
UNIVERSITY OF OTTAWA

Ottawa – October 30, 2006

The Impact of Anti-terrorism Legislation On Charities

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

© 2006 Carters Professional Corporation

CARTERS.ca

CARTERS PROFESSIONAL CORPORATION

Société professionnelle Carters

Barristers, Solicitors & Trade-mark Agents

Affiliated with **Fasken Martineau DuMoulin LLP**

Avocats et agents de marques de commerce

Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux

Ottawa (613) 235-4774

Mississauga (416) 675-3766

Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

By Appointment / Par rendez-vous

Toronto (416) 675-3766

London (519) 937-2333

Vancouver (877) 942-0001

www.charitylaw.ca

UNIVERSITY OF OTTAWA
 Ottawa – October 30, 2006

**The Impact of
 Anti-terrorism Legislation
 on Charities**

By Terrance S. Carter, B.A., LL.B.
 ©2006 Carters Professional Corporation

“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
 Thursday, November 14, 2002, pg. A4

2

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

For more details see article “The Impact of Anti-terrorism Legislation on Charities: *The Shadow of the Law*”, “*The What, Where and When of Canadian Anti-Terrorism Legislation for Charities in the International Context*” and Anti-terrorism & Charity Law Alerts at www.charitylaw.ca and www.antiterrorismlaw.ca

3

1. Background and Overview

- *Anti-terrorism Act (Bill C-36)* is a very complicated piece of legislation that coordinates the provisions of many federal acts
- *Anti-terrorism Act (Bill C-36)* needs to be read in conjunction with *Foreign Missions and International Organizations Act (Bill C-35)*, *Public Safety Act (Bill C-7)* and subsequent regulations, as well as, pending Bill C-25

4

- The full impact of anti-terrorism legislation may not be understood for years
- Charities will need to become proactive in understanding the law and its impact on their operations
- *Anti-terrorism Act* includes:
 - “*Super Criminal Code*” terrorist offences
 - Money laundering legislation extended to include terrorist financing
 - New process for the deregistration of charities

5

2. *Criminal Code* Definitions Under *Anti-terrorism Act* That Impact Charities

“Terrorist Activity” Definition

- 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

6

– On October 24, 2006, an Ontario Superior Court of Justice released its decision in *R. v. Khawaja*

- The court struck down a portion of the definition of “terrorist activity” in the *Criminal Code*
- The court found that the definition of “terrorist activity”, which required proof that the specified activity was undertaken in whole or in part for a political, religious or ideological cause, infringed an individual’s freedom of religion, thought, belief, opinion, expression and association as guaranteed by section 2 of the *Charter*

7

- The definition has been severed from the rest of the legislation, while the remainder of the anti-terrorism provisions remain in force
- Ruling has a positive effect in that it highlights the deficiencies in Canada’s anti-terrorism laws
- But ruling also has the perverse effect of broadening the definition of “terrorist activity” and reduces the elements the Crown must prove

8

- 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

9

- 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”
 - *Foreign Missions and International Organizations Act* 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

10

- 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

11

- 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

12

“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

13

- 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
- The *Kwawaja* decision upheld the definition of “facilitation” notwithstanding its breadth and lack of “mens rea”
- Under *Anti-terrorism Act*, 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

14

3. Specific *Criminal Code* Offences That May Impact Charities under *Anti-terrorism Act*
- (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

15

(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

16

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

17

- **FACT SITUATION #3** – A hospital foundation raises funds for the general operations of a hospital that provides medical care to student protesters 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 protesters by providing sleeping facilities in its church basement in fact situation #3 above

18

• **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

19

• **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

20

• **FACT SITUATION #7** – A church collects donations for a young Afghan boy who is undergoing emergency medical treatment in Canada. Some of the funds are wired to family members in Afghanistan who will be caring for the boy when he returns home. One of his relatives in Afghanistan who helps manage the funds that have been received has some links to members of the Taliban

• 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

21

4. The Charities Registration (Security Information) Act (Part 6) Under Anti-terrorism Act

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:

22

- 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

23

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
- No criminal charges need to be laid in order to issue a security certificate

24

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

25

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

26

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

27

“Under the Shadow of the Certificate Process”

- During testimony before Parliament committees reviewing Bill C-36 (now the *Anti-terrorism Act*), senior CRA officials stated that the security certificate provisions constituted a “prudent reserve power”
- Senior CRA officials also confirmed during testimony the “voluntary deregistration” of charities and withdrawal of applications as a result of inquires by CRA about possible terrorist connection
- CRA officials also noted that CRA has received additional resources creating new capability for a more in depth analysis in keeping with the initiative to “strengthen and enhance the monitoring of charities”

28

5. Proceeds of Crime (Money Laundering) and Terrorist Financing Act

- *Proceeds of Crime (Money Laundering) and Terrