;
- (iii) investment principles for charitable organizations.

The next challenge is to determine some priority for which issues should be taken on first. However, before that, it is equally important to articulate what the issues are within each category and topic. The project outline hints at the issues but is not sufficiently specific to form the basis for the preparation of a work plan.

I suggest we need to follow a process like this:

- (i) a preliminary identification of issues to allow a sense of scope;
- (ii) a detailed listing of issues to disclose research requirements;
- (iii) a listing of issues and potential responses, to be used for consultation purposes;
- (iv) after consultation, proposed responses/solutions to issues.

Of course, everyone wants to jump to solutions, but the discipline of the process is important. Good process usually reduces good results, but poor process inevitably produces poor results.

Would it help to do the following?

- (i) ask the national section if our grouping is viable, and if any issues are omitted;
- (ii) ask members to volunteer/attach to a specific group;
- (iii) within the group, ask members to produce a list of issues (not solutions) under each heading.

This is important to get members to drill down a bit. For example, there is a problem with Cy pres is insufficient. What are the variations in court decisions that create this problem? I apologize that this sounds a little “preachy”,

But I think you know me well enough to say that that’s just me setting out for you and that I am quite ready to be corrected or persuaded otherwise.

I thought it best to lay out these thoughts for your review. Nothing is written in stone but hopefully this will generate some discussion and the basis to move forward.

Best wishes, Peter.

## ATTACHMENT #2

### CBA/ULCC Charities Project Issues Template

The co-chairs have developed a chart consisting of three categories and various sub topics under each category. In order to assess the relevance and priority of the various sub topics, it is essential to have relatively even and uniform understanding and descriptions of the topics.

At this stage, a thumbnail sketch of the issue and area is all that is required. Further research and analysis comes later.

The following five headings are all required fields, so that we can carry out a full assessment.

#### **The problem.**

What is the difficulty that we are addressing? For example, the law is uncertain and those regulated by it cannot determine how to order their conduct. It may be that the law is unclear, there is a vacuum or is just plain outdated. For example, many current activities are clearly charitable in nature and beneficial, but do not fit well, or at all within the common law definition of charity – both regulators and participants suffer from the uncertainty and the resulting inefficiency.

#### **Legal response.**

Is there a potential legal response to the problem? Will the courts respond, or is a legislative amendment or new legislation necessary? Is this a problem that lends itself to a legal as opposed to an educational solution?

#### **Who is impacted by the problem?**

Is this a large disparate group, or a small group that we can work around? Who should be consulted about the nature of the problem and any potential solutions? Who, if anyone, is likely to oppose addressing the problem?

#### **Potential solutions.**

How might the problem be addressed, and in what context? Is this a small fix, or a conceptual restatement? This is a brief description of potential solutions; that it is not a crafting of the eventual solution. Absolutely no drafting!!! Drafting occurs after research and analysis, and after policy decisions have been made. Do not draft at this stage (No matter how convinced you are that you have the perfect solution).

#### **Benefits of solving the problem.**

This is a bookend to the description of the problem. What benefit would the solution of the problem bring - more certainty, less litigation, more satisfied participants?

None of this requires a treatise. Follow the order of the headings, a two-page document should more than suffice. If you feel there is relevant information outside the four headings, add it as a postscript.