
**CANADIAN BAR ASSOCIATION/ ONTARIO BAR ASSOCIATION
4TH NATIONAL SYMPOSIUM ON CHARITY LAW**

Toronto - May 11, 2006

**THE WHAT, WHERE AND WHEN OF
ANTI-TERRORISM LEGISLATION FOR
CHARITIES IN THE INTERNATIONAL
CONTEXT**

By Terrance S. Carter, B.A., LL.B.

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INTRODUCTION

- **The 5th anniversary of the terrorist attacks on the U.S., continues to be used as a justification for the introduction of increasingly strict anti-terrorism legislative measures around the world**
- **New political reality of Hamas in power, the listing of the Tamil Tigers in Canada, as well as natural disasters like the tsunami, are complicating an already confused landscape**
- **At the same time, there is an increased need for humanitarian aid in regions that are politically unstable**

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- As such, charitable organizations that operate in the international context need to be aware of the what, where and when of both Canadian and international anti-terrorism measures
- For Canadian charities which operate either directly or indirectly on an international basis, they need to:
 - Understand Canadian anti-terrorism legislation
 - Understand the international context of anti-terrorism legislation in key jurisdictions
 - USA
 - UK
 - Australia
 - Develop a due diligence response by adopting and implementing appropriate policies and procedures

ANTI-TERRORISM LEGISLATION IN CANADA

- *Anti-terrorism Act (Bill C-36)*
 - Amended *Criminal Code, Canadian Human Rights Act, Proceeds of Crime (Money Laundering Act)*
 - Created *Charities Registration (Security Information) Act*
- *Foreign Missions Act (Bill C-35)*
 - Modernizes Canada's privileges and immunities regime to comply with international obligations
- *Public Safety Act (Bill C-7)*
 - Broadens government's power to collect and distribute financial information relevant to money laundering and terrorist financing

“SUPER CRIMINAL CODE”

- ***Anti-terrorism Act* amendments create a new type of criminal offence within the *Criminal Code* provisions directed at terrorism**
- **New definitions of “terrorist activity,” “terrorist group,” “facilitation of terrorist activities or terrorist group” are extremely broadly worded**

- **e.g. 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**
 - **Any terrorist activity was actually carried out**
- **Charities could very well become involved unwittingly in violating the *Criminal Code* without actually intending to directly or indirectly support any terrorist activity**

SPECIFIC OFFENCES THAT MAY IMPACT CHARITIES

- **s. 83.02: directly or indirectly providing or collecting property that is intended to be used ... in whole or in part in a terrorist activity**
- **s. 83.03: directly or indirectly providing or inviting the provision of property, etc. ... that facilitate or carry 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 owned or controlled by or on behalf of a terrorist group ...**
- **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**

Sample Fact Situations Involving Possible Violations of the *Criminal Code*

- **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 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**

PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT

- **Creation of FINTRAC, an independent government agency to combat organized crime with a mandate to collect, analyze, assess and disclose information to assist in the detection, prevention and deterrence of money laundering and terrorist financing**

- **Act requires certain transactions to be reported to FINTRAC: suspicious transactions, large transactions, and cross-border transactions**
 - **All cash transactions over \$10,000 within Canada**
 - **Import or export of cash or other monetary instruments over \$10,000**
- **Possible reporting duties for charities if a charity is involved in money service business**

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CHARITIES REGISTRATION (SECURITY INFORMATION) ACT

- **Enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity**
- **Security certificate can be issued against a charity 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 engaged in or will engage in a “terrorist activity”**

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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 Federal Court 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 Federal Court Judge's determination is not subject to appeal or review by any court**

Evidence to Be Examined in Private by Federal Court 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**

Effect of Certificate

- **Once a certificate is determined to be reasonable by a Federal Court 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**

CONCERNS WITH SECURITY CERTIFICATES

- **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 charity**

THE INTERNATIONAL CONTEXT OF ANTI-TERRORISM LEGISLATION

- **The global reach of Canadian charitable organizations both in terms of charitable activities and extended donors means that these organizations and their advisors must look beyond domestic anti-terrorism policies**
- **Charities working in foreign countries on their own or through third parties will need to comply with both domestic and foreign laws**
- **Charities are now also open to increased donor scrutiny in order to ensure donor is in compliance with their own country's laws**

UNITED STATES (Key Legislative Provisions)

- **Executive Orders 12947 (January 23, 1995) and 13224 (September 23, 2001)**
 - **Implemented by Bill Clinton and George W. Bush**
 - **Proscribes terrorist organizations and prohibits transactions with such organizations**
- ***Omnibus Diplomatic Security and Antiterrorism Act of 1986***
 - **Extended U.S. federal jurisdiction over those individuals or organizations committing terrorist acts against American citizens anywhere in the world**

UNITED STATES (cont'd)

