

**THE LAW SOCIETY OF UPPER
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**Charities and Compliance with
Antiterrorism Legislation**

Power Point Presentation

November 20th, 2002

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Charities and Compliance with Anti-terrorism Legislation By Terrance S. Carter, B.A., LL.B.

For Background Materials See Article by Same Name
And "Charity Law Bulletins #10, #11, #12, #14 and #16"
at www.charitylaw.ca and www.antiterrorismlaw.ca

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**"Who gives a hoot about civil rights
when people are preparing to maim or
murder us? It's time for us to take the
gloves off. And if we don't, we deserve
whatever we get."**

Peter Marwitz
former CSIS agent
Globe & Mail

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OVERVIEW OF TOPICS

1. *Background and Overview*
2. *Criminal Code Definitions*
3. *Specific Criminal Code Offences*
4. *The Charities Registration Act*
5. *Proceeds of Crime and Terrorist Financing*
6. *The Risk to Charities*
7. *Developing a Due Diligence Response*

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1. Background and Overview

- Bill C-36 is a very complicated piece of legislation that coordinates the provisions of many federal acts
- Bill C-36 needs to be read in conjunction with Bill C-35 *An Act to Amend the Foreign Missions and International Organizations Act* (proclaimed in force as of April 30, 2002) and Bill C-17 *Public Safety Act* introduced October 31, 2002 (formerly Bill C-55 and Bill C-42) and subsequent regulations

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- The full impact of anti-terrorism legislation may not be understood for years
- Charities will need to become proactive in understanding the law
- Bill C-36 includes:
 - “Super Criminal Code” terrorist offences
 - Money laundering legislation extended to include terrorist financing
 - New process for the deregistration of charities

2. Criminal Code Definitions Under Bill C-36 That Impact Charities

“Terrorist Activity” Definition

- Bill C-36 includes a very broad definition of “Terrorist Activity” (S. 83.01)
- Definition covers situations that may impact charities, which amongst others includes:
 - Acts or omissions
 - Both in and outside of Canada
 - Committed in whole or in part for political, religious or ideological purposes, objectives or causes

- With the intention of intimidating the public with regard to its security, including its economic security, or compelling a person, government or organization to do or refrain from doing any act
- That intentionally causes injury or death, endangers a person’s life or causes a serious risk to health or safety of the public or any segment of the public or causes substantial property damage likely to cause the above harm or a serious interference or disruption of essential services
- Includes conspiracy, attempt or threat to commit a terrorist activity
- Includes being an accessory after the fact or counseling in relation to any terrorist act

- Definitions also include actions taken against “Internationally Protected Individuals”
 - Bill C-35 extends “internationally protected person” status to foreign representatives including diplomatic and other officers at an “intergovernmental conference”
 - The means of transportation and meeting area for “internationally protected persons” are also protected
 - Any threatening or commissioning of acts against such “persons”, “official premises”, or “means of transport” which is likely to endanger the life or liberty of such persons is a terrorist activity
 - Therefore protestors blocking a road to a WTO Conference or a G8 Summit run the risk of committing a terrorist activity

“Terrorist Group” Definition

- “Terrorist group” is very broadly defined
- “Terrorist group” is defined (S.83.01) as:
 - A “Listed Entity” (S.83.05), i.e. An entity that the government has reasonable grounds to believe

- Has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity, or
- Is knowingly acting on behalf of, at the direction of, or in association with such entity
 - An entity that has as one of its purposes or activities facilitating or carrying on of terrorist activities
 - An entity includes trusts, unincorporated associations and organizations, and an association of such entities

“Facilitation” Definition

- A terrorist activity is “facilitated” whether or not
 - The facilitator knows that a particular terrorist activity is facilitated;
 - Any particular terrorist activity was foreseen or planned at the time it was facilitated; or
 - Any terrorist activity was actually carried out
- The definition of “facilitation” applies to the entire “Part” of the Criminal Code on terrorism
- To “facilitate” a terrorist activity may require only a limited “mens rea” or guilty mind

- This is different from the 1999 *U.N. Convention for the Suppression of the Financing of Terrorism* that uses more intentional language of “willfully” and “knowledge” in describing offences of financing terrorism
- Under Bill C-36, unintentional actions of a charity may therefore result in a charity unwittingly becoming a terrorist group
- In addition, “actus reus” or guilty act is no longer a necessity

3. Specific Criminal Code Offences That May Impact Charities under Bill C-36

- (S. 83.03) Directly or indirectly providing or inviting the provision of property, financial or other related services that facilitates or carries out a terrorist activity or benefits a terrorist group
- (S. 83.04) Directly or indirectly using or possessing property to facilitate a terrorist activity
- (S. 83.08) Dealing with property, facilitating transactions or financial or related services for the benefit or at direction of a terrorist group

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(S. 83.18) Directly or indirectly participating or contributing to any actions that enhance the facilitation of a terrorist activity

(S. 83.21) Directly or indirectly instructing a person to carry out activities for the benefit of a terrorist group

(S. 83.22) Directly or indirectly instructing a person to carry out a terrorist activity

(S. 83.11) Financial institutions (which may include charities) are obligated to determine if they possess property of a "listed entity"

(S. 83.14) The Attorney General may apply for an Order of Forfeiture of Property of a terrorist group

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Impact of Criminal Code Offences on Charities

- **FACT SITUATION #1** – A charity through a fundraiser requests the provision of medical supplies to fund an agent in the Middle East and gives instructions to the agent to use the supplies at a hospital that might treat or give medicine to a member of a terrorist group
- **FACT SITUATION #2** – A charity through a fundraiser solicits funds for a programme to conduct aerial drops of food packages in Afghanistan where some remaining members of the Taliban might receive a few of the food packages

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- **FACT SITUATION #3** – A hospital foundation raises funds for the general operations of a hospital that provides medical care to student protestors at an anti-globalization protest who erect a road block leading to an International Economic Summit
- **FACT SITUATION #4** – A religious denomination provides funding to a local church that assists student protestors by providing sleeping facilities in its church basement in fact situation #3 above

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- **FACT SITUATION #5** – A church organizes a two week prayer vigil in front of a private abortion clinic in the hope that there will be fewer abortions taking place at the clinic. Clients of the clinic complain that they cannot access services at the clinic because of fear of intimidation from members of the vigil even though the participants utter no threats. The owners of the abortion clinic are also upset because they have lost revenue during the vigil

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- **FACT SITUATION #6** – A charitable organization that deals with refugees finds a church or a group of individuals willing to sponsor a refugee claimant from a Southeast Asian country. The organization has interviewed the refugee, but does not know that the refugee's brother, who occasionally receives financial help from the refugee, may be linked to al Qaida
- In all of these fact situations, the charity, the fundraiser, the agent and donors may be found to have violated the Criminal Code, with corresponding loss of charitable status

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4. The Charities Registration (Security Information) Act (Part 6) under Bill-36

Practical Impact

- Even if a charity is not charged with a Criminal Code offence, a possible violation of the Criminal Code may result in a charity losing its charitable status without the protection of due process

Certificate Issued

- Solicitor General and Minister of National Revenue may sign a certificate that, based upon security or criminal intelligence reports, there are reasonable grounds to believe that a registered charity or an applicant for registered charity status:

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- Has made, makes or will make available any resources, directly or indirectly to a listed entity
- Made available any resources, directly or indirectly, to an entity (*not a listed entity*) that was and continues to be engaged in terrorist activities or activities in support of them
- Makes or will make available any resources, directly or indirectly, to an entity (*not a listed entity*) that engages in or will engage in terrorist activities or activities in support of them

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Concerns Involving the Issuance of a Certificate

- No knowledge or intent is required
- Past, present and future actions can be considered
- No due diligence defence
- No definition of what “indirectly” means
- No warning given
- Low standard of “reasonable grounds to believe” utilized
- “Confidential” information considered may not be disclosed to the charity

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Referral to Federal Court Judge

- The certificate must be served upon the charity or the applicant and referred to a single Federal Court Judge for judicial consideration
- The charity or applicant is to be provided with a summary of information and a reasonable opportunity to be heard
- The Fed. Ct. Judge will then determine if the certificate is reasonable and if so, the charity will lose its charitable registration or the applicant will be ineligible to become a charity
- The Fed. Ct. Judge’s determination is not subject to appeal or review by any court

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Evidence to Be Examined in Private by Fed. Ct. Judge:

- The security or criminal intelligence reports used by the Ministers
- Other evidence if the disclosure would injure national security or the safety of anyone
- Information obtained in confidence from a government, an institution of a foreign state, or from an international organization
- Any reliable and relevant information can be examined, whether or not it is or would be admissible in a court of law

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Effect of Certificate

- Once a certificate is determined to be reasonable by a Fed. Ct. Judge, then the registration of that charity is automatically revoked
- This may result in the loss of charitable property due to the 100% tax imposed on revocation of charitable status
- A certificate is effective for a period of seven years, but may be cancelled earlier upon an application based upon a material change of circumstances

