

# FOCUS ON WILLS, ESTATES, CHARITIES & TRUSTS

## Anti-terrorism legislation requires due diligence from tsunami relief agencies

By Terrance S. Carter  
and Sean S. Carter

In the wake of the recent disastrous tsunami in Southeast Asia there is tremendous need for emergency aid and humanitarian assistance. To meet these needs, Canadian citizens and charities have responded with an unprecedented outpouring of donations in support of the humanitarian relief effort. However, what may not be initially evident to Canadian charities is the application of Canadian anti-terrorism legislation to the activities undertaken to provide humanitarian aid. Active compliance with the legislation is needed at all levels of a charity's operations as it responds to the disaster. Given the complexity of the compliance issues, this article can provide only a very brief overview of some of the issues and concerns that charities should consider while



Charities operating in tsunami affected areas (such as the Canadian Red Cross in Sri Lanka above) need to be aware of the effects of anti-terrorism legislation on their work. Photo courtesy of Canadian Red Cross

assisting with the tsunami humanitarian relief effort.

Charities must comply with significant legal requirements in providing aid in response to the tsunami regardless of their size or the method of providing assistance. A charity may decide to collect and forward donations to another Canadian registered charity that, in turn, delivers the aid. In other circumstances, a charity may deliver aid through agents in the affected area in accordance with an agency agreement as required by the Canada Revenue Agency ("CRA"). If they have the resources and capacity to do so, charities may also provide aid directly to the disaster areas using their own facilities and employees in the affected region. In all of the above scenarios, there are important requirements imposed on charities resulting in due diligence steps that must be pursued. The responsibilities of a charity in these situations range from maintaining



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appropriate financial records and reporting obligations, particularly if the charity is party to an agency arrangement, to ensuring that aid does not inadvertently assist any person or organization with links to "terrorism", as defined in the applicable anti-terrorism legislation.

The body of applicable legislation and compliance regimes that have been emerging in Canada relating to anti-terrorism are sig-

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## Elder law: more than wills and estates

Using a wills approach, a lawyer making a new will needs to incorporate a client's instructions. An elder law approach would also require the lawyer to investigate or formalize the arrangements for a client's private care.

By Hugh S. McLellan

Elder law is both a practice area and a substantive area of law. Although some of the substantive law of elder law has often been considered part of a wills and estates law practice (such as planning for incapacity), in fact, wills and estates law is really a small part of an elder law practice. The significant practice difference between the two areas of law, is in the manner in which an elder law lawyer would approach a client's situation.

Elder law is a recent development in Canada, although it has been recognized in the United States for many years. Of course, the U.S. health and social security system is different from Canada (at least at present). Nevertheless, issues such as planning for inca-

capacity, housing options, abuse of seniors, etc. are important topics wherever there is a senior population.

With an aging population and improving medical technology keeping people alive longer, in terms of sheer numbers, we are going to see a significant increase in the senior populace. According to Statistics Canada, presently 3.9 million Canadians (12%) are over age 65; by 2021, this will increase to 6.7 million (18%) over age 65 and by 2040, 9.3 million Canadians (25%) will be over 65 years of age.

With the increasing number of older citizens, comes an increasing number of citizens with mental problems. According to the Alzheimer's Society, Alzheimer's type dementia affects about one

person in 50 between ages 65-74; one person in nine between ages 75-84; and one person in three over age 85. These statistics have considerable implications for lawyers practising elder law.

As stated above, the significant difference between elder law and wills and estates law, is in the manner in which an elder law lawyer would approach a client's situation. Typically, a wills and estates lawyer would consider the client's instructions and prepare documents to deal with that matter.

An elder law lawyer often uses a multidisciplinary, holistic approach. This means the lawyer looks at the client's whole situation and determines if the client can benefit from the involvement of other professionals, such as, accountants, financial planners,

social workers, care providers, and medical personnel.

