UNIFORM LAW CONFERENCE OF CANADA

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

UNIFORM UNINCORPORATED NONPROFIT ASSOCIATIONS ACT

Québec, QC
August 10–14, 2008

INTRODUCTION

[1] There are three primary modes of collective nonprofit activity: the nonprofit corporation; the charitable trust; and the unincorporated nonprofit association (UNA). The residual, or default, mode is the UNA. Whenever people join together and agree to pursue common nonprofit purposes and they do not take the steps required by law to incorporate their group or to form a charitable trust, then, in the eyes of the law, they form a UNA.

[2] No one can say with complete precision how many UNAs are active in Canada. Even the authoritative *National Survey of Nonprofit and Voluntary Organizations*, published by Statistics Canada, formally excluded UNAs from its scope, "because of the substantial difficulties identifying and locating them."[1] This survey was only able to offer the estimate that there are currently "thousands" of UNAs in Canada.[2] One way to appreciate the diversity of UNAs in this country is to note the different types of bodies that have been labelled as UNAs in court cases. The jurisprudence reveals that examples of UNAs range from small-scale charities,[3] clubs,[4] neighbourhood groups,[5] and athletic teams and associations[6] to larger bodies such as political parties,[7] trade unions,[8] religious organizations,[9] and professional sports leagues.[10] Each of these types of UNAs will have members. Some of them will have hundreds or even thousands of members. Many of them will interact with third parties, who may attend social events sponsored by a UNA, may receive services from a UNA, or may provide goods or services to a UNA. These "thousands" of UNA potentially touch the lives of millions of Canadians.

[3] In 2005, the Uniform Law Conference of Canada (ULCC) entered into a joint project with the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the Mexican Conference of Commissioners on Uniform State Laws (MCCUSL) to create a harmonized legal framework for UNAs in North America. The Joint Drafting Committee began to meet in 2006. In 2007, the Joint Drafting Committee agreed on a Statement of Principles[11] that each country has used as the basis for its draft legislation. The Uniform Unincorporated Nonprofit Associations Act (the Uniform Act) that follows this introduction is one part of the ULCC contribution to this joint project. The ULCC Team has also drafting amendments to the Québec Civil Code, which are contained in a sepa-

rate document. This approach reflects the fact that the law of Québec already has a legislative framework for UNAs[12] and is, in all respects, considerably more advanced than the law that prevails in common law Canada in connection with UNAs.

[4] A good summary of the basic elements of a UNA at common law is found in a judgment of Lawton L.J. of the English Court of Appeal, who described a UNA as ". . . 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."[13] This summary must be supplemented by an important point for understanding the legal nature of a UNA. At common law, a UNA is not a legal entity that is separate from its members. This position is largely responsible for the arrested development of the law of UNAs in common law Canada.

[5] In fact, it is something of a misstatement to say that there is a law of UNAs in the same sense that there is a law of corporations or a law of trusts. Instead of a coherent legal framework for UNAs, there is merely a series of rules drawn mainly from the law of contracts, agency, and trusts that the courts have applied to UNAs. Most of these rules were developed by the English courts in the nineteenth century. They tend to reflect both the social conditions of that time and a lingering judicial distaste for unincorporated bodies that were, until the late eighteenth century, actively suppressed by the government.

[6] The common law rules governing UNAs have come into conflict with modern policy goals, particularly in the area of labour relations, and they have been overridden by the legislature for certain types of UNAs in certain specific circumstances.[14] More recently, the courts have begun to reform some of the basic assumptions about UNAs. The leading case is the 1996 decision of the Supreme Court of Canada in *Berry v. Pulley*.[15] In *Berry*, the court began the process of unraveling the central thread of UNA jurisprudence: the conclusion that UNAs are not legal entities separate from their members. The court decided that, since trade unions are given legal entity status for certain purposes spelled out

in labour relations statutes, this status could be extended to apply to an issue that is not addressed in the governing legislation.[16]

[7] The Supreme Court of Canada was careful to limit the scope of its reasoning in *Berry*. It concluded that the courts should follow the lead of the legislature in reforming the law of UNAs.[17] While this is a reasonable conclusion, it has the potential to cause further fragmentation and incoherence in the law. One the one hand, certain UNAs such as trade unions and political parties may be accorded entity status while, on the other hand, small-scale UNAs such as clubs, sports teams, and neighbourhood associations continue to be saddled with an out of date and confusing legal regime.

[8] The Uniform Act is intended to remedy these deficiencies in the common law by establishing a coherent legal framework for UNAs. It was drafted with the concerns of small-scale informal UNAs uppermost in mind. Many of the provisions of the Uniform Act are framed as default rules that are intended to give some basic structure to these informal bodies. All UNAs would be able to modify these default rules.

[9] The Uniform Act addresses the following issues: (1) definition and types of organizations covered; (2) the application of the Act and its relationship to other laws; (3) the legal status, capacity, and powers of a UNA; (4) claims and liabilities; (5) governance—including the rights of members and the powers and duties of managers; (6) dissolution and winding up; and (7) mergers and conversion. The basic approach of the Uniform Act is to treat a UNA as a legal entity in addressing these issues. In addition, the Uniform Act is intended to supplement, rather than displace, existing laws that may apply to specific types of UNAs (such as trade unions). Finally, many of the provisions of the Uniform Act are geared to the nonprofit corporations statute of the enacting jurisdiction. This approach is intended to ensure that the enactment of the Uniform Act does not create an artificial disincentive to incorporation.

PROJECT TO CREATE A HARMONIZED LEGAL FRAMEWORK FOR UNINCORPORATED NONPROFIT ASSOCIATIONS IN NORTH AMERICA

UNIFORM UNINCORPORATED NONPROFIT ASSOCIATIONS ACT

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UNINCORPORATED NONPROFIT ASSOCIATIONS ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of [enacting jurisdiction], enacts as follows:

DEFINITIONS AND INTERPRETATION

Definitions

1 The following definitions apply in this Act.

"governing principle" of an association means a rule of the association that governs its purpose or operation or the rights or responsibilities of its members or managers.

"majority vote" in relation to any matter means a majority of the votes cast at a properly called meeting of the persons entitled to vote on that matter.

"manager" means

(a) a [natural] person who, under an association's governing principles, alone or together with others, is responsible for managing, or supervising the management of, the association's undertaking and affairs; and

(b) a member who becomes a manager by default under clause 20(1)(b) or subsection 20(2).

"member" means a person who, under an association's governing principles, is entitled to participate in

(a) the selection of persons to manage, or supervise the management of, the association's undertaking and affairs; or

(b) the development [or amendment] of the association's governing principles or policies.

"nonprofit association" means a body of persons joined by mutual consent for one or more common purposes other than profit.

"person" includes an unincorporated organization, a government and a department or branch of a government.

Comment: This section contains the definitions that apply throughout the Uniform Act.

A UNA's "governing principles" are the equivalent of a nonprofit corporation's constitutions, articles of incorporation, or bylaws. They are the foundational rules that govern the

UNA's purposes and internal affairs. The governing principles of a UNA do not have to be in writing. *See* section 2.

