

RECENT CCRA NEWSLETTER ADDRESSES IMPACT OF ANTI-TERRORISM LEGISLATION

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A. INTRODUCTION

In its recent *Registered Charities Newsletter*, Spring 2002 – No.12, under an article entitled “The New Anti-Terrorism Law: Impact on Charities”, the Charities Directorate of Canada Customs and Revenue Agency (“CCRA”) outlines the process of deregistration of charities under the *Charities Registration (Security Information) Act* (“*Charities Registrations Act*”) that was established by Part 6 of Bill C-36, the *Anti-Terrorism Act*. The complete text of the *Registered Charities Newsletter*, Spring 2002 – No.12 is available at www.cca-adrc.gc.ca/tax/charities/newsletters/news12-e.html. The newsletter provides insight into how CCRA envisions the process of deregistration being implemented and its impact upon both registered charities and applicants for charitable status in Canada. While it is helpful that CCRA has addressed this important issue affecting charities, the newsletter raises a number of concerns about CCRA’s perception of the fairness of the process. A summary of these concerns are discussed in this Bulletin after a brief explanation is given about the process itself.

B. A BRIEF SYNOPSIS OF THE CERTIFICATE PROCESS

The following synopsis provides a brief overview of the deregistration process resulting from the issuance of a certificate under the *Charities Registration Act*. For more information on this process, reference can be

made to the full text of the *Charities Registration (Security Information) Act*, available at www.sgc.gc.ca/WhoWeAre/Terrorism/Part6-e.htm.

Deregistration under the *Charities Registration Act* involves the issuance of a “security certificate” against a registered charity or an applicant for charitable status, as the case may be, where there are reasonable grounds to believe that the organization has made, makes or will make resources available, directly or indirectly, to an entity that has or will engage in a “terrorist activity” as defined in subsection 83.01(1) of the *Criminal Code*. The process is initiated by the Solicitor General of Canada and the Minister of National Revenue who, if reasonable grounds are found, will jointly sign the security certificate. The registered charity or applicant for charitable status that is the subject of the security certificate is then informed of the issuance of the certificate and the certificate is given over for judicial consideration to a Federal Court judge.

During the judicial consideration stage of the process, the charity or applicant for charitable status receives a summary of the grounds giving rise to the issuance of the security certificate comprised of the security and criminal intelligence information that the judge decides to divulge. If the security certificate is found to be reasonable by the Federal Court judge, then it is valid for seven years, during which time a registered charity is stripped of its charitable status or an applicant for charitable status is ineligible to obtain charitable status.

C. CONCERNS ARISING FROM THE CCRA NEWSLETTER

1. The Judicial Consideration of the “Security Certificate”

One area of concern that arises from the CCRA newsletter is the comment made in respect to the mandatory judicial consideration of the validity of a security certificate. In this regard, CCRA states that the “*judicial review process has been designed to be as fair and open as possible.*” However, the restrictions and directives contained within the *Charities Registration Act*, which are not referred to in the CCRA newsletter, do in fact limit procedural fairness and openness in relation to the issuance and judicial consideration of the security certificate. One example which indicates that the process is not necessarily as fair and open as possible is found within section 7 of the *Charities Registration Act*, which in part states that “*any reliable and relevant information*” may be admitted into consideration by a Federal Court judge “*whether or not the information is or would be admissible in a court of law*”.

The issue of determining the reasonableness of the decision to issue a security certificate would be based in part upon this broader base of information available for the court to consider. This should be of concern to charities since section 7 of the *Charities Registration Act* effectively waives the ordinary rules of evidence regarding the admissibility of information that may be considered by the Federal Court.

Another provision within the *Charities Registration Act* that does not reflect a process that is as fair and open as possible is paragraph 8(1)(a) dealing with evidence to be considered by a Federal Court judge. It states that “*information obtained in confidence from a government, an institution or an agency of a foreign state, from an international organization of states or from an institution or agency of an international organization of states*” can be relied upon in determining the reasonableness of the certificate, even though it cannot be disclosed to the charity in question. Furthermore, the judge is to decide on the relevance of such information after hearing arguments from the Minister seeking to include it. Whether the information is ultimately relied upon or not, the determination takes place entirely in the absence of the charity or its counsel.

In addition, in paragraph 6(1)(b), the *Charities Registration Act* grants the judge considering the certificate discretionary power to decide whether any information “*should not be disclosed to the applicant or registered charity or any counsel representing it because the disclosure would injure national security or endanger the safety of any person.*” This raises the possibility that much of the security information and intelligence reports considered by a Federal Court judge may be considered too sensitive for national security reasons to be disclosed to the affected charity. In addition, after a certificate is issued, subsection 11(5) of the *Charities Registration Act* precludes any avenue for judicial appeal or review, other than a limited right to apply for review if there has been a material change in circumstances.

In summary, given the fact that there is no right to appeal a security certificate, that the ordinary rules of evidence have been waived, and that evidence deemed to be injurious to national security or a person’s safety is not to be disclosed to the charity, it is difficult to see how the charity deregistration process could be considered to be as fair and open as possible

2. Summary of Information Giving Rise to Issuance of the Security Certificate

Another area of concern that arises from the CCRA newsletter is the comment made in respect to the summary of security and criminal intelligence reports that is to be considered by a Federal Court judge.

This summary is only provided to the charity once the security certificate is referred to a Federal Court judge for a determination concerning its reasonableness after being signed by the Solicitor General and the Minister of National Revenue. The newsletter by CCRA states that the summary “*must contain enough information to allow the organization to respond, and may only exclude information that the judge has determined would be injurious to national security and the safety of persons.*” However, the only requirement in paragraph 6(1)(b) of the *Charities Registration Act* regarding what the summary “must” contain is that it provide enough information “*to enable the applicant or registered charity to be reasonably informed [not defined] of the circumstances giving rise to the certificate*”. This wording raises the possibility that the charity may very well not receive “*enough information to allow the organization to respond,*” notwithstanding the comment by CCRA to the contrary.

In addition, with respect to the second part of the CCRA statement indicating that the summary “*may only exclude information that the judge has determined to be injurious to national security and the safety of persons*” (emphasis added), there does not appear to be any statutory basis within the *Charities Registration Act* to support this statement. The only requirement within paragraph 6(1)(b) of the *Charities Registration Act* concerning the summary is that the applicant or registered charity must be “*reasonably informed of the circumstances giving rise to the certificate*”.

Given that the summary of the “*grounds giving rise to the issuance of a certificate*” will likely be sparse, if not anaemic in the first instance, the usefulness of the summary will be further diminished by the absence of confidential foreign information, as well as any information that may be injurious to national security or a person’s safety.

D. CONCLUSION

While it is commendable that CCRA has provided a commentary on the security certificate process that charities face under the *Charities Registration Act*, certain aspects of the commentary by CCRA in its

newsletter raise concerns for charities by giving the impression that the certificate process is a fair and open one. It clearly is not. Charities need to understand that the certificate process they face is unprecedented in its lack of procedural fairness, both with regard to the process of determining the reasonableness of the certificate and in the lack of evidence provided to the charity in order that it may defend itself. The certificate process under the *Charities Registration Act* is not one that should be seen as providing charities with any sense of assurance or confidence in either the equity or the outcome of the process. For more information on this matter, reference can be made to various articles and commentaries found at www.antiterrorism.ca.