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

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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 UNAs 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 drafted amendments to the Québec Civil Code, which are contained in a separate

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. On 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) mergers; and (7) dissolution and winding up. 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.

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UNIFORM 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 subsection 18(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 of the association's governing principles or policies.

"nonprofit association" means an unincorporated 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 a number of times in the default organizational rules that appear later in the Uniform Act. *See* sections 14 (1) (a), 15 (1) (b), and 25 (b). 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 18 (2). 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 at 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 specific phrase has been used because 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* section 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 (" 'person' includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law"). 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 oral, 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, if the profit is used only for its nonprofit purposes or set aside for those purposes.

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. This understanding of the term "nonprofit" is consistent with the approach of most Canadian nonprofit corporation statutes, which tend to contain an express statement that a nonprofit corporation is permitted to engage in profit-making activities that are incidental to its nonprofit purposes. *See*, *e.g.*, *Society Act*, R.S.B.C. 1996, c. 433, s. 2 (2) ("Carrying on a business, trade, industry or profession as an incident to the purposes of a society is not prohibited by this section, but a society must not distribute any gain, profit or dividend or otherwise dispose of its assets to a member of the society without receiving full and valuable consideration except during winding up or on dissolution. . . ."). Canadian nonprofit corporation statutes vary considerably in how they express these constraints on engaging in profit-making activities and on distribution of profits to members. *See* R. Jane Burke-Robertson & Arthur B.C. Drache, *Non-Share Capital Corporations*, looseleaf (Toronto: Thomson Carswell, 2004) at § 3 (d) (ii). There is surprisingly little case law on the consequences of a breach of either the constraint on engaging in profit-making activities or the constraint on distributions to members. *See*, *e.g.*, *Trident Foreshore Lands Ltd. v. Brown*, 2004 BCSC 1365, 50 B.L.R. (3d) 13; *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.). This may be indicative of a broad consensus among participants in the nonprofit sector not to engage in those activities which evades ready conversion into direct statutory language. Since the main purpose of the Uniform Act is not to 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. This result would change fundamentally the liability and governance regime of the body. Other unpleasant consequences could follow from failing the nonprofit test, including tax and litigation consequences. Subsection (1) refers to "an association" rather than "a nonprofit association" because the test in this subsection may need to be pressed into service to determine if a body is a UNA or some other entity.

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 Act
4(1) This Act applies to every nonprofit association formed or operating in [enacting jurisdiction], 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 formed under an Act or regulation or under the prerogative of the Crown; and

(d) an association or type of association exempted by regulation.

Exception — application of foreign law
4(2) Despite subsection (1), 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.

Regulations
4(3) The Lieutenant Governor in Council may make regulations exempting an association or class of associations from the application of this Act.

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 formed 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, consistent with the overriding concept that a UNA is a default form of organization for unincorporated nonprofit bodies. Subsection (3) grants regulation-making authority for this purpose.

Subsection (2) contains an exception to subsection (1) with respect to the application of foreign law. The general conflicts rules governing UNAs are in a state of confusion and arrested development which is similar to the poorly developed state of the law that generally relates to UNAs. The conflicts issue, then, should be approached from first principles. This issue is a subset of a broader conflicts issue regarding the status of a foreign corporation. The word "corporation" has the potential to confuse in this context. It is used in a sense that is broader than registration under an incorporation statute such as the *Canada Business Corporations Act*. In fact, the word points to the live issue under dispute, which is whether a court should treat a foreign body as having some attribute of a domestic corporation, such as limited liability. A common fact pattern involves a foreign organization that is active in a host jurisdiction and it either is sued or wishes to sue in the host jurisdiction's courts. The host jurisdiction may not recognize the organization as having the capacity to sue or be sued in its own name, but the question arises whether the organization's home jurisdiction would recognize it as having such capacity. The Canadian courts have tended to resolve this dispute by applying the law of the organization's home jurisdiction. *See Skyline Associates v. Small* (1974), 50 D.L.R. (3d) 217 (B.C.S.C.), *aff'd* (1975), 56 D.L.R. (3d) 471 (B.C.C.A.); *International Assn. of Science and Technology for Development v. Hamza* (1995), 122 D.L.R. (4th) 92 (Alta. C.A.).