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5. Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Part 4) under Bill C-36

- *Proceeds of Crime (Money Laundering) Act* now includes the financing of terrorist activities
- The act requires certain transactions to be reported to FINTRAC, a new government agency
- Duty to report to FINTRAC includes, among others:
 - Banks and other financial intermediaries
 - Companies to which the trust and loan companies act applies
 - Trust companies regulated by a provincial act

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- Persons and entities authorized to engage in the business of dealing in securities or engaged in the business of foreign exchange dealing
- Certain professionals including lawyers and accountants (lawyers partially exempt pending constitutional challenge)
- What must be reported?
 - Suspicious transactions – not defined
 - Source or destination of funds is suspicious
 - Nature of transactions, e.g. clusters of transactions through multiple entities

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- Large transactions and cross border
 - All cash transactions over \$10,000
 - Import or export of cash or other monetary instruments over \$10,000
- *Proceeds of Crime (Money Laundering) Act* is important for charities because:
 - Possible reporting duties for charities
 - i.e. exemption from registration under S.35 (2) 7 of the *Securities Act* for charities, which may be seen as authorizing charities to carry on the business of dealing in securities

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- i.e. subsequent regulations released on May 9, 2002, include definitions such as “Financial Entity” and “Money Services Business” that may include charities
- Possible exposure to being reported by another entity
 - who the information goes to, i.e. FINTRAC
 - what the information may be used for, i.e. deregistration
- Since lawyers fall under the legislation for large cash and cross border transactions, lawyers dealing with charities may have a duty to report

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6. The Risk to Charities

Triple Threat from Bill C-36

- Past, present and future acts can be considered in revoking or denying charitable status
- Can involve Criminal Code offences, loss of charitable status and money laundering violations
- Can result in penalties, imprisonment and seizure of charitable property

Lack of Fairness Before the Law Under Bill C-36

- Limited access to information
- Normal rules of evidence do not apply

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Limited Defence

- No due diligence defence available for charities for either
 - Criminal Code offences
 - Loss of charitable status
- Knowledge and intent have been curtailed
 - Facilitation of terrorist activities or groups involves lower threshold than other Criminal Code offences
 - Not a requirement at all for loss of charitable status

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Discrimination Concerns of Bill C-36

- Charities with political, religious and ideological purposes will be suspect because they in part meet the definition of “terrorist activity”
- Religious, ethnic and environmental charities may be scrutinized more than others

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Negative Impact on Charities From Bill C-36

- Change in public’s perception of charities as being associated with possible financing of terrorism
- Possible “chill effect” on future charitable activities for international religious and humanitarian NGOs.
- Exposure of the charity and it’s board to third party liability on behalf of victims of 9/11-style “terrorist attacks”, i.e. 1 trillion dollar law suit against, among others, Saudi Arabian charities
- A charity must now look not only at the donor and their funds, but the means by which the donor raised its funds i.e. author of book purported to “encourage” terrorism who offers all proceeds to Oxfam, resulting in Oxfam refusing donations

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Serious Penalties and Liability to Charities and Directors

- Directors could be charged with Criminal Code offences
- Agents of charities involved in international operations could expose both the charity and directors to liability
- Breach of fiduciary duty arising from a loss of charitable property could lead to personal liability for directors
- Fines, penalties and Criminal Code charges are not normally included in insurance coverage
- Gifts by donors to a charity that is a terrorist group may put the donors at risk of violating the Criminal Code and will therefore require appropriate inquiries of intended recipient charities

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7. Developing a Due Diligence Response to Bill C-36

The Need for Due Diligence

- Due diligence is not a defence for either
 - Criminal Code offences
 - Part 6 certificates revoking charitable status
- Due diligence, though, can be effective in avoiding possible violations of Bill C-36 before they occur
- Undertaking due diligence is mandatory in accordance with the common law fiduciary obligations of directors to protect charitable property

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What Does Due Diligence Include

- Due diligence through education
- Due diligence at the board level
- Due diligence at staff and volunteer level
- Due diligence checklist of charitable program
- Due diligence with umbrella associations
- Due diligence concerning “affiliated charities”
- Due diligence with regards to third party agents
- Due diligence concerning donors
- Documenting due diligence through an anti-terrorism policy statement
- Evidencing due diligence with CCRA
- Evidencing due diligence with legal counsel

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