A definition of "majority vote" is included for the sake of clarity. This expression crops up frequently in the default organizational rules that appear later in the Uniform Act. *See* sections 16 (2), 18 (1), 22 (1), and 27. The term is defined as a majority of votes cast at a duly constituted meeting of a UNA in distinction to the majority of votes that could potentially be cast by all of the UNA's members or managers, whether participating at the meeting or not. The definition in the Uniform Act is consistent with the understanding of this concept in Canadian corporate law.

A "manager" of a UNA is an individual who, under the UNA's governing principles, actively manages or supervises the management of the UNA's undertaking and affairs. The word "manager" was selected as a neutral term to express this concept. The individuals on governing boards of UNAs are often in practice styled "directors," "governors," or "trustees." The definition of "manager" turns on the substance of an individual's role within the UNA and not on the individual's formal designation. So, an individual with the title of "director," "governor," or "trustee" could be a "manager" for the purposes of the Uniform Act. The expression "responsible for managing, or supervising the management of" in clause (a) is commonly used in Canadian corporate law statutes. *See*, *e.g.*, *Business Corporations Act*, S.B.C. 2002, c. 57, s. 136 (1); *Society Act*, R.S.B.C. 1996, c. 433, s. 24 (2). An individual becomes a manager in accordance with the UNA's governing principles or, if no managers have been selected, the Uniform Act supplies a default rule. *See* section 20. A manager is not required to be a member of the UNA.

The Uniform Act contains a broad definition of "member." A person is considered a member of a UNA for the purposes of the Uniform Act if that person is entitled to participate either in the selection of the UNA's managers or in the development of the UNA's governing principles or policies. The definition is framed in these broad terms in order to ensure that the benefits of the Uniform Act, such as the insulation from liability, will flow to persons who may find themselves liable or otherwise disadvantaged under the archaic common law rules. The definition of "member," like the definition of "manager," is concerned with a person's function within the UNA and not with a person's formal designation. In many cases, persons are described as "members" of a UNA for reasons related to fundraising or honouring past service. These honorary "members" are not "members" for the purposes of the Uniform Act if they are not entitled, under the UNA's governing principles, either to participate in the selection of managers or to participate in the UNA's governing principles or policies. The definition uses generic terms such as "participate in the selection of" and "participate in the development" of in order to accommodate the vast number of organizational structures that prevail among UNAs. For example, many UNAs select their managers by majority vote a meeting, but many use other means, such as appointment by a stakeholder or appointment by virtue of office. The Uniform Act is not intended to affect any of these arrangements.

"Nonprofit association" is defined in simple, broad terms. The phrase "mutual consent" refers to the contractual basis of the formation of a UNA. This phrase has been used be-

cause most agreements to form a UNA do not rise to the level of formality that is common among, for example, commercial contracts. Although it would be preferable, in practice, for a UNA's contract of formation (which will make up an important part of its governing principles) to be in writing, the Uniform Act does not require that it be in writing. Most UNAs are informal creations that are formed and that operate without independent legal advice. Imposing a writing requirement, or other formalities, on the creation of a UNA is not advisable, as it would have the likely effect of excluding many UNAs from the scope of the Uniform Act. This result would uncut this effort at law reform and would exacerbate the fragmentation of the law respecting UNAs, which is one of the most disagreeable features of that body of law. Although the agreement to form a UNA may be very informal, there still must be some objective evidence that the parties intended to form a UNA. Common examples of this objective evidence are the use of the UNA's name in communications, the existence of a bank account in the UNA's name, or the existence of a mailing or internet address in the UNA's name. [The reference to "a body of persons" in the definition indicates that the mutual consent of at least two persons is needed to form a UNA.] There are limitations on the types of nonprofit associations that are UNAs for the purposes of the Uniform Act. *See* sections 3–4.

"Person" is given a broad definition in the *Interpretation Act*s of most provinces and territories. *See*, *e.g.*, *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29. The intent of this definition is to extend further the definition of "person" to embrace unincorporated organizations, governments, and departments or branches of governments. In some cases, these bodies may be members of UNAs. There is no reason to deny them the benefits that flow from the Uniform Act.

The derivation of the definitions in section 1 from the Joint Drafting Committee's Statement of Principles is as follows: "governing principle"—Principle (2); "manager"—Principle (4); member—Principle (3); "nonprofit association"—Principle (1).

Evidence of governing principles

2 An association's governing principles may be in writing or inferred from the practices of the association used by it consistently for the most recent five years or, if it has existed for less than five years, throughout its existence.

Comment: Many UNAs operate on an informal basis. Often, UNAs only have rudimentary written bylaws, or other organizational documents, to govern their internal practices and procedures. Many UNAs lack written bylaws or organizational documents entirely. This section is intended to accommodate these UNAs and to provide them with statutory support for their basic organizational structure. For example, an unincorporated church that has no written bylaws addressing the issue of notice of meetings may have evolved the practice of printing notice of its annual meeting of members in the church bulletin for the three weeks preceding the annual meeting. If this practice were followed for five years (or if it were followed consistently since the church's inception, if the church is less than five years old), then it would form part of the church's governing principles by virtue of this section. If it continued to be followed in the sixth year and subsequent years, this practice would be determinative of the question of whether reasonable notice of an

annual meeting had been given to the members. This section is based on the definition of "established practices" found in the California Corporation Code. *See* Cal. Corp. Code § 18010 (" 'established practices' means the practices used by an unincorporated association without material change or exception during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence").

Derivation: Principle (2).

Interpretation of "nonprofit association"

3(1) An association does not cease to be a nonprofit association merely because it engages in a profit-making activity or earns a profit, unless it pays a dividend or distributes any part of its income or profit to its members [or managers] otherwise than as

(a) reasonable compensation for services rendered to the association;

(b) a reimbursement of expenses reasonably incurred on behalf of the association;

(c) a repurchase of a membership or repayment of a capital contribution in accordance with the association's governing principles;

(d) a distribution of property to the members on a winding-up of the organization; or

(e) a payment or distribution to a member that is a nonprofit organization.

Effect of joint ownership

3(2) Joint ownership of property, whether as joint tenants or tenants-in-common, is not by itself sufficient to establish a nonprofit association, even if the owners use the property for a nonprofit purpose.

Comment: This section contains two interpretive statements that may be used in defining a UNA for the purpose of the Uniform Act. Subsection (1) clarifies the meaning of "nonprofit" as it is used in the Uniform Act. This term may be easily misunderstood, as it implies that "nonprofit" bodies must forswear all activities that could produce a profit. In fact, many UNAs do engage in profit-making activities, as a means to support and advance their purposes. For example, a UNA may operate a bingo parlour and use the profits from that activity to buy food for a homeless shelter. If the Uniform Act were interpreted as prohibiting these types of profit-making activities, then it would be felt as an obtrusive constraint by most UNAs. Subsection (1) makes it clear that profit-making activities, as such, are not the issue; rather, the focus is on distribution of the UNA's income or profit to its members. Clauses (a) to (e) provide further clarification as to when such a distribution is permissible. Since the main purpose of the Uniform Act is not to empower or regulate UNAs, but rather to clarify the rights and responsibilities of members and managers vis-à-vis each other, the UNA, and third parties, subsection (1) has been drafted as an interpretative provision for determining whether a body qualifies as a

UNA. By taking this approach, subsection (1) should not be interpreted as a statutory empowerment to engage in profit-making activity or as a statutory mandate to use profit for nonprofit purposes. If a body does not qualify as a UNA by failing the nonprofit test set out in this subsection, then it would presumptively be considered a partnership, which is the for-profit analogue of the UNA.

Subsection (2) makes it clear that two or more people holding property in common do not by that fact alone constitute a UNA.

Derivation: Subsection (1)—Principle (5); Subsection (2)—Principle (1).

APPLICATION OF THIS ACT AND OTHER LAWS

Application of this Act

4 This Act applies to every unincorporated nonprofit association, whether formed before or after the coming into force of this Act, other than

(a) a marriage, common-law relationship or other domestic living arrangement;

(b) a trust;

[(c) [an association that is organized and operated as] a co-operative;]

(d) an association that is formed under an Act or regulation [or under the prerogative of the Crown]; and

(e) an association or type of association prescribed by regulation.

Comment: This section preserves the residual or default character of the UNA form by stating that the Uniform Act applies to every UNA, whether it was form before or after the coming into force of the Uniform Act. Given the informal character of most UNAs, it is not practical to expect the members or managers of UNAs to take positive steps to opt into this statutory regime. Further, most of the Uniform Act's provisions are enabling or clarifying. Where rules of conduct or organization are set out in the Uniform Act, they tend to take the form of default rules that may be modified by a particular UNA. On balance, it was concluded that UNAs would benefit from the automatic application of the Uniform Act to them. The section also contains a limited set of exceptions to this basic rule of application. It recognizes that not every form of unincorporated nonprofit organization should automatically qualify as a UNA. Marriages, common-law relationships, and other domestic living arrangements are excluded for public policy reasons. Trusts are already governed by a well-developed set of laws. It is unnecessary to apply the legal principles set out in the Uniform Act to them. For the sake of clarity, associations formed pursuant to a special statute or regulation are excluded from the Uniform Act, as these associations tend to have their own organizational structure set out in the statute or regulations. Enacting jurisdictions can choose to expand or limit this list of exclusions, consis-

tent with the overriding concept that a UNA is a default form of organization for unincorporated nonprofit bodies.

Derivation: Principle (1) and Principle (6).

General principles of law and equity

5 The general principles of the common law and equity supplement this Act and continue to apply, except to the extent that they are inconsistent with this Act.

Comment: This section confirms the basic rule of statutory interpretation that principles of the common law and equity continue to apply, unless they are expressly displaced by a provision of the Uniform Act. Examples of these common law and equitable principles are the general principles of contract, agency, fraud, and estoppel. This section is included for greater clarity. Enacting jurisdictions can choose whether or not it is necessary.

Derivation: Principle (9).

Conflict with other Act or regulation

6 This Act supplements other laws that relate or apply to unincorporated nonprofit associations. In the event of a conflict between a provision of this Act and a provision of any other Act or regulation

(a) that governs a specific type of unincorporated nonprofit association; or

(b) that regulates nonprofit associations operating in [enacting jurisdiction];

the provision of that other Act or regulation prevails to the extent of the conflict.

Comment: Many jurisdictions have legislation that affects certain types of UNAs, such as trade unions, political parties, and churches. *See*, *e.g.*, *The Trade Union Act*, R.S.S. 1978, c. T-17; *Election Act*, R.S.B.C. 1996, c. 106; *Trustees (Church Property) Act*, R.S.B.C. 1996, c. 465. Clause (a) of this section establishes the rule that, in the event of an inconsistency between the Uniform Act and any of these statutes, the latter prevails. Under generally accepted principles of statutory interpretation, there is a strong presumption against inconsistency. As a result of this presumption, this inconsistency provision should only rarely be called on in practice.

Clause (b) establishes the same inconsistency rule for a different class of statutes—those statutes that regulate the activities of the nonprofit or voluntary sector generally. In comparison with the types of statutes covered by clause (a), there are few of these types of statutes in Canada, but they are not unknown. *See*, *e.g.*, *Uniform Charitable Fundraising Act*.

Enacting jurisdictions should undertake a thorough review of all these other laws that may apply to UNAs should be conducted to be certain that they do not need to be amended in order to continue to apply to UNAs after the Uniform Act comes into force. If amendments to these other laws are necessary, then they should be included as consequential amendments in the Bill that enacts the Uniform Act.

Derivation: Principle (10).

Governing law

7(1) Subject to subsection (2), this Act applies to all unincorporated nonprofit associations formed or operating in [enacting jurisdiction].

Exception

7(2) The law of the jurisdiction

(a) stipulated in an association's governing principles; or

(b) in the absence of applicable governing principles, in which an association has its main place of activities;

governs the relations among its members and managers and between the association and its members and managers.

Comment: The Uniform Act does not contain a registration or filing requirement for UNAs. Subsection (1) clarifies that the Uniform Act applies to all UNAs formed in or active in an enacting jurisdiction. Subsection (2) sets out a rule for the governing law applying to the internal relations of a UNA. Consistent with general contractual principles, this rule permits a UNA to stipulate a jurisdiction in its governing principles which supplies its governing law. If a jurisdiction is not specified in the governing principles, then the default rule is that jurisdiction in which the UNA has its main place of activities supplies the UNA's governing law.

Derivation: Principle (6).

LEGAL STATUS, CAPACITY AND POWERS

Separate legal entity

8 An unincorporated nonprofit association is [for all purposes] a legal entity separate and apart from its members and managers.

Comment: This section sets out a fundamental statement of principle for the Uniform Act. The separate legal status of a UNA is a concept that undergirds later provisions in the Uniform Act allowing a UNA to hold and dispose of property in its own name and to sue and be sued in its own name. It is also the key underpinning of the liability rules in the Uniform Act, which insulate the assets of members from claims against the UNA. This section reverses traditional common law principles that treat UNAs and other unin-

corporated bodies such as partnerships as aggregates of their members (or partners) and not as legal entities in their own right. This reversal is justified for several reasons. First, the traditional common law aggregate theory is out of step with contemporary social attitudes. It needlessly exposes members of UNAs and third parties that deal with UNAs to potential unexpected losses. As a corollary of this point, it is noteworthy that many of the social institutions that UNAs frequently encounter—from banks and financial institutions to government bodies such as the Canada Revenue Agency and provincial liquor control branches—tend to treat UNAs as *de facto* legal entities. Second, adopting this statement of principle promotes harmonization of the law governing UNAs across Canada. Under Québec's *Civil Code* UNAs have a legal entity status for the issues addressed in the Code. *See* C.C.Q. arts. 2267–79. Third, the aggregate theory has been questioned in recent appellate decisions involving UNAs. *See Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, 211 D.L.R. (4th) 651; *Ahenakew v. MacKay* (2004), 71 O.R. (3d) 130, 241 D.L.R. (4th) 314 (C.A.). While neither case went so far as to conclude that the aggregate theory is not applicable to or inappropriate for all UNAs, both decisions do represent a significant erosion of the theory for the specific circumstances that they addressed and indicate that the courts are open to further development of the law in this direction.

Derivation: Principle (7).

Perpetual existence

9 An unincorporated nonprofit association continues to exist, despite changes in its membership, until it is dissolved and wound up as provided for in sections 27 and 28.

Comment: This section contains an important corollary to the general principle set out in section 8. It declares that a UNA has perpetual existence. This is one of the key aspects of legal entity status. As a practical matter, the members of a UNA may agree to limit its existence to a set term by spelling out that agreement in the UNA's governing principles. The Uniform Act provides a summary procedure for ending the existence of a UNA by dissolution and winding up. *See* sections 27–28.

Derivation: Principle (8).

Legal capacity and powers

10 An unincorporated nonprofit association has the legal capacity and powers of a natural person, including the capacity and power

(a) to acquire, hold, encumber or transfer property in its own name;

(b) to enter into contracts in its own name;

(c) to be a beneficiary; and

(d) to sue and be sued in its own name, and to commence, defend, or intervene or participate in, any judicial, administrative or other proceeding.

Comment: This section contains an orthodox statement of the capacity and powers of a UNA in language that is familiar from Canadian for-profit and nonprofit corporate statutes. *See*, *e.g.*, *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15 (1); *The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2, s. 15 (1). The section is included in the Uniform Act as a corollary of the general principle set out in section 8. It also clarifies that the old doctrine of *ultra vires* does not apply to UNAs under the Uniform Act. The list of specific powers set out in clauses (a) to (d) are included for further clarity. Clauses (a) to (d) are not intended as an exhaustive list of the powers of a UNA. Instead, they address key issues that have caused problems for UNAs and their members under the existing common law rules.

Since at common law UNA is not considered a legal entity separate from its members, it cannot hold or dispose of property in its own name. The nature of the property interest that the members of a UNA hold in any common property has been the subject of some academic debate. Despite theoretical uncertainties, in most circumstances this method of holding property has not caused any practical problems. The reason for this is that most UNAs will appoint trustees to hold the property in trust for the members. These trustees tend to be bare trustees: they are subject to direction from the UNA's management or they have to comply with the purposes set out in the UNA's contract of formation. Practical problems do commonly arise in connection with gifts to a UNA. These gifts are often made by will and the testator often does not appreciate the intricate legal planning that is required to make an effective gift to a UNA. In summary, any gift to the UNA outright is void, because the UNA is not a legal entity. On the other hand, a gift to the current members of the UNA in common is legally effective, but undesirable for most testators as it gives them no assurance that the property will be used to further the purposes of the UNA. So, lawyers have had to come up with various devices to attempt to satisfy donors' intentions without offending the law. These devices have to navigate through a number of dangers. If the UNA is not a charity—and most of them will not be charities—then the gift could be struck down for any of the following reasons: (1) it could create a noncharitable purpose trust; (2) it could offend the rule against perpetuities; (3) it could fail due to the beneficiaries being unascertainable; or (4) if the gift is made in a will, it could be struck down due to uncertainty. The courts have occasionally been willing to save gifts from being struck down. But an unfortunate side effect of these judgments is that the cases in this area are extremely difficult to reconcile and the law is rather uncertain. The Uniform Act will bring an end to this uncertainty.

As a corollary of these common law rules regarding property, a UNA cannot be a beneficiary under a will or a trust. The Uniform Act reverses this rule.

Since it is not a legal entity, a UNA cannot enter into or perform a contract in its own name. This rule has a significant bearing on liability issues involving UNAs and third parties. These issues are expressly dealt with later in the Uniform Act. *See* sections 14–15.

A UNA cannot sue or be sued at common law, but in the early nineteenth century the English Court of Chancery devised a method of allowing suits involving UNAs to proceed after a fashion. The court adapted its already existing representative proceeding for use in these circumstances. This procedure survived the fusion of the common law and equitable courts in England and was copied almost verbatim into the rules of court for the common law Canadian provinces and territories. *See*, *e.g.*, British Columbia, *Supreme Court Rules*, r. 5 (11); Ontario, *Rules of Civil Procedure*, r. 12.07. The representative proceeding works by selecting a person or persons as representatives of the entire membership of the UNA. Only the representatives need to be named in the proceeding and served with process. But leave of the court is required to enforce any judgment or order obtained in a representative proceeding against a specific member of a UNA. Most practitioners agree that the representative proceeding is a serviceable procedure for cases that seek an equitable order, such as an injunction or a declaration, but that it is a very ill adapted procedure for an action that seeks a money judgment.

A further problem with this procedure is that it was historically unavailable to a member of a UNA who wished to advance a claim. The courts have dismissed these claims on the basis that a member is theoretically suing all the members of the UNA, including himself or herself. This would put the member on both sides of the proceeding, which could not be permitted. *See Kelly v. National Society of Operative Printers' Assistants* (1915), 84 L.J.K.B. 2236, 113 L.T. 1055 (Eng. C.A.). The Supreme Court of Canada has recently overturned this rule for trade unions. *See Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493. But the rule may still apply to other types of UNAs. The Uniform Act deals with this issue below. *See* sections 14–15.

A few jurisdictions in Canada have rules of court that purport to allow a UNA to sue and be sued. *See Federal Court Rules, 1998*, r. 111; Manitoba, *Court of Queen's Bench Rules*, rr. 8.09–8.12; New Brunswick, *Rules of Court*, rr. 9.01–9.03. The effectiveness of these rules was cast in doubt by a recent decision of the Manitoba Court of Appeal, which struck down the Manitoba rules as an unauthorized attempt to affect the property interests of members of UNAs. *See Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Assn. v. Harms*, 2003 MBCA 112, 231 D.L.R. (4th) 213. As the Uniform Act sets out a comprehensive legislative framework for UNAs, paragraph (d) of this section is not vulnerable to attack on these grounds.

STATEMENT OF AUTHORITY
TO TRANSFER REAL PROPERTY

To be drafted, if necessary:

The provisions, to be modelled on Section 5 of the UUNAA(1996), might be better located in the relevant real property legislation.

Another approach might be to enable an association to grant a

power of attorney to an individual that could be filed with the director under The Corporations Act or with the registrar of the appropriate land titles office or property registry.
Such a provision could be modelled on the power of attorney or attorney-for-service provisions in the enacting jurisdiction's Corporations Act.

Here are some sample power of attorney provisions.

From the BC *Business Corporations Act*
Corporations may grant power of attorney in writing
144 (1) A British Columbia corporation may, in writing, designate a person as its attorney and empower that attorney, either generally or in respect of specified matters, to sign deeds, instruments or other records on its behalf.

(2) Every deed, instrument or other record signed by an attorney on behalf of a British Columbia corporation, so far as it is within the attorney's authority, binds the corporation.

From the BC *Society Act*
Attorney for service
77 (1) The registrar must require an extraprovincial society to appoint, within a time specified by the registrar, a person resident in British Columbia as its attorney authorized and directed on its behalf to accept service of process in all proceedings by or against the society in British Columbia and to receive all lawful notices to the society.

(2) The society must, within one week after the appointment, file a copy of the appointment with the registrar.

(3) If the person appointed attorney ceases to act, the society must

(a) within one week after the attorney ceases to act, appoint a new attorney, and

(b) within one week after the appointment, file a copy of the appointment with the registrar.

(4) The name and address of the attorney must be stated in the copy of an appointment filed under this section.

(5) If the address of the attorney changes, the society must file a notice of the change with the registrar.

In Manitoba, *The Real Property Act* allows for the registration of a Power of Attorney by any person:

Power of attorney
83(1) A person may, under power of attorney, authorize another person to act for him in respect of the transfer or other dealing with any land, mortgage, encumbrance, or lease.

Revocation or notice of death filed
83(2) No registered power of attorney shall be deemed revoked by act of the parties thereto nor by death unless and until a revocation thereof is registered, or the registration is lapsed upon request, with evidence of death attached.

CLAIMS AND LIABILITIES

No effect on earlier claims
11 This Act does not affect an action or proceeding that was commenced, or a right that accrued, before this Act came into force.

Comment: This section contains a transitional rule.

Derivation: Principle (15).

[Claim not affected by change in managers or membership
12 A claim for relief by or against an unincorporated nonprofit association does not abate merely because of a change in its managers or membership.]

Comment: This section reverses an old common law rule. Historically, a plaintiff was required to name and serve all members of a UNA in order to commence an action in the common law courts involving the UNA or any funds held in common by the members of the UNA. Further, in order to sustain the proceeding the membership of the UNA had to remain constant until judgment. If a member left the UNA for whatever reason (*e.g.* resignation or death) or if a new member joined the UNA after proceedings had been commenced then those proceedings could be defeated by a plea of abatement. *See Halsbury's Laws of England*, 3d ed., vol. 30 (London: Butterworth & Co., 1959) at 27, n. (k) ("A plea in abatement was a plea by which before the coming into force of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), the defendant, without admitting or denying the cause of action, set up some matter of fact the legal effect of which was to preclude the plaintiff from recovering upon the writ and declaration as then framed, e.g. that the plaintiff or defendant was under some personal disability or suing or being sued, or could not sue or be sued alone, being a joint party with others to the cause of action." [ci-

tation omitted]). The plea of abatement did not survive the fusion of the common law and equitable courts in the United Kingdom and it is not a part of contemporary civil procedure in Canadian courts. The broader question of whether a change in membership of a nonprofit organization has any effect on proceedings involving the organization appears to be unresolved. Some commentators have said that only the members at the time the cause of action arose can be held liable (this position would cause problems in a representative proceeding). *See*, *e.g.*, J.F. Keeler, "Contractual Actions for Damages Against Unincorporated Bodies" (1971) 34 Mod. L. Rev. 615 at 626. British Columbia's courts have rejected this argument. *See Shaw v. Real Estate Board of Greater Vancouver* (1973), 29 D.L.R. (3d) 774, [1973] 5 W.W.R. 726 (B.C.C.A.). But this argument may be available in other provinces. This issue should be conclusively resolved by the general principle set out earlier in the Uniform Act allowing a UNA to sue and be sued in its own name. *See* section 10 (d). Enacting jurisdictions can decide whether a provision specifically reversing this old common law rule is required in light of their civil procedure rules.

Derivation: Principle (14).

Limited effect of judgment or order

13 A judgment or order in an action or proceeding against an unincorporated nonprofit association is not effective against a member or manager of the association unless he or she was named and served as a party to the action or proceeding and the judgment or order is issued against him or her based on a finding of his or her personal liability.

Comment: This section is the first of a series of sections dealing with liability and the UNA. Issues of liability often involve third parties who are not members or managers of a UNA. Common fact patterns include contractual claims involving a third party who supplies goods or services to a UNA under a contract that the third party (wrongly) believes to be with the UNA itself and tort claims, framed in occupiers' liability or vicarious liability, involving a third party who has been injured at an event sponsored by the UNA. Cases involving third party liability have vexed the Canadian courts for close to one hundred years. *See*, *e.g.*, *Dodd v. Cook*, [1956] O.R. 470, 4 D.L.R. (2d) 43 at 51 (C.A.), Schroeder J.A. (". . . the existence of such associations has over the years given rise to difficult problems both in the field of contracts and in that of torts"). This section is consistent with the principle set out earlier in the Uniform Act declaring a UNA to be a separate legal entity. *See* section 8. By its terms the section applies to judgments and orders, which means that its scope is larger than liability under a money judgment. The section also embraces court orders such as injunctions and other orders such as an award in arbitration.

Derivation: Principle (19).

Principle #17: Venue and Service
To be drafted if necessary. In Manitoba, court rules would probably provide for these matters.

The Rules Committee of the Court of Queen's Bench in Manitoba previously attempted, under its rule-making authority, to make rules respecting service on unincorporated associations. They were later ruled ultra vires because they purported to allow an unincorporated political association to be sued in the name of the association. It was held that the impugned rule had crossed the line from procedural to substantive law, which was beyond the rule-making power.

One approach would be to put regulation-making powers in this Act. Another would be to review the regulation/rule making powers for the various levels court of court and amend them as necessary to ensure that the courts have the necessary powers.

It might also be advisable to supplement the courts' ability to make rules respecting service with a provision enabling an association to appoint an attorney for service and to file the appointment (or a notice of it) with a government official, perhaps with the person with whom an extra-provincial corporation would file the appointment of an attorney for service.

Liability of association

14 An unincorporated nonprofit association is liable for its own acts and omissions and for the acts and omissions of its managers, employees and agents to the same extent that a corporation is liable for the acts and omissions of its managers, employees and agents.

Comment: The purpose of this section is to clarify two issues. First, a UNA is liable for its own acts and omissions. Under existing common law rules, a UNA cannot be liable for its acts and omissions because the UNA is not a separate entity. Second, a UNA is vicariously liable for the acts and omissions of its managers, employees, and agents to the same extent as a corporation is vicariously liable for the acts and omissions of its directors, employees, and agents. The principles of vicarious liability in common law Canada are primarily judge-made law. They are currently in a phase of transition and development. A number of the leading cases involved nonprofit corporations. *See Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570. By virtue of this section, this developing jurisprudence will be applicable to UNAs.

Derivation: Principle (18).

Limited liability of member or manager

15(1) Except as otherwise provided in this section, a member or manager of an unincorporated nonprofit association is not liable for any of the following merely by reason of being a member or manager:

(a) a debt or other obligation of the association;

(b) an act or omission for which the association is liable.

Exception
15(2) Despite section 8,

(a) a member of an association may be held liable for debt or other obligation of the association in circumstances in which a shareholder of a corporation may be held liable for a debt of other obligation of the corporation; and

(b) a manager of an association may be held liable for debt or other obligation of the association in circumstances in which a director of a corporation may be held liable for a debt of other obligation of the corporation.

Member or manager liable for own conduct
15(3) Subject to any law limiting the liability of volunteers, a member or manager is liable for his or her own tortious acts and omissions.

Member or manager liable under contract
15(4) A member or manager of an unincorporated nonprofit association is liable for an obligation under a contract entered into by or on behalf of the association if the member or manager

(a) assumed personal liability for the obligation; or

(b) executed the contract on behalf of the association without the authority to do so or without disclosing that he or she was acting on behalf of the association.