The Uniform Act departs to a degree from this common law conflicts rule. Under section 4 (1), the Uniform Act applies to every UNA formed *or operating* in the enacting jurisdiction. This means that questions of entity status, capacity, and liability should be decided by applying the law of the host jurisdiction, if that host jurisdiction has enacted the Uniform Act. The one exception is spelled out in section 4 (2). The law of the UNA's home jurisdiction continues to govern its internal affairs. The Uniform Act adopted this conflicts rule for the sake of consistency with the rule adopted by NCCUSL. As a general

comment, the best way to create certainty in this area would be widespread enactment of the Uniform Act.

The Uniform Act does not contain a registration or filing requirement for UNAs. 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 (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. It is also consistent with the residual or default nature of UNAs. The *Partnership Act*s and *Personal Property Security Act*s of most provinces and territories contain a provision similar to this one. *See*, *e.g.*, *Partnerships Act*, R.S.O. 1990, c. P.5, s. 45; *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 68 (1).

Derivation: Principle (9).

Conflict with other Act or regulation

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

(a) that governs a specific type of 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 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).

LEGAL STATUS, CAPACITY AND POWERS

Separate legal entity

7 A nonprofit association is 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 unincorporated 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).

Continuing existence

8 A nonprofit association continues to exist, despite changes in its membership, until it is dissolved and wound up as provided for in sections 25 and 26.

Comment: This section contains an important corollary to the general principle set out in section 7. It declares that a UNA continues in existence until it is dissolved and wound up under the Uniform Act. 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 25–26.

Derivation: Principle (8).

Legal capacity and powers

9 A 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 7. 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. In order to understand the significance of these clauses, it is necessary to know something of the history and background to the common law rules that currently govern UNAs.

Since at common law a 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. Practi-

cal 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.

Granting UNAs the power to own and dispose of property may raise practical issues for a jurisdiction's land titles or land registration system. Since there is no filing requirement for UNAs, third parties may have legitimate questions about the authority of a person to transfer land in the name of a UNA. The joint working group considered a number of devices to bridge this practical issue, such as filing a statement of authority with a jurisdiction's land title office or land registry or requiring a UNA to transfer land by power of attorney. In the end, no provisions resolving this matter were included in the Uniform Act. Enacting jurisdictions should consult with their land title offices or land registry to determine the best approach to take in the jurisdictions. Consequential amendments to the jurisdiction's *Land Title Act* or *Land Registration Act* may be needed to implement a system that gives third parties sufficient assurance in accepting a transfer of land held by a UNA.

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 12–13.

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 mem-

bership 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. Enacting jurisdictions are free to determine whether such provisions relating to the practical aspects of litigation, such as service and venue, are best located in their rules of court or in the Uniform Act itself.

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." [citation 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 involv-

ing 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 allowing a UNA to sue and be sued in its own name.

Transitional — transferred property
10 An estate or interest in real or personal property that

(a) by terms of a transfer was purportedly transferred to a nonprofit association before this Act came into force; and

(b) under the laws of [enacting jurisdiction], did not vest in the association or in one or more persons on behalf of the association;

vests in the association on the day this Act comes into force, unless the parties have treated the transfer as ineffective.

Comment: The rule at common law is that a gift to a UNA is void. This conclusion follows from the UNA's lack of legal entity status. This section is intended to give effect to a transfer of property that would have been frustrated by the common law rule. It is not a retroactive rule. It only applies to facts that are in existence when the Uniform Act comes into force. At that time, clause (a) applies to a purported transfer of property that could not be given effect at the time it was made. The section belatedly makes it effective—that is, effective when the Uniform Act comes into force and not when the transfer was made. The practical result of this difference is that when the purported transfer is effective, the transfer is subject to interests in property that came into being in the interim.

The rationale for this section is that it carries out the intentions of the parties to a transfer, which the common law rule would have thwarted. Currently, it is very common for people to donate funds to UNAs. These donations are rarely, if ever, challenged on the basis that a UNA lacks entity status. This section provides some added protection, in the case that the advent of the Uniform Act in a jurisdiction becomes a spur to action for those who may have an interest in challenging a donation to the UNA. If, subsequent to the transfer but before the Uniform Act comes into force, the parties treat the transfer as ineffective, then this savings rule does not apply.

Derivation: no specific principle.

CLAIMS AND LIABILITIES

No effect on earlier claims
11 Nothing in this Act affects an action or proceeding that was commenced, or a right or liability that accrued, before this Act came into force.

Comment: This section contains a transitional rule. This transitional rule is consistent with the orthodox Canadian rule of statutory interpretation, which is that a statute presumptively should not be interpreted to interfere with vested rights. *See* Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed., trans. by Douglas J. Simsovic *et al.* (Toronto: Carswell, 2000) at 156–74. Vested rights include both rights that have vested at common law and acquired, accrued, or accruing statutory rights. *See* Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at 266. Whether any given right or liability is vested or not requires examination of the specific set of circumstances surrounding the right. This question has often been considered by the courts. *See*, *e.g.*, *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271 at 282–84, Dickson J.; *Dikranian v. Québec (A.G.)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at paras. 37–40, Bastarache J.

Derivation: Principle (15).

Liability of association

12 A 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 nonprofit corporation is liable for the acts and omissions of its directors, officers, 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.

The issue at stake in this section is liability to third parties. 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 contains a liability rule that is consistent with the principle set out earlier in the Uniform Act declaring a UNA to be a separate legal entity. *See* section 7. This liability rule should be clearer and easier to apply in practice. It is also a rule that is in greater

accord with the legitimate expectations of both the members and managers of UNAs and third parties who deal with UNAs.

Derivation: Principle (18).

Limited liability of member or manager
13(1) Except as otherwise provided in this section, a member or manager of a 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.

Member or manager liable for own conduct
13(2) Subject to any law limiting the liability of volunteers, a member or manager of a nonprofit association is liable for his or her own tortious acts and omissions.

Member or manager liable under contract
13(3) A member or manager of a 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 England, 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 interests 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 points 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. This section 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) 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.

As a general rule, members or shareholders of a corporation enjoy limited liability. This rule is entrenched in all Canadian corporation statutes. But the courts have, particularly in the for-profit sphere, articulated a number of exceptions to this general rule. Collectively,

these exceptions are described as "lifting the corporate veil." There is no general principle that ties all these exceptions together. Commentators have noted that courts have lifted the corporate veil in the following circumstances: (1) when authorized to do so by a statute (this is very rare—an example would be when a shareholder has improperly received a distribution on a winding up of a corporation—*see Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 226 (4)); (2) when a fraud has been committed; (3) when the corporation is the agent of its shareholders; (4) when the corporation is a façade or alter ego of its shareholders; and (5) in certain other miscellaneous situations, such as when it is necessary to determine a corporation's residence, to protect national security, or for public policy reasons. *See* Kevin P. McGuiness, *Canadian Business Corporations Law*, 2d ed. (Markham, ON: LexisNexis Canada, 2007) at 50–60. It is still an open question whether this body of jurisprudence applies to nonprofit corporations. The issue is rarely discussed in academic commentary. As a matter of first impression, it is clear that members of a nonprofit corporation do not have the same financial interests that shareholders of a for-profit corporation have. But this point may only serve to reduce the incidence of these situations occurring in the nonprofit context. There is no reason why, in principle, any of these situations could not arise in connection with a nonprofit corporation, so the Uniform Act proceeds on the basis that this jurisprudence would apply.

A related but distinct phenomenon is the liability of directors of a corporation. Unlike lifting the corporate veil, this liability tends to be statutory in origin. For example, a statute may hold a for-profit or nonprofit corporate director liable for unpaid wages. *See*, *e.g.*, *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 96. There has been a noteworthy expansion of these types of statutes over the past few years. It is also important to note that, on occasion, the governing law treats for-profit and nonprofit corporate directors differently. *See*, *e.g.*, *Employment Standards Regulation*, B.C. Reg. 396/95, s. 45 (exclusion from personal liability for director of a charity).

In principle, these rules should apply to the members and managers of a UNA. In practice, enacting jurisdictions should review their statutory rules that impose liability on either the members or the directors of a nonprofit corporation and determine which of those provisions should be amended to apply expressly to the managers of a UNA.

The purpose of subsection (3) 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: This Part of the Uniform Act deals 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

Becoming or ceasing to be a member

14(1) Except as otherwise provided in the governing principles of a nonprofit association,

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

(b) a person may resign from membership at any time; and

(c) the resignation, suspension or expulsion of a member does not relieve the member of any liability or obligation that he or she incurred as a member.

Membership is voluntary

14(2) No person may be made a member of a nonprofit association without his or her consent.

Comment: Subsection (1) establishes default rules for the admission and resignation of members. As is the case for the other default rules in the Uniform Act, subsection (1) only requires a majority vote for the admission of a new member. 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. Clause (c) confirms that the resignation, suspension, or expulsion of a member has no effect on the liability of a member to the UNA. 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.

