THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 14, 2020

Via email: admin@unilaw.ca; consult@unilaw.ca

Executive Secretary
Uniform Law Conference of Canada
15 Ettrick Crescent
Nepean, ON K2J 1E9

To whom it may concern:

Re: Uniform Law on Informal Public Appeals and Crowdfunding

I am writing on behalf of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA Section), in response to the Uniform Law Conference of Canada consultation on a draft *Uniform Informal Public Appeals and Crowdfunding Act* (UIPACA).

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The CBA's mandate includes seeking improvements in the law and the administration of justice. The CBA Section members practise in all areas of charities and not-for-profit law and in every size of practice, from large national firms to sole practitioners. We are dedicated to the evolution of a fair and efficient system reflecting principles of natural justice and Canadian interests.

The CBA Section welcomes the efforts by the ULCC to regulate informal public appeals across Canada, as those appeals have become increasingly prevalent in recent years. The UIPACA is intended to offer an appropriate body of laws to assist organizers in creating and administering informal appeals to the public for donations. Approximately 90% of the Act consists of provisions and commentary from the 2011 *Uniform Informal Public Appeals Act* (UIPAA), with little or no change. However, the changes are significant and would disproportionally impact registered charities and other qualified donees. That is the focus of this letter.

Exempting intermediaries

Qualified donees were exempted from the application of the 2011 UIPAA, which was appropriate given that fundraising activities of these entities are already highly regulated under the *Income Tax Act (Canada)* (ITA) and oversight of the Canada Revenue Agency Charities Directorate. The proposed section 2(2)(b) would extend that exemption to intermediaries, defined to include an

"internet platform" that assists in organizing a public appeal and holds or transmits a fund raised through a public appeal, where the proceeds are intended to be paid directly to a qualified donee (as defined by the ITA).

In the *Information Release* with the invitation for input, the ULCC working group notes that:

> Many fundraising appeals for humanitarian and community causes are conducted by individuals and groups that are not organized charities. The laws that apply to these "informal" appeals, their organizers and the money they raise is unsatisfactory. These laws may result in problems for the appeal leaders and may cause the appeal to fail.

This suggests that the ULCC Working Group considers protection of the public and appeal organizers as an important priority. The CBA Section would go further to state that qualified donees that are otherwise exempted from the framework of this legislation could become unintended victims of self-serving appeal organizers and intermediaries that would be exempted under the revised legislation. In our view, those qualified donees need protection too.

From our experience in advising qualified donees, crowdfunding platforms can be used by third parties to raise monies for a qualified donee without the qualified donee necessarily consenting. This results in an intermediary raising funds on behalf of a qualified donee, using the qualified donee's name and brand, receiving donations and taking a percentage off the top – all without obtaining the permission of the qualified donee. Many crowdfunding sites are only peripherally interested in raising and forwarding money to the associated charity. Their primary focus is data harvesting of donor personal information. Although the UIPAA does not currently delve into privacy issues related to informal public appeals, consideration should be given to these issues because unregulated data harvesting of donor information is a serious and significant issue for crowdfunding appeals.

We suggest that section 2(2)(b) of the proposed UIPACA be amended to state that intermediaries are exempted from the Act only if their terms of use explicitly require that:

> i) appeal organizers have a direct agreement or contractual arrangement with a qualified donee which provides that the funds are intended to be paid directly to a qualified donee;
>
> ii) donors be given the opportunity to have their personal information deleted by the internet platform; and
>
> iii) where an internet platform organizes public appeals itself and not as an intermediary, it is no longer exempt from the legislation.

Otherwise any potential intermediary could claim that it is crowdfunding for a qualified donee, without the consent of the qualified donee.

Trustees

There appears to be a gap in logic in section 4(1). The amendments would introduce a definition of "appeal organizer" in section 1(1), and throughout the commentary imply that the trust is connected to the appeal organizer. The comments following section 24(1) recognize that the trustee is the "appeal organizer or other trustee." Our suggestion is to explicitly define when an appeal organizer may be a trustee (or will be subject to specifically naming another trustee in a

user agreement). This could either be accomplished in the definition of "appeal organizer" in section 1(1), or in the explanation of how a person becomes a trustee in section 4(1).

Intermediaries as Trustees

Modified section 4(2) of the UIPACA would, in effect, afford internet platforms and similar intermediaries the protection of a bank. Banks are highly regulated and even if they are not considered trustees under this Act, there are other regulations with which they must comply. Any internet intermediary would not have to comply with the same regulations as banks in dealing with financial transactions, and it is unclear why the UIPACA would not impose obligations on these crowdfunding entities that have no other regulation as to how they do business.

We suggest that this aspect of the proposed Act be reconsidered and crowdfunding intermediaries that are not financial institutions otherwise regulated not be exempted from a fiduciary relationship. The ULCC could consider a framework like that proposed in section 31(1) of the *Uniform Charitable Fundraising Act*, substituting the words "intermediary that is not a savings institution" for "fundraising business":

> Every intermediary that is not a savings institution that receives contributions to be paid to or for the benefit of a qualified donee is a fiduciary and holds the contributions in trust for the qualified donee.

Conclusion

We hope that our comments will be helpful in your deliberations. We believe that the changes we have suggested will assist both responsible and legitimate fundraisers and internet platforms.

Yours truly,

(original letter signed by Julie Terrien for Theresa Man)

Theresa Man
Chair, CBA Charities and Not-for-Profit Law Section