Comment: The main liability rules applicable to UNAs under the Uniform Act are set out in this section. The Uniform Act represents a significant departure from the common law liability rules for UNAs. These common law rules are somewhat obscure and not always well understood, even by lawyers. This is due, in part, to the curious historical development of the common law rules.

Historically, the courts turned to a number of analogies in sorting out the principles to apply in cases involving UNAs and liability to a third party. Early in the nineteenth century, the English courts held in a few cases that a UNA was analogous to a partnership. *See*, *e.g.*, *Delauney v. Strickland* (1818), 2 Stark. 416, 171 E.R. 690 (K.B.). Under this theory, the entire membership of the UNA would be liable. This position was quickly superseded by another theory. In deciding who exactly should be held liable in these circumstances, the courts turned to rules formulated in the law of agency. See *Flemyng v. Hector* (1836), 2 M. & W. 172, 150 E.R. 716 (Ex. Ch.); *Re The St. James's Club* (1852), 2 De G. M. & G. 383, 42 E.R. 920 (Ch.). From about the mid nineteenth century in Eng-

land, and shortly thereafter in common law Canada, to the present day, agency principles have held sway in cases involving UNAs and liability to a third party.

The key question for determining liability under agency rules is, Who is the real principal? Answering this question is a fact-driven exercise. But, to the extent that it is possible to generalize, in most cases courts applying the law of agency have found that liability rests with the executive committee (or "managers") of the UNA. *See Wise v. Perpetual Trustee Co. Ltd*., [1903] A.C. 139 (P.C.); *Bradley Egg Farm Ltd. v. Clifford*, [1943] 2 All E.R. 378 (C.A.).

This approach to liability has caused a number of problems. First, it does not operate well within the representative proceeding rules, which is the main procedural device used for court proceedings involving UNAs. Under the agency-derived liability rules, the executive and ordinary members of UNAs almost always have different interest in a proceeding. The ordinary members have a defence to the question of who is the real principal that the executive members do not. As a result, both the ordinary members and any funds held in common among all the members of the UNA are effectively sheltered from liability. Second, the fact-driven nature of the agency-derived liability rules has made it difficult for the courts to formulate consistent principles of liability assignment, similar in nature to those applying to directors of corporations or trustees of trusts. As a result, this body of law is inconsistent and uncertain. Both these point compound each other and create a broader complaint. By sheltering the assets of the ordinary members and the common assets of the UNA's membership in most cases, by exposing the assets of the UNA's executive in most cases, and by creating uncertainty around the boundaries of these statements, this liability regime has confused members of UNAs, defied the legitimate expectations of third parties dealing with them, and on occasion left third parties who have acted in good faith without a remedy for their claims.

The Uniform Act reverses these common law rules and clearly affixes liability with the UNA. Section 15 contains a number of key articulations of this principle.

The effect of subsection (1) is to provide the members and managers of a UNA with the same protection against personal liability that is afforded to the directors, officers, and members of a nonprofit corporation. This protection applies both to contractual liability and tortious liability.

Subsection (2) contains an exception to the general liability rule. The purpose of this subsection is to make the law regarding lifting the corporate veil that has developed in connection with corporations applicable to a UNA. The subsection is deliberately framed in broad rules to capture both statutory and common law instances of lifting the corporate veil. For instance, a number of statutes impose personal liability on the directors of a corporation for certain obligations of a corporation, such as unpaid wages or unremitted source deductions. In addition, the courts have developed a series of rules regarding lifting the corporate veil. This subsection makes it clear that, in principle, these rules apply to the members and managers of a UNA. In practice, the fact that the members of a UNA, like the members of a nonprofit corporation, do not have an expectation of financial gain

that the shareholders of a for-profit corporation have should result in fewer cases in which the courts will lift the corporate veil and affix personal liability on a member or a manager.

Subsection (3) makes it clear that nothing in the Uniform Act relieves a member or a manager from liability for a tort committed by that member or manager. The subsection refers to laws limiting the liability of volunteers. These laws are much more common in the United States, where a number of statutes have been enacted over the last twenty years conferring varying levels of immunity from liability for torts committed by individuals in a volunteer capacity. Nothing in the Uniform Act confers such immunity on the members or managers of a UNA, but one Canadian province does have legislation that is similar to the American volunteer protection statutes. *See Volunteer Protection Act*, S.N.S. 2002, c. 14.

The purpose of subsection (4) is to confirm that a member or a manager of a UNA continues to be liable under a contract if that member or manager has (a) agreed to assume liability under the contract, either as a party to it or as a guarantor or (b) has signed the contract as an agent with an undisclosed principal.

Derivation: Principles (16), (19)–(24)

GOVERNANCE

Introductory Comment: Sections 16–26 deal with the governance of UNAs. This area has received little attention by the common law. Considerable uncertainty abounds with respect to basic questions of governance, such as members' rights and managers' duties and obligations. Larger, sophisticated UNAs have likely dealt with these questions in their contract of formation and other basic charter documents. But smaller, informal UNAs, which make up the bulk of UNAs in Canada, likely have not addressed basic governance questions. This part contains a number of governance rules, most of which are default rules that any given UNA can choose to modify. Many of these rules were inspired by longstanding equivalent rules for corporations. Given the varying state of development of nonprofit corporate law across Canada, enacting jurisdictions should take care to ensure that the default rules in the Uniform Act are harmonized with corresponding rules in the jurisdiction's nonprofit corporations statute.

Members

Matters requiring membership approval

16(1) Except as otherwise provided by the governing principles of an unincorporated nonprofit association, the following matters require the approval of its members:

(a) the admission of new members;

(b) the suspension or expulsion of a member;

(c) the adoption or amendment of governing principles;

(d) the selection and dismissal of managers;

(e) any activity or transaction outside the ordinary course of the association's activities, including, without limitation,

(i) a sale, lease or other disposition of all or substantially all of the association's property, and

(ii) a merger or conversion under section [29?].

Membership decisions
16(2) Except as otherwise provided by the governing principles of an unincorporated nonprofit association,

(a) each member is entitled to one vote on each matter put to a vote at a meeting of members; and

(b) matters to be decided by members are to be decided by a majority vote.

Notice and quorum for meetings of members
16(3) An association's governing principles govern the notice and quorum requirements for meetings of members.

Comment: The purpose of this section is to establish a basic default framework for decision-making by the members of a UNA. Subsection (1) sets out a default list of matters that require member approval. Subsection (2) establishes a majority vote as the default requirement for approval by the members. "Majority vote" is a defined term. *See* section 1. Some of the matters listed in subsection (1) require supermajority approval under nonprofit corporation statutes. The Uniform Act does not take this position. If a UNA wishes to require a supermajority for any of these issues, then it may implement this requirement through its governing principles. Subsection (3) does not contain a default rule for notice of and quorum at a meeting of members, but it does give statutory recognition of those requirements as they are spelled out in a UNA's governing principles.

Derivation: Principles (26), (30)

Member is not agent
17 A member of an unincorporated nonprofit association is not an agent of the association unless he or she is a manager of the association.