Derivation: Principles (35)–(36)

Membership decisions

15(1) Except as otherwise provided by an association's governing principles,

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

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

(c) membership approval is required for

(i) a change in the association's governing principles,

(ii) a merger under section 24, and

(iii) any transaction or activity outside the ordinary course of the association's activities, including a sale, lease or other disposition of all or substantially all of its property.

Notice and quorum for meetings of members
15(2) A nonprofit 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
16 A member of a nonprofit association is not an agent of the association merely by reason of being a member.

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)

Membership not transferable

17 A membership in a 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 understood to be 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

Selection or dismissal of managers

18(1) Except as otherwise provided by a nonprofit association's governing principles, membership approval is required for the selection or dismissal of a manager.

Members as managers

18(2) If an association would otherwise have no 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, responsibilities and decisions of managers

19(1) Except as otherwise provided by a nonprofit association's governing principles,

(a) the managers of an association have equal rights in carrying out their responsibilities as managers; and

(b) differences among the managers are to be resolved by a majority of the managers.

Notice and quorum for meetings of managers

19(2) A nonprofit association's governing principles govern the notice and quorum requirements for meetings of its managers.

Comment: This section provides a basic default 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. Clause (a) of subsection (1) provides that managers have equal rights in carrying out their managerial responsibilities. The nature of these responsibilities can be grasped from the definition of "manager" in section 1, which provides that a manager is an individual who actively manages or is responsible for supervising the management of a UNA. 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.

Subsection (2) confirms that the governing principles of a UNA govern practical issues such as notice and quorum requirements for a managers' meeting. The use of proxies at a managers' meeting is not permitted at common law.

Derivation: Principles (29)–(30).

Manager's duties of loyalty, good faith and care

20 A manager of a nonprofit association

(a) has the same duties of loyalty, good faith and care that a director or officer of a nonprofit corporation has under the laws of [enacting jurisdiction]; 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 law.

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 applicable 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 no 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. The approach of framing the duties of managers of UNAs by reference to directors and officers of nonprofit corporations is analogous to the approach taken to liability in limited liability partnership legislation. *See Model Limited Liability Partnership Act*, s. 4 (1) ("Partners in an [enacting jurisdiction] LLP are personally liable for any partnership obligation for which they would be liable if the partnership were a corporation of which they were the directors.").

This section is one of the few sections in the Uniform Act that is mandatory rather then default or "subject to the UNA's governing principles." The mandatory nature of these duties is well recognized in corporate law. Most nonprofit and for-profit corporate statutes expressly exclude contracting out of these duties. *See Society Act*, R.S.B.C. 1996, c. 433, s. 26; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 122 (3).

Derivation: Principles (31), (33)

Association may indemnify manager
21(1) Subject to its governing principles, a nonprofit association may indemnify, or enter into an agreement to indemnify, a manager of the association to the extent that a nonprofit corporation may indemnify a director or officer of the corporation under the laws of [enacting jurisdiction].

Association may advance litigation expenses
21(2) Subject to its governing principles, a nonprofit association may advance, or enter into an agreement to advance, an amount to a manager who is, or is about to become, a party to a legal or administrative action or proceeding to pay for expenses related to that action or proceeding pending its outcome, but only to the extent that a nonprofit corporation may advance an amount to a director or officer in similar circumstances under the laws of [enacting jurisdiction].

Association may obtain insurance
21(3) A nonprofit association may purchase and maintain insurance for the benefit of a manager against any liability incurred by the manager in his or her capacity as a manager of the association.

"Manager" includes former manager
21(4) In this section, "manager" includes a former manager.

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 note of recent developments in litigation and authorize the advancement of defence costs. *See*, *e.g.*, *Societies Act*, R.S.A. 2000, c. S-14 (no indemnification provisions); *Society Act*, R.S.B.C. 1996, c. 433, s. 30 (indemnification with court approval); *The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2, s. 111 (indemnification and advancement of defence costs). In view of this variety, subsections (1) and (2) are both tied to the statute governing nonprofit corporations in the jurisdiction.