- *Anti-Terrorism Act of 1987*
 - **Barred fundraising for Palestine Liberation Organization**
- *Federal Courts Administration Act of 1992*
 - **Defined international terrorism as acts intended to intimidate a civilian population or coerce a government**
- *International Emergency Economic Powers Act (1977)*
 - **Enhances the presidential authority when there is an “unusual and extraordinary threat” to the national security, foreign policy, or economy of the U.S. with its source outside the U.S.**

UNITED STATES (cont'd)

- *Antiterrorism and Effective Death Penalty Act (1996)*
 - **Provides federal government with ability to prevent persons subject to U.S. jurisdiction from providing material support or resources to foreign organizations that engage in terrorist activities**
- *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)*
 - **Enhances and expands presidential and federal law enforcement authority, i.e. expanded surveillance powers, confiscation powers**

UNITED STATES (cont'd)

- ***Suppression of the Financing of Terrorism Convention Implementation Act (2001)***
 - **Targets domestically formed entities, including tax exempt organizations, creating new offence to provide or collect funds for a terrorist act**
- **Voluntary Best Practices Guideline for U.S. Based Charities (revised as of December 2005)**
 - **Issued by U.S. Treasury Department**
 - **Purports to assist charities in developing a risk-based approach to guard against the threat of diversion of charitable funds for use by terrorists**
 - **Viewed in effect as mandatory notwithstanding the misnomer of being called voluntary**

UNITED STATES (cont'd)

- **Sets out necessity for fiscal responsibility for fiduciaries of the charity to exercise due care and for charitable organizations to comply with U.S. laws**
 - **Calls for disclosure/transparency**
 - **Recipients of resources or services need to be clearly identified and due diligence searches conducted**
- **No *de minimus* threshold with respect to due diligence requirements and therefore it creates an increasing burden on all charities to comply**
- **Concern that Voluntary Best Practices may compromise safety of humanitarian workers as charities become “surrogate police”**

UNITED KINGDOM (Key Legislative Provisions)

- **U.K. has over 200 separate counterterrorism laws**
- **Four major additions since 2000**
 - *Terrorism Act 2000*
 - *Anti-terrorism, Crime and Security Act 2001*
 - *Prevention of Terrorism Act 2005*
 - *Terrorism Act 2006, which was introduced in October 2005 and passed into law on March 30, 2006*

UNITED KINGDOM (cont'd)

- *Terrorism Act 2000*
 - **Primary piece of counterterrorism legislation**
 - **Extends proscription to international groups**
 - **Police given wider stop and search powers and power to detain suspects after arrest for up to seven days**
 - **New offences allow police to arrest individuals suspected of inciting terrorist acts, seeking or providing training for terrorist purposes, or providing instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons**

UNITED KINGDOM (cont'd)

- **“Terrorism” defined in the *Terrorism Act 2000* to have a three-pronged requirement:**
 - **Involve serious violence against a person; serious damage to property; endanger a person’s life; create a serious risk to the health or safety of the public or a section of the public; or be designed to seriously interfere with or seriously disrupt an electronic system**
 - **Use or threat of action must be designed to “influence government” or “intimidate the public”**
 - **Use or threat must be made for the purpose of advancing a political, religious or ideological cause**

UNITED KINGDOM (cont'd)

- ***Anti-terrorism, Crime and Security Act 2001***
 - **Provides stronger police powers to investigate and prevent terrorist activity and other serious crime**
 - **Includes provisions to cut off terrorist funding; information sharing; streamline relevant immigration procedures; improve security of dangerous substances**

UNITED KINGDOM (cont'd)

- **Part 4 of the *Anti-terrorism, Crime and Security Act 2001* proved especially controversial**
 - **Enabled Secretary of State to issue certificates in respect of persons he suspected to be a terrorist and whose presence in the country posed a risk to national security**
 - **Persons named in these certificates were subject to deportation or detention**
 - **Detention powers said to be a direct contravention of U.K.'s obligations under the *European Convention on Human Rights***

UNITED KINGDOM (cont'd)

- ***Prevention of Terrorism Act 2005***
 - **Repealed impugned powers under *Anti-terrorism, Crime and Security Act 2001* and replaced them with a system of control orders**
 - **Control orders can be made against any suspected terrorist, whether a U.K. national or not, and whether the terrorist activity is international or domestic; renewable every 12 months**
 - **Authorities can impose conditions on individuals ranging from prohibitions on access to specific items or services, and restrictions on association with named individuals, to the imposition of restrictions on movement or curfews**

UNITED KINGDOM (cont'd)

- ***Terrorism Act 2006***
 - **Creates offence of “encouraging” or “glorifying” terrorism**
 - **Prohibits sale/dissemination of books, internet material, etc., that encourage people to engage in terrorism or provide information that could be useful to terrorists**
 - **Creates extra-territorial jurisdiction for U.K. courts for certain terrorism related offences**
 - **Extends period of pre-charge detention from 14 days to up to 28 days**

UNITED KINGDOM (cont'd)