Comment: This section is intended to clarify that a person's status as a member of a UNA does not, in itself, make that person an agent of the UNA. Agency and the power to bind a UNA are the subject of general agency principles. *See* section 5. Under agency

law, the managers of a UNA would, in a typical case, be considered to have the apparent authority to bind the UNA for acts in the ordinary course of the UNA's activities. So, a member who is also a manager should be considered to be an agent of the UNA. This conclusion is reached by virtue of the person's status as a manager. Under general agency law, a member may have the actual authority to bind the UNA or may have apparent authority to bind the UNA because of the member's established course of dealing with a third party or because of the doctrine of estoppel. In these cases, the member is not an agent of the UNA solely by virtue of being a member.

Derivation: Principle (27)

Admitting or removing a member, or resigning
18(1) Except as otherwise provided in the governing principles of an unincorporated nonprofit association,

(a) a person may be admitted, suspended or expelled as a member of the association by a majority vote of the members; and

(b) a person may resign from membership at any time [by giving notice of the resignation to the association].

Membership is voluntary
18(2) No person may become a member of an unincorporated nonprofit association without his or her consent.

Effect of termination on existing liability
18(3) The resignation, suspension or expulsion of a member does not relieve the member from any liability or obligation that he or she incurred as a member before the resignation, suspension or expulsion occurred.

Comment: Subsection (1) establishes a default rule for the admission of members. As is the case for the other default rules in the Uniform Act, subsection (1) only requires a majority vote. A UNA may wish to set a higher requirement. This can be done under its governing principles. Clause (b) of subsection (1) deals with resignation of members. It makes it clear that a UNA cannot prevent a person from resigning (as this would likely be void in any event on public policy grounds), but the UNA can impose a reasonable notice requirement. Subsection (2) is intended to clarify that, even though the terms and conditions of membership can be set by a UNA's governing principles, the governing principles cannot require any person to become or remain a member against that person's wishes. Subsection (3) makes it clear that resignation, suspension, or expulsion of a member does not affect any existing liability or obligation of the member.

Derivation: Principles (35)–(36)

Membership not transferable

19 A person's membership in an unincorporated nonprofit association is not transferable except as permitted by the association's governing principles.

Comment: This rule corresponds to a basic position of the nonprofit or voluntary sector. A member of a club or a church, for instance, is usually seen as making a personal commitment that should not be transferable. Several Canadian nonprofit corporations statutes contain a similar rule. *See*, *e.g.*, *Society Act*, R.S.B.C. 1996, c. 433, s. 9. If a specific UNA wishes to allow transfers, then they can be made in accordance with the UNA's governing principles.

Derivation: Principle (37)

Managers

Becoming a manager under governing principles

20(1) If the governing principles of an unincorporated nonprofit association provide for the selection of managers,

(a) a person becomes a manager according to those principles; and

(b) if no person has become a manager in accordance with those principles, or if every manager has ceased to be a manager, every member is a manager.

Members are managers if governing principles are silent

20(2) If the governing principles do not provide for the selection of managers, every member of the association is a manager.

Comment: "Manager" is defined in section 1. This section provides default rules for the selection of managers. The word "selection" is used as a neutral term, embracing election, appointment, and other means of selecting an individual to be a manager of a UNA. The selection of managers is to be done in accordance with a UNA's governing principles. If no selection has been made in accordance with the governing principles, or if a UNA has no governing principles covering this issue, then by default all the members of a UNA are managers. This may be appropriate for small UNAs, but larger UNAs will have an incentive to select their managers in accordance with their governing principles.

Derivation: Principle (28)

Rights and responsibilities of managers

21 Except as otherwise provided by an association's governing principles,

(a) the association's managers are responsible for managing, or supervising the management of, the association's undertaking and affairs;

(b) the managers have equal rights in carrying out those responsibilities.

Comment: The statement of the managers' duties in clause (a) is an orthodox statement, familiar from most Canadian for-profit and nonprofit corporate statutes. Clause (b) provides that the managers of a UNA have equal rights in carrying out their responsibilities. Both statements are default rules, which may be modified by a UNA's governing principles.

Derivation: Principle (29).

Management decisions
22(1) Except as otherwise provided by an association's governing principles, a management decision is made when it is approved by a majority of the managers.

[Managers cannot vote by proxy
22(2) A manager cannot vote by proxy on a matter put to a vote of the managers.]

Notice and quorum for meetings of managers
22(3) An association's governing principles govern the notice and quorum requirements for meetings of its managers.

Comment: This section establishes a basic framework for decision making by a UNA's managers. The intent is that a UNA's governing principles will provide for the type of managerial structure that the UNA wants to have. Subsection (2) is bracketed because it essentially confirms the common law position. Enacting jurisdictions can decide whether or not it necessary to include it in the Act.

Derivation: Principle (30)

Manager's duties of loyalty, good faith and care
23 A manager of an unincorporated nonprofit association

(a) has the same duties of loyalty, good faith and care that a director or officer of a nonprofit corporation has under [name of enacting jurisdiction's Act governing nonprofit corporations]; and

(b) is liable for a breach of any of those duties to the same extent that a director or officer of a nonprofit corporation would be liable under that Act.

Comment: This section contains the duties of loyalty, good faith, and care that apply to a manager of a UNA. The section is geared to the duties that are set out in the enacting jurisdiction's nonprofit corporation statute. This approach has been taken for two reasons. First, most of the issues that confront the managers of a UNA are essentially the same as the issues that confront the directors of a nonprofit corporation. Framing the duties ap-

plicable to managers in the same terms as the duties applicable to directors will ensure that the large body of jurisprudence that has built up around the corporate duties will be available to assist with interpretation of the UNA duties. Second, there is considerable variation in the statutory expression of these duties for nonprofit corporation directors across Canada. Some jurisdictions, such as Ontario, have not statutory duties. Others, such as British Columbia, have only a skeletal expression of the statutory duties in their nonprofit corporations legislation. *See Society Act*, R.S.B.C. 1996, c. 433, s. 25. Still others, most notably Saskatchewan, have more sophisticated versions of the statutory duties, which take into account recent developments in the jurisprudence. *See The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2, s. 109. Enacting jurisdictions can decide whether this section should be framed in terms that correspond to their current nonprofit corporate legislation, or whether, given the direction of reforms in this area, this section should be cast in the most sophisticated terms.

Derivation: Principles (31), (33)

Association may indemnify manager

24 An unincorporated nonprofit association may indemnify a manager of the association, to the same extent that a nonprofit corporation may indemnify its directors under [name of enacting jurisdiction's Act governing nonprofit corporations], for any expense or liability incurred in relation to any legal or administrative action or proceeding to which the manager is made a party by reason of being or having been a manager of the association.

Comment: The right to indemnification for nonprofit corporation directors varies greatly from jurisdiction to jurisdiction. Some statutes do not provide for indemnification, others only provide for indemnification with court approval, and still others take out of recent developments in litigation and authorize the advancement of defence costs. As with the previous section, enacting jurisdictions can decide whether to match this provision with the current provision in the nonprofit corporate statute or, if that provision is felt to be deficient, to substitute a more sophisticated version.