"At common law, a [corporation] was permitted to indemnify directors in certain circumstances." John O.E. Lundell *et al.*, eds., *British Columbia Company Law Practice Manual*, looseleaf, 2d ed., vol. 1 (Vancouver: The Continuing Legal Education Society of British Columbia, 2003) at § 6.58. The complicating factor of this simple statement is introduced by the phrase "in certain circumstances." These circumstances are largely determined by the law of agency. How these agency principles operate is explained in the following passage from a Canadian corporate law textbook:

> If A employs B as an agent and instructs B to do a particular task, such as dig a hole at a specified place, there is no question that B will normally be entitled to indemnification against liability should it subsequently be discovered that by digging that hole B was committing an act of trespass. The right of indemnity arises because B is merely carrying out A's instruction; it would be unconscionable if B were forced to bear a liability where he or she was blameless.
>
> However, there is no right of indemnification where the tort is attributable to the manner in which B chooses to perform the assigned task. For instance, if B is instructed to dig a hole on property belonging to A and while so digging that hole throws the dirt onto the property of C so as to commit a trespass against C, then B is not entitled to an indemnity from A. . . . By extension, there is no right of indemnification for losses incurred by B in carrying out A's instructions where those losses are attributable to B's own lack of skill in performing the task in question. . . .
>
> The third situation which may arise is where A instructs B to do an act that B knows is wrongful. A person is always liable for his or her own tortious acts even when carried out on behalf of a principal for whom that person acts as an agent. For instance, if A employs B as a bouncer and instructs B to eject C violently from a bar with a use of unreasonable force, B is not entitled to indemnification from A nor is A entitled to indemnification from B.

Kevin P. McGuiness, *Canadian Business Corporations Law*, 2d ed. (Markham, ON: LexisNexis Canada, 2007) at 1090–91.

So, as a general rule directors and officers are entitled at common law to indemnification for acts done within the scope of their authority. Most Canadian jurisdictions have enacted statutory provisions that modify the common law to a degree. In the main, these provisions allow indemnification ". . . against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, actually and reasonably incurred by him or her, in a civil, criminal or administrative action or proceeding to which he or she is made a party because of being or having been a director, including an action brought by the society or subsidiary, if (a) he or she acted honestly and in good faith with a view to the best interests of the society or subsidiary of which he or she is or was a director, and (b) in the case of a criminal or administrative action or proceeding, he or she had reasonable grounds for believing his or her conduct was lawful." *Society Act*, R.S.B.C. 1996, c. 433, s. 30 (2).

Given the realities of contemporary legislation, advancement of costs to defend an action is often of more pressing concern for a director or officer than indemnification after judgment. Modern nonprofit corporation legislation expressly recognizes this point. *See The Non-profit Corporations Act, 1995*, S.S. 1995, c. N-4.2, s. 111. The same considerations apply to managers of UNAs.

Subsection (3) confirms that a UNA may purchase and maintain liability insurance for its managers. The advent of directors and officers insurance was viewed as controversial when the first provisions authorizing it began to appear in nonprofit corporate statutes in the 1960s and 1970s. *See* Peter A. Cumming, *Proposals for a New Not-for-Profit Corporations Law for Canada*, vol. 1 (Ottawa: Information Canada, 1974) at 53–54. Now, such insurance is considered a vital part of the operation of a nonprofit organization. It both gives comfort to directors and officers and relieves the nonprofit corporation from the

need of maintaining a large reserve for the possible payment of indemnities. *See* Daniel L. Kurtz, *Board Liability: A Guide for Nonprofit Directors* (Mt. Kisco, NY: Moyer Bell, 1988) at 107–08.

Subsection (4) gives the word "manager" an expanded definition for this section. Including former managers within the scope of the indemnification provisions is consistent with nonprofit corporate law. *See*, *e.g.*, *Society Act*, R.S.B.C. 1996, c. 433, s. 30 (2).

Derivation: Principle (34)

Access to Records

Access to records
22(1) The members and managers of a nonprofit association and their agents and legal representatives are entitled, upon reasonable notice, to inspect and copy, at a reasonable time and location specified by the association, any records of the association that are material to their rights or obligations as members or managers, as the case may be.

Membership lists
22(2) Despite subsection (1), 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.

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
23 A 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. These restrictions will vary from case to case. In general, they may

include restrictions such as making the records available only at specific location, limiting the time of access to business hours, and charging a reasonable fee for copies. Whether any given restriction is reasonable depends in large measure on the context in which it is imposed.

Derivation: Principle (32)

MERGER

Capacity to merge

24(1) A nonprofit association and one or more other organizations (each of which is referred to in this section as a "participating organization") may merge and continue as one organization (referred to in this section as the "merged organization") in accordance with a plan of merger and this section.

Plan of merger

24(2) A plan of merger must include

(a) the name and form of each participating organization;

(b) the name and form of the merged organization and its proposed governing principles or similar rules;

(c) the terms of the proposed merger, including

(i) terms that address the manner in which the interests of owners and members of the participating organizations in those organizations are to be disposed of or converted into interests in the merged organization,

(ii) terms that address the effect of the proposed merger on the liability of a member, owner or manager of a participating organization, or any similar person in relation to a participating organization, for any liability of the participating organization,

(iii) terms that provide for the vesting of property of each participating organization in the merged organization, and the disposition of any such property that is not to vest in the merged organization,

(iv) terms that specify the extent to which the rights, privileges, immunities, powers, and purposes of each participating organization lapse or continue as rights, privileges, immunities, powers and purposes of the merged organization, and

(v) terms that continue the liabilities of the participating organizations as liabilities of the merged organization, or ensure that any liability not so continued, including any liability to a person who does not consent to the merger, will be satisfied or adequately provided for;

(d) a description of persons who may adversely affected by the merger, the nature of their interest in the outcome, and the measures, if any, to be taken to protect their interest; and

(e) the proposed effective date of the merger.

Approvals required
24(3) A merger under this section takes effect only if

(a) the merger complies with the governing law of each participating organization, and has been approved by each participating organization in accordance with its governing law; and

(b) the terms of the merger are approved, upon a joint application by the participating organizations, by [the superior court of plenary jurisdiction in the enacting jurisdiction].

Powers of court
24(4) The court, in response to an application for its approval of the terms of a proposed merger, may

(a) make any interim order it thinks fit, including any order determining notice to be given to any person, or dispensing with notice to any person; and

(b) dismiss the application, or approve the terms of the merger as proposed or with any amendments or additional terms or conditions the court considers necessary to protect any material interest in a participating organization.

Effect of merger
24(5) Subject to any terms or conditions of the court order approving a merger,

(a) on the effective date of the merger,

(i) the participating organizations are continued as the merged organization, and cease to exist as separate organizations, and

(ii) the merger takes effect in accordance with the terms of merger approved by the court;

(b) any property that was held under a trust or condition by a participating organization and vests in the merged organization, continues to be held by the merged organization under the same trust or condition; and

(c) if a bequest or other gift made to a participating organization takes effect or remains payable after the merger, it enures to the benefit of, and may be trans-

ferred or paid to, the merged organization, subject to any condition or trust obligation that would have applied to the participating organization if the merger had not occurred.

Comment: This section authorizes a UNA to merge with another UNA or with another organization. The bulk of the section is concerned with setting out the procedure for such a merger. The starting place for any merger is the plan of merger, which is an agreement between the parties. Subsection (2) sets out in detail the requirements for a plan of merger. Subsection (3) describes the approvals that are required for a merger to be effected. For a UNA, a merger must be authorized by a majority vote of the UNA's members, unless the UNA's governing principles require a different authorization. *See* section 15 (1) (c) (ii). A merger must also be authorized by the Superior Court of an enacting jurisdiction. This requirement varies from the typical requirement for approval of an amalgamation of two corporations, which can usually be approved by the Registrar of Companies or similar administrative official. Since a UNA does not make any filings with such an administrative official, it is not appropriate to involve that person in the approval of a merger involving a UNA. Subsection (5) sets out the legal effects of a merger.

In order for another type of organization to merge with a UNA, it will need to be authorized under its governing legislation. In all likelihood, enacting jurisdictions will have to consider amending the governing legislation for various types of organizations to give this section its full effect.

Derivation: Principle (40).

DISSOLUTION AND WINDING-UP

How association may be dissolved

25 A 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;

(c) as permitted or required by a court order; or

(d) if the association is no longer active and has been inactive for at least three years, by a resolution of its managers or, if it has no managers, of its last incumbent managers.

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
26 Subject to any court order governing the dissolution, when a 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).

COMING INTO FORCE

Coming into force
27 This Act comes into force ....

Comment: Canadian jurisdictions take a variety of approaches to bringing legislation into force. For example, in some jurisdictions it is typical for statutes to come into force on royal assent; in others, legislation typically comes into force by proclamation or regulation. It is not the intent of the Uniform Act to prescribe a specific method for coming into force. Enacting jurisdictions should consider whether a transitional period is necessary. The Uniform Act works significant changes in the legal framework for UNAs. It may be advisable to spend six months or one year publicizing the changes among participants in the nonprofit sector and providing plain language educational materials explaining the changes to the law.

Derivation: no specific principle.

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[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.