- **U.K. Charity Commission**
 - **Holds charities and their trustees responsible for the charity’s actual activities, as well as the public’s *perception* of the charity’s activities**
 - **Cautions that any allegation of links to terrorism will be investigated as an “immediate priority”**
 - **Liaises closely with intelligence, security and law enforcement agencies to facilitate a thorough investigation**
 - **Does not refer solely to list of proscribed organizations under anti-terrorism legislation but suggests there is a “broader context” to terrorism**

AUSTRALIA (Key Legislative Provisions)

- **Prior to September 11, 2001, there were no federal, state or territorial laws on terrorism in Australia**
- **Australian Constitution does not provide federal government with the explicit power to make laws with respect to terrorism**
- **States had to refer their legislation powers**
- **Since 2002, federal and state governments have introduced a number of anti-terrorism laws**

AUSTRALIA (cont'd)

- ***Criminal Code Act 1995***
 - ***Amended by Security Legislation Amendment (Terrorism) Act 2002***
 - **Defines terrorist act as an action or threat of action that causes serious physical harm or death to a person, or endangers a person's life or involves serious risk to public health or safety, serious damage to property or serious interference with essential electronic systems, and the action is done or the threat is made with the intention of advancing a political, religious or ideological cause and to coerce or influence by intimidation an Australian or foreign government or the public**

AUSTRALIA (cont'd)

- ***Australian Security Intelligence Organization Act 1979***
 - **Individuals who may have information relating to a terrorism offence may be questioned for up to 24 hours (48 hours if interpreter used); and detained for up to 168 hours**
- ***Anti-terrorism Act 2004***
 - **Ensures a national approach to the treatment of terrorism offences, resolving differences in separate bail regimes of the states**

AUSTRALIA (cont'd)

- **Terrorism suspects can only get bail in “exceptional circumstances”**
- **Extends pre-charge detention time from 4 hours to 24 hours; law enforcement authorities can “stop the clock” when making overseas inquiries**
- **Requires convicted terrorists to serve three quarters of sentence before being granted parole**
- ***Anti-terrorism Act (No. 2) 2004 and Anti-terrorism Act (No. 3) 2004, make it an offence to associate with a member of a listed terrorist organization, and ensures suspected terrorists cannot obtain travel documents***

AUSTRALIA (cont'd)

- ***Anti-terrorism Act 2005***
 - **Makes five interpretive amendments to the *Criminal Code Act 1995*, clarifying that, in the prosecution of a terrorism offence, it is not necessary to identify a particular terrorist act; it is enough to prove that the particular conduct was related to “a” terrorist act**
- ***Anti-terrorism Act (No. 2) 2005***
 - **Covers control orders, preventative detention, use of lethal force by law enforcement authorities, “advocating” and financing terrorism, and supporting insurgency abroad**

FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING (“FATF”)

- **Inter-governmental body established by the G7 group in 1989 with purpose to develop policies to combat the laundering of drug money**
 - **Mandate refocused to participate in the war on terrorism**
- **Sets standards for national anti-money laundering and counter terrorist financing programmes**
- **Evaluates degree to which countries have implemented measures that meet those standards**
- **Identifies and studies money laundering and terrorist financing methods and trends**

FATF (cont'd)

- ***The Forty Recommendations and Nine Special Recommendations on Terrorist Financing***
 - **These two policies set the international standard for combating the financing of terrorism**
 - **40 Recommendations focus on:**
 - **Need for domestic legal systems to criminalize money laundering**
 - **Financial institutions must take measures to prevent money laundering and terrorist financing**
 - **Countries must establish a financial intelligence unit**
 - **Need for international co-operation, including mutual legal assistance and extradition**

FATF (cont'd)

- **Special Recommendation VIII focuses on non-profit organizations and the need for countries to ensure they cannot be misused**
- **Interpretative Note to Special Recommendation VIII mirrors U.S. Treasury Department's Voluntary Best Practices**
- **No legislative authority but has significant influence over policy dealing with counterterrorism measures in member nations and will become even more influential in the future**

DUE DILIGENCE RESPONSE

- **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 Canada’s *Anti-terrorism Act* before they occur**
- **Undertaking due diligence is mandatory in accordance with the common law fiduciary obligations of directors to protect charitable property**

- **Global standards are required for charities that operate internationally, as well as those that transfer funds cross border or work with international partners and utilize foreign financial institutions**
- **What Does Due Diligence Include?**
 - **Recognize the risk factors**
 - **Due diligence through education**
 - **Due diligence at the board level**
 - **Due diligence at staff and volunteer level**

- **Due diligence checklist of charitable programs and ongoing assessments of projects**
- **Due diligence concerning umbrella associations**
- **Due diligence concerning “affiliated charities”**
- **Due diligence with regards to third party agents, i.e. foreign financial institutions and recipient organizations, subcontracting organizations, etc.**
- **Due diligence concerning donors**
- **Due diligence concerning publications, website, public statements, etc.**

- **Developing an in-house due diligence procedures to ensure ongoing, regular due diligence reviews**
- **Evidencing due diligence with insurance companies**
- **Documenting due diligence through coordinating anti-terrorism policy statements**
- **Evidencing due diligence with CRA**
- **Evidencing due diligence with legal counsel**

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