



MEMORANDUM

To: Karen Hudes, Chair, International NPO Committee
From: Lee Irish
CC: Aaron Schildhaus, Past Chair, Karla Simon, Vice Chair
Date: March 22, 2006
Re: Reform Project on Unincorporated Nonprofit Associations

From March 17 through March 20th the author participated in a Project to Harmonize the Legal Framework for Unincorporated Nonprofit Associations in North America. There were 17 participants, two Mexican participants from Mexico City, four Canadian participants, one from Montreal, one from Ontario, and two from British Columbia, and eleven Americans, one each from Texas, Wisconsin, New York, Idaho, Alabama, Delaware, California, Illinois, Oregon, Minnesota, and Washington, D.C. Five Americans appointed to the Committee were unable to attend, as was one Mexican member. The Committee meetings were held at the Marriott Downtown Waterfront Hotel in Portland, Oregon.

This Reform Project is historic. It represents the first time that the National Conference of Commissioners for Uniform State Laws (NCCUSL) has sought to work with other nations to reform a body of law. The other sponsoring organizations are the Business Law and International Law Sections of the American Bar Association, the Uniform Laws Commission of Canada, the British Columbia Law Institute, and the Mexican Bar Association.

The purpose of this initial meeting was to introduce the Committee members to each other, to state the problem from the perspectives of the United States, Mexico, and both English- and French-speaking Canada, and to work towards a statement of common principles. Mexico and Quebec have civil law systems, while the United States and Anglo Canada have the common law. The Co-Chairs of the Committee are Prof. Marilyn Phelan of Texas, Elias Mansur of Mexico, and Arthur Close of British Columbia.

The tentative plan of work that was agreed upon was to seek to agree on common principles at this initial meeting, to have the Reporter, Harry Haynsworth of Minnesota, put these in writing to be circulated among Committee members. The committee will meet again, probably in September or October 2006 to finalize the principles. The national delegations will then work separately to reflect the agreed principles in draft legislation appropriate for the various jurisdictions. A third meeting of the Committee will be held sometime in 2007 so that Committee members can comment on each others drafts and finalize them. Finalized drafts

will then be presented to the sponsoring bodies. If approved, they will then be presented to the various jurisdictions for enactment, probably in 2009 or 2010.

The first report was given by Canada, the law of which most nearly reflects the classic common law approach. Under the common law an unincorporated nonprofit association (UNA) was defined as consisting of two or more persons bound together by mutual undertakings for one or more common nonprofit purposes. At common law UNAs are not recognized as legal entities. As a result, UNAs are unable to receive or hold property, to open bank accounts, etc. Because they lack entity status, UNAs are not able to sue or be sued in their own name. Any tort or contract liability is the joint and several liability of those members who are principals, i.e., in a position de jure or de facto to control or direct the affairs of the UNA. Agency law is used to determine which members of a UNA are liable, either for obligations or debts under a contract, or for torts under the doctrine of respondeat superior. Under the common law members have only those rights with respect to the UNA that are reflected in the agreement of association, which can be written, oral, or manifested by mutually agreed conduct.

By practice and gradual reform through the courts, UNAs in Canada have been allowed to open bank accounts in their own name and are treated as entities by governmental agencies, e.g., for wage and hour laws and workplace safety. Although any UNA property is owned by the members rather than the UNA, each member's share is deemed to be dedicated exclusively to UNA purposes, no member can withdraw his share of the property or transfer it, and a member is not entitled to any distribution with respect to it when he withdraws from the association or otherwise ceases to be a member. Some UNAs are quite large and wealthy, such as labor unions and political parties, and the Canadian courts have begun to recognize such UNAs as legal entities, competent to sue or be sued, hold property, etc.

The Ontario Law Reform Commission recommended that a law be passed that would give all UNAs entity status, the right to hold property, and the right to sue or be sued in their own name, but no legislation has been enacted and the Commission was disbanded.

Montreal, on the other hand, has enacted legislation that gives entity status to UNAs, allows them to acquire, hold, and dispose of property, and sue or be sued in their own names. In addition, this law gives members of a UNA the right to participate in the governance of the organization and the right to examine its books and records. Montreal has a project to amplify this law, but at the present that project is inactive.

In the United States many states still follow the classic common law approach, though many of them use a concept of partnership or mutual agency to make all members of a UNA jointly and severally liable for torts and contracts. Some states

have special statutes giving entity status to some UNAs, e.g., churches. In 1996 the NCCUSL promulgated a Uniform Unincorporated Association Act (UUAA), but it dealt only with the problems of property, tort and contract, and the right to sue or be sued. It did not deal with members rights or establish fiduciary standards or rules for governance. The ABA opposed it, and the result is that it has been adopted in only 11 states (Alabama, Arkansas, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Texas, West Virginia, Wisconsin, and Wyoming). The current Project originated as an effort to revise and extend the UUAA.

California, which has had a law for UNAs since 1941, recently adopted a fairly comprehensive new law dealing with entity status, property, contract and tort, the right to sue and be sued, member's rights, and governance. It did not, however, adopt fiduciary standards or deal with merger or dissolution issues.

Mexico has no law for UNAs. In consequence, they are not recognized as legal entities; they cannot hold real property or sue or be sued in their own names. Contract law governs the rights of members and the governance of a UNA. Agency law determines liability for tort or contract. Any corrective legislation would have to be put into the Civil Code. Each of the 32 states, the Federal District, and the Federal Government has a Civil Code.

For two and one-half days the Committee discussed the various legal issues and possible approaches to reform. Although there were many disagreements, by the end of the discussion a fair consensus had been obtained on basic principles. Harry Haynsworth will now take his notes and those of Marilyn Phelan and prepare a written statement of Principles, which the Committee will discuss in Fall 2006.

All-in-all this is a very promising and interesting Project. The members of the Committee are knowledgeable, thoughtful, and committed to reform. There is a long road ahead, but it promises to be productive. The author made many substantial contributions to the work of the Committee and established good working and personal relations with all members.

Please let me know if you have questions or need more.

Respectfully submitted,

Lee Irish