For example, a client may come into your office saying that she needs to do a new will because she has just moved into the home of one of her children; some of her money was used to pay for renovations to the child's house and the client now wants to change her



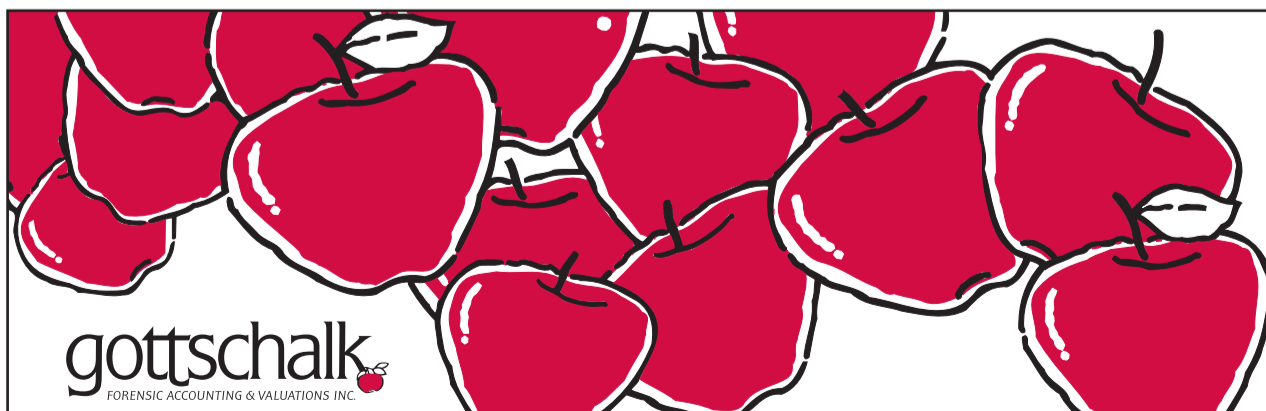
Hugh S. McLellan

will to make a bequest to her other child of a similar amount that she paid to her child for the renova-

tions. A pure wills approach would result in the lawyer making a new will incorporating those instructions. An elder law lawyer would also be investigating the arrangements for the private care and considering whether this needs to be formalized. Housing and care concerns are often the most important issues for senior clients, but may be the least familiar to wills lawyers. The budgeting for those care costs might require expert assistance. Elder law lawyers are not expected to provide such expertise themselves, but must be ready to make referrals to professionals and government departments.

Sources for referrals can be obtained from local Estate Planning Councils, various government sources, Senior's Centres, publications and continuing legal education as well as the CBA Elder Law section. In addition to operating a listserv for members (which is an excellent forum to share information), the CBA Elder

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## WILLS, ESTATES, CHARITIES &amp; TRUSTS

## Canadian charities should be aware of complex compliance issues under anti-terrorism laws

TSUNAMI

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nificant and complex. Contravening the provisions of Canadian anti-terrorism legislation could lead to prosecution under the *Criminal Code*, expose a charity's directors or officers to personal liability or even initiate the deregistration process under the *Charities Registration (Security Information) Act*. For an overview of Canada's anti-terrorism legislation, and some of the resulting due diligence requirements for charities, reference can be made to *Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law* available at [www.carters.ca/pub/article/charity/2004/tsc1028a.pdf](http://www.carters.ca/pub/article/charity/2004/tsc1028a.pdf).

indictable offence that carries a prison term of up to 14 years. In accordance with section 83.05 of the *Criminal Code*, a list of entities that knowingly facilitate terrorist activities has been compiled (available at [www.psepc-sppcc.gc.ca/national\\_security/counterterrorism/Entities\\_e.asp](http://www.psepc-sppcc.gc.ca/national_security/counterterrorism/Entities_e.asp)), several of which purportedly operate in the affected area. Canada also maintains a separate list of "terrorist organizations" under the *United Nations Suppression of Terrorism Regulations* (available at [www.osfi-bsif.gc.ca/eng/publications/advisories/index\\_supervisory.asp](http://www.osfi-bsif.gc.ca/eng/publications/advisories/index_supervisory.asp)) which charities should be aware of. Charities – whether they have employees in the affected region, are party to an agency relationship to deliver aid, or have

nizations include "Jemaah Islamiyyah", which is one of Canada's listed entities pursuant to subsection 83.05(1) of the *Criminal Code*. In addition, the "Liberation Tigers of Tamil Eelam (LTTE)", also believed to have a presence in the region, is a listed organization in the *United Nations Suppression of Terrorism Regulations*. The significance of the purported presence of these organizations could result in increased scrutiny of relief and reconstruction efforts by authorities from Canada and other jurisdictions. Implications of the United States' policies concerning non-profits are discussed in relation to Canadian charities in *Anti-Terrorism Alert No. 5*, available at [www.carters.ca/pub/alert/atcla/atcla05.pdf](http://www.carters.ca/pub/alert/atcla/atcla05.pdf).

There are several key directives and publications from CRA that apply to the funding and distribution of humanitarian assistance internationally. One of the most recent initiatives is the list of several designated Canadian aid organizations for which donations received before January 11, 2005 are eligible for tax credits in the 2004 year, as well as matching grants from the federal government. Since these organizations had to meet certain government requirements, the listing of these organizations provides an important endorsement; however, it does not necessarily absolve these charities of their basic responsibilities under anti-terrorism legislation. The list of eligible registered charities can be found at [\[cida.gc.ca\]\(http://cida.gc.ca\) and a fact sheet by CRA concerning the tsunami relief effort is available at \[www.cra-arc.gc.ca/tax/charities/tsunami\\\_faq-e.html\]\(http://www.cra-arc.gc.ca/tax/charities/tsunami\_faq-e.html\).](http://www.acdi-</a></p>
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Also of importance is the recent CRA publication of "Charities in the International Context", which is available at [www.cra-arc.gc.ca/tax/charities/international-e.html](http://www.cra-arc.gc.ca/tax/charities/international-e.html).

In this publication, CRA points out that Canada's *Income Tax Act* rules apply no matter where a Canadian registered charity operates. CRA rules allow a charity to either make gifts to "qualified donees", or carry on its own activities.

In addition, CRA encourages active participation and oversight of how aid is being delivered, while recognizing the increasing difficulty of this task in parts of the world where identified "terrorist groups" operate.

Finally, Canadian charities should note that as aid flows beyond Canadian borders, other countries will also be provided

with access to information concerning donor and recipient charities through international information sharing and collection practices. In this regard, foreign governments may be conducting their own assessments and could launch investigations based on this information, according to their domestic anti-terrorism initiatives. Charities need to be aware that their donations and actions to provide humanitarian relief will likely be under close scrutiny by governmental agencies in Canada, as well as in other jurisdictions. For further discussion on this issue, reference can be made to *Anti-Terrorism and Charity Law Alert No. 4* available at [www.carters.ca/pub/alert/atcla/atcla04.pdf](http://www.carters.ca/pub/alert/atcla/atcla04.pdf).

Implementing effective ongoing monitoring and due diligence procedures will become more important as the need for assistance in tsunami affected areas of Southeast Asia evolves from requiring immediate, emergency humanitarian relief, to that of a commitment to long-term reconstruction efforts. In providing assistance during this time of need, Canadian charities need to be aware of the complexity of the compliance issues under anti-terrorism legislation and regulations in Canada on both an immediate and long-term basis.

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**"Prior to the tsunami disaster, several organizations believed to be operating in the affected parts of Southeast Asia were a major focus of public counter-terrorism efforts by countries such as the United States."**

The potential application of anti-terrorism legislation is heightened, in part, because Southeast Asia has been identified as the central operating area for several "terrorist organizations." Under Canadian anti-terrorism legislation, any form of assistance that reaches members of an organization that has been identified as an entity associated with "terrorism" could be considered a "facilitation" of terrorist activities in contravention of subsection 83.19 of the *Criminal Code*, which is an

simply transferred funds to another Canadian registered charity – should be proactive in initiating their own due diligence procedures to minimize their vulnerability to potential, unintended, contravention of Canadian anti-terrorism legislation.

Prior to the tsunami disaster, several organizations believed to be operating in the affected parts of Southeast Asia were a major focus of public counter-terrorism efforts by countries such as the United States. These specific orga-



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LET'S MAKE CANCER HISTORY

## Consider capacity, influence and conflicts for elder law

ELDER

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Law section is holding its first National CLE. in Toronto May 13-14. The Elder Law Section (in conjunction with the Wills and Estates Section and the Canadian Bankers Association) is also preparing a best practices guideline for lawyers relating to powers of attorney.

There are a number of issues that the elder law lawyer must pay particular attention to in practise. Capacity, undue influence and potential conflicts ought to be considered in every situation. The wise practitioner should keep extensive notes of the interview and include observations as to the appearance and demeanor of the client.

One of the facts of life is that with age comes some deterioration in a person's physical abili-

ties. A reduction in a client's eyesight means that an elder law practitioner should use large print stationary for business cards, appointment reminder cards, accounts, etc.

A reduction in a client's hearing means that the lawyer must be prepared to constantly check to make sure the client understands what is being discussed. A reduction in mobility means that the law office must be wheelchair and walker accessible. The elder law lawyer should be prepared to make home and hospital visits. The assistance lawyers are able to give to the senior members of society can make for a very rewarding practice of law.

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