Derivation: Principle (34)

Access to Records

Access to records—members

25(1) The members of an unincorporated nonprofit association and their agents and legal representatives are entitled, upon reasonable notice, to inspect and copy during usual business hours, at a reasonable location specified by the association,

(a) the records of the association's governing principles;

(b) minutes of meetings and resolutions of the members;

(c) financial statements of the association;

(d) the names of the association's managers, and their contact information; and

(e) subject to subsection (2), any other records of the association that are material to their rights or obligations as members.

Access to membership lists
25(2) No member is entitled to inspect or copy a list of members of the association unless he or she has provided a written undertaking not to use the information, or allow it to be used, except in connection with

(a) an effort to influence the voting of the members of the association; or

(b) any other matter relating to the affairs of the association.

Access to records—managers
25(3) The managers of an association are entitled to inspect and copy, at any reasonable time,

(a) any records referred to in subsection (1);

(b) minutes of meetings and resolutions of the managers or any committee of managers;

(c) accounting records of the association; and

(d) any other records of the association that are material to their rights and duties as managers.

Comment: The Uniform Act does not require a UNA to maintain books and records. If a UNA chooses to maintain books and records, then they must be made available to the members and managers in accordance with this section. The term "records" should be interpreted broadly, embracing both written and electronic data. Subsection (2) is included as a special rule applying to membership lists. Access to these lists has been an area of rising concern in the voluntary sector. In the absence of a clear statutory rule, participants in the voluntary sector often turn to government bodies, such as the Registrar of Companies or the Office of the Information and Privacy Commissioner, to resolve disputes, even though those bodies have no statutory authorization to play this role. Subsection (2) is modelled on legislation in force in Saskatchewan. *See The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2, s. 21.

Derivation: Principle (32)

Restrictions on access and use

26 An unincorporated nonprofit association may impose reasonable restrictions on access to its records and on their use.

Comment: This section authorizes a UNA to impose reasonable restrictions on access to and use of its records.

Derivation: Principle (32)

DISSOLUTION AND WINDING-UP

How association may be dissolved

27 An unincorporated nonprofit association may be dissolved as follows:

(a) as provided for in its governing principles;

(b) if not provided for in the governing principles, by a majority vote of its members; or

(c) if the is no longer active,

(i) as permitted or required by a court order, or

(ii) by a resolution of its managers [or, if it has no managers, by those who were its last managers,] if it has not been active for at least three years.

Comment: The dissolution of a UNA presents two potential problems. The first is the procedure to be followed. If there is no contrary provision made in the UNA's contract of formation, then dissolution requires the unanimous consent of all members. This default rule is sometimes referred to as the "clubman's veto." This name captures the nineteenth-century origin of the rule, which is now often felt as an onerous imposition on UNAs and their members. It can be very difficult simply to locate all the members of a UNA, let alone to secure their unanimous consent. But the courts have concluded that they have a very limited jurisdiction to assist UNAs in these circumstances. *See* Brian Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43 Mod. L. Rev. 626 at 630 (the court's jurisdiction to intervene may be based on one of three theories: (1) contractual frustration; (2) an analogy to the corporate law concept of "loss of substratum," that is a total collapse of the UNA as a functioning unit; or (3) under the inherent equitable jurisdiction to order a just and equitable winding up).

This section provides a very basic procedure for the winding up of a UNA. The key reform in this section is the default rule that a UNA may be wound up by a majority vote of its members. (A UNA may provide for a different standard in its governing principles.) The section also provides for the winding up of inactive UNAs.

Derivation: Principle (38).

Winding-up

28 When an unincorporated nonprofit association is dissolved, any remaining property of the association must be dealt with according to the following rules:

1. Any property held under a trust must be dealt with, transferred or distributed according to the terms of the trust.

2. Any donated property held subject to a condition that it be paid or transferred to a person designated by the donor must be paid or transferred to that person.

3. All known debts and liabilities of the association must be paid or adequately provided for.

4. Any remaining property must be distributed according to the association's governing principles or, in the absence of an applicable governing principle, equally among the association's current members or as they otherwise direct.

5. If any remaining property cannot be distributed according to rule 4, it is to be dealt with in the same manner as property of a person who dies intestate and without a successor under [name of intestate succession Act in enacting jurisdiction].

Comment: This section contains a basic distribution scheme for a UNA's assets after it has been wound up. The section is based on Cal. Corp. Code § 18410.

Derivation: Principle (38).

MERGERS AND CONVERSION

To do: Consider adapting ULLCAA (2006) Sections 1001-1009, as suggested by the First Reading Draft.

To do: Consider uniformity provision and severability clause (as found in First Reading Draft s. 28 and 30). Are these typical of Cdn uniform laws?

To do: Consider what transitional provisions are required, if any.

[1] Michael H. Hall, *et al.*, *Cornerstones of Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations* (Ottawa: Statistics Canada, 2004) at 7, n. 4.
[2] *Ibid.* at 56.
[3] See, *e.g.*, *Yue Shan Society v. Chinese Workers' Protective Association*, [1944] 2 D.L.R. 287, [1944] 3 W.W.R. 497 (B.C.C.A.).
[4] See, *e.g.*, *MacDonald v. Bezzo (Litigation guardian of)* (1998), 108 O.A.C. 232, 38 B.L.R. (2d) 1 (C.A.).
[5] See, *e.g.*, *Ladies of the Sacred Heart of Jesus (Covenant of the Sacred Heart) v. Armstrong's Point Association* (1961), 29 D.L.R. (2d) 373, 36 W.W.R. 364 (Man. C.A.), leave to appeal to S.C.C. refused, [1962] S.C.R. viii.
[6] See, *e.g.*, *Hanson v. Ontario Universities Athletic Association* (1975), 11 O.R. (2d) 193, 65 D.L.R. (3d) 385 (H.C.J.).
[7] See, *e.g.*, *Zundel v. Liberal Party of Canada* (1999), 90 O.T.C. 63, 60 C.R.R. (2d) 189 (Gen. Div.), aff'd (*sub nom. Zündel v. Boudria*) (1999), 46 O.R. (3d) 410, 181 D.L.R. (4th) 463 (C.A.).
[8] See, *e.g.*, *Orchard v. Tunney*, [1957] S.C.R. 436, 8 D.L.R. (2d) 273.
[9] See, *e.g.*, *S. (J.R.) v. Glendinning* (2000), 191 D.L.R. (4th) 750, 49 C.P.C. (4th) 360 (Ont. S.C.J.).
[10] See, *e.g.*, *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 70 B.C.L.R. (2d) 27, 92 D.L.R. (4th) 349 (S.C.), aff'd (1995), 2 B.C.L.R. (3d) 3, 122 D.L.R. (4th) 412 (C.A.).
[11] *See*, online: NCCUSL Committees <http://www.law.upenn.edu/bll/archives/ulc/hunaa/2007july_principles.htm>.
[12] C.C.Q. arts 2267–79.
[13] *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.).
[14] *See*, *e.g.*, *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 154 ("Every trade union and every employers' organization is a legal entity for the purposes of this Code.").
[15] 2002 SCC 40, [2002] 2 S.C.R. 493, 211 D.L.R. (4th) 651 [*Berry* cited to S.C.R.].
[16] *Berry*, *ibid.* at para. 48.
[17] *Berry*, *ibid.* at para. 51.