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ANTI-TERRORISM AND CHARITY LAW ALERT NO. 37

AUGUST 25, 2014

EDITOR: TERRANCE S. CARTER

ANTI-DIVERSION ISSUES FOR CHARITIES OPERATING ABROAD♦

By Terrance S. Carter & Sean S. Carter*

A. INTRODUCTION

Many Canadian charities pursue charitable purposes abroad by conducting activities such as disaster relief, poverty reduction, and missionary programs. However, these charities are often unaware of the impact that Canadian legislation can have on their charitable activities outside of Canada.

The emergence of "anti-diversion" issues involved in international operations is becoming an increasingly important area of compliance concern for charities that carry on or are contemplating carrying on operations abroad. "Anti-diversion" generally means the practice of ensuring that funds or other aid are not diverted away from their intended beneficiaries, intentionally or not. In this regard, anti-terrorism and anti-bribery legislation are prominent forms of government anti-diversion initiatives that charities must consider before embarking on foreign operations. Specifically, all charities that conduct activities or provide funding abroad must proactively comply with anti-diversion legislation in Canada in order to avoid potentially significant penalties and even criminal liability. These legislative requirements can be challenging for charities, but non-compliance is not an option. "Nonprofit Organizations" & "Terrorism Financing". This *Anti-Terrorism and Charity Law Alert* explores various anti-diversion initiatives for charities.

♦ This *Anti-Terrorism and Charity Law Alert* was originally published in the Canadian Council of Christian Charities Bulletin Issue 4, 2014 on July 29, 2014.

* Terrance S. Carter, B.A., LL.B., Trade-Mark Agent, is the managing partner of Carters Profession Corporation, and counsel to Fasken Martineau DuMoulin LLP on charitable matters. Sean S. Carter, B.A., LL.B., practices general civil, commercial and charity related litigation from the Toronto office of Carters Professional Corporation. The authors would like to thank Adriel Clayton, B.A. (Hons), J.D., for assisting in the preparation of this alert.

B. ANTI-TERRORISM LEGISLATION

Anti-terrorism legislation in Canada can have a significant impact on a charity's international operations, as it focuses on situations where charities operating abroad can be compromised in the raising or distribution of funds. The consequences for breaching anti-terrorism legislation can be severe. Numerous charities have had their charitable status revoked by CRA for allegedly directly or indirectly financing terrorism. As the repercussions for non-compliance are significant, it is essential for charities to be familiar with the basic elements of anti-terrorism legislation and adopt appropriate compliant practices in response.

1. *Criminal Code* Offences

The *Criminal Code* creates several offences relating to the financing and facilitation of terrorist activity.[1] A selection of *Criminal Code* provisions that could impact charities includes sections 83.03, 83.08 and 83.18, which effectively prohibit organizations from directly or indirectly providing property to facilitate terrorist activity, dealing with such property in any manner, or knowingly enhancing the "facilitation" of terrorist activity, whether through past, present or future action.

These offences are broad and potentially uncertain in scope, and charities could therefore be caught unknowingly engaging in terrorist financing. For example, under section 83.03, if a charity sends funds to an aid organization abroad, and the aid organization subsequently transfers those funds to a third party that uses the funds to facilitate a terrorist activity, then the charity could be found to be involved in indirectly financing terrorism in violation of the *Criminal Code*. These provisions cast a significantly broad net in order to encompass any economic connection, however remote, with "terrorist activity" or a "terrorist group" as defined in section 83.01.

Charities found in violation of anti-terrorism legislation may also have their charitable status revoked, even where a charity is unintentionally involved in activities or with groups that meet the definition of "terrorist activity" or "terrorist group" under the *Criminal Code*. Directors of charities could face fines, penalties, and even imprisonment if the charity is found to be engaged in terrorism-related activities. Depending on the offence, penalties include fines up to $100,000 and/or imprisonment for a term of up to 14 years.[2]

[1] *Criminal Code*, RSC 1985, c C-46, at ss 83.02-83.04.
[2] *Ibid* at ss 83.12, 83.191, 83.201, 83.202

Another concern, although less remote, for charities is the potential for being included as a "listed entity" under section 83.05 of the *Criminal Code*. An example of this possibility arose in 2014 when a Canadian non-profit organization, which had once had charitable status in Canada, was named a "listed entity" under the *Criminal Code*. The consequences of becoming a listed entity are serious, including a freeze of assets and a ban on Canadians dealing with the entity's property, facilitating any transactions regarding such property, or providing financial services in relation to such property. Additionally, a judge may make an order for the seizure or forfeiture of property that is owned or controlled by or on behalf the entity or that has been or will be used to "facilitate" a "terrorist activity".

2. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* Offences

Anti-money laundering is a complicated area of Canadian anti-terrorism legislation, the details of which are beyond the scope of this article. However, charities operating internationally need to be aware of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[3] (the "Act") and its various Regulations. Charities that engage in transactions over $10,000 may be subject to scrutiny and investigation by the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"). The Act requires certain transactions, such as those in which money laundering or terrorist financing could be reasonably suspected, to be reported to FINTRAC for the purposes of detecting criminal behaviour, and gives significant powers to government agencies to identify and investigate charities, as well as their directors and officers if there are concerns raised.

3. Deregistration under the *Charities Registration (Security Information) Act*

The final part of Canadian anti-terrorism legislation involves the *Charities Registration (Security Information) Act* ("CRSIA").[4] Under this Act, the government can revoke the charitable status of an existing charity or deny a new charitable status application if it determines that the charity has supported or will support "terrorist activity". Such process is initiated by the issuance of a "certificate" against the charity or applicant for charitable status, although the government has not needed to do so to date because it has a conventional process created to accomplish the same end results.

[3] SC 2000, c 17.
[4] S.C. 2001, c. 41, s. 113.

Under subsection 4(1) of the CRSIA, a certificate can be issued against an existing charitable organization or an applicant for charitable status where there are "reasonable grounds" to believe the organization has made, makes or will make resources available, directly or indirectly, to an entity that has or will engage in "terrorist activity". However, the CRSIA does not define "reasonable grounds". In order to issue the certificate, the court will determine the certificate's reasonableness. If it is deemed reasonable and the court issues the certificate, the CRSIA effectively precludes any avenue for judicial appeal or review.

Charities that are the subject matter of a certificate not only lose the tax benefits of charitable status, but may also be exposed to investigation and prosecution under the *Criminal Code*. The charity's assets may also be frozen or seized. This could entail bankruptcy, insolvency, or winding up and, in turn, could expose the charity's directors to civil liability at common law for breach of their fiduciary duties by not adequately protecting the assets of the charity.

C. ANTI-BRIBERY LEGISLATION

In some areas of the world, bribery may be so prevalent that the employees and agents of a charity operating in those areas may be put under pressure to provide bribes in order to accomplish their intended charitable programmes.[5] Charities, of course, are prohibited from engaging in bribery, since to do so would constitute giving an unacceptable private benefit in violation of the charity's charitable purpose.[6] Any charity involved in such activities could face loss of charitable status, as well as allegations of breach of trust through the misapplication of charitable property. This in turn could leave the directors and officers of the charity open to personal liability for the misapplication of charitable funds or property that had been paid out as a bribe.

Charities need to be aware of Canada's *Corruption of Foreign Public Officials Act*[7] ("CFPOA"). Section 3(1) of the CFPOA prohibits bribery of foreign public officials when the bribe is intended "to obtain or retain an advantage in the course of business". This could impact charities carrying on activities outside of Canada where their programs in a foreign jurisdiction include a "related business" activity permitted under the *Income Tax Act*, or a charitable program that involves an inherently commercial element like microfinance, or simply constructing a hospital or school. As a result of Bill S-14, *An Act to amend the*

[5] Charity Commission for England and Wales, *Compliance Toolkit: Protecting Charities from Harm,* April 2011 (Revised June 2012), Chapter 3, M1, available online at: <http://www.charitycommission.gov.uk/media/89358/chapter-3.pdf>.
[6] See, for example, *Inland Revenue Commissioners v Oldham Training Enterprise Council*, [1996] BTC 539 (Eng. Ch. Div.).
[7] S.C. 1998, c. 34.

Corruption of Foreign Public Officials Act,[8] the prohibitions on bribery under the CFPOA apply to organizations involved in any business or undertaking in a foreign country, regardless of whether that undertaking was conducted for profit.

Currently, section 3(4) of the Act permits "facilitation payments" to be undertaken "to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions..." by excluding situations listed therein from the prohibition on bribery. However, the amendments introduced by Bill S-14 will repeal this exemption on a date to be fixed by order of the Governor in Council, which means that in the future charities could be exposed to possible criminal liability for activities which are currently permitted under the "facilitation payment" exemption. This could leave charities operating in foreign jurisdictions where "facilitation payments" might be considered necessary under limited certain conditions that, if ignored, could impede humanitarian aid, in an untenable predicament.

The laws of the jurisdiction in which a charity operates may also serve as a source of criminal liability for a charity's employees and agents who engage in bribery. For example, a Canadian charity that makes payments through the U.S. banking system or sells goods of U.S. origin or with U.S. content might also fall under the jurisdiction of the U.S. *Foreign Corrupt Practices Act*[9] ("USFCPA") and could be subject to the anti-bribery provisions in the USFCPA.

Canadian charities wanting to prevent their organization from becoming involved with bribery may wish to consult some of the resources generated by the United Kingdom ("UK") Ministry of Justice. After the UK adopted the *Bribery Act 2010*,[10] the Ministry of Justice recommended six principles for preventing bribery,[11] which the Charity Commission for England and Wales has since reiterated.[12]

[8] Bill S-14, *Fighting Foreign Corruption Act*, 1st Sess, 41st Parl, 2013 (Royal Assent 19 June 2013).
[9] 1977 (FCPA) (15 U.S.C. §78dd-1, et seq).
[10] Bribery Act, 2010 (UK), c.23.
[11] Ministry of Justice, UK, *Bribery Act 2010 – Guidance*.
[12] *Supra* note 5 at M3.

D. ANTI-DIVERSION DUE DILIGENCE

Although due diligence is not a defence for violations of anti-terrorism legislation, developing effective due diligence policies and procedures is important to do in order to evidence an intention to comply in the event of future scrutiny by CRA or other government authorities. However, the greatest benefit from exercising due diligence is its preventative effect.

In this regard, it is important to know that CRA has published a "Checklist for charities on Avoiding Terrorist Abuse" that is intended to help Canadian charities identify vulnerabilities to terrorist abuse and develop good management practices.[13] The US Treasury Department has also published the "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities",[14] for charities to consider in adopting protective practices. The Financial Action Task Force also provides Recommendations on the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (the "Recommendations").[15] The Recommendations strongly influence governments in their regulation of charities and organizations would be well advised to incorporate these into their policies and to ensure compliance.

Among other things, the CRA checklist, US Treasury Department's guidelines and the Recommendations indicate that an anti-terrorist financing and anti-money laundering policy should include adequate and transparent bookkeeping and recordkeeping; having appropriate, sound, internal financial and other oversight and verification controls; and having methods to report suspicious transactions. These policies should also address due diligence issues relating to the charity's own board members, key employees and participants, the charity's financial management, partners' board members, donors and programs.

An anti-bribery policy should also be created separate from an anti-terrorist financing and anti-money laundering policy. Among other things, it should establish internal accounting controls to ensure a proper and accurate recordkeeping and accounting process; create a compliance code to detect and prevent CFPOA violations based on a risk assessment specific to each charity; ensure appropriate whistleblowing and disciplinary procedures for violations; and take into account the facilitation payment exemption which will be removed in the future.

[13] Available online at: http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/vtb-eng.html
[14] Available online at: http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf
[15] Available online at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

Anti-diversion due diligence policies must be carefully thought through, normally with the guidance of legal counsel. The process of preparing policies in this regard requires a comprehensive review of the charity's operations in order to identify the charity's risks and objectives. Appropriate policies will give the charity guidance on how to document all other aspects of due diligence related to anti-diversion, including all applicable documents, such as statements of disclosure and checklists. It will also identify documents that could be filed with third parties, such as the CRA, as preventive measures and describe how to meet reporting requirements in the event that there is an actual or potential violation.

E. CONCLUSION

Although many charities may be tempted to dismiss anti-diversion issues as being inapplicable to their operations, the enhanced focus that governments are giving to anti-diversion issues are making it more important than ever for Canadian charities operating abroad to start to take these issues seriously. As such, it is important for those charities that operate in the international area to become familiar with their legislative anti-diversion obligations and take appropriate steps to implement necessary due diligence policies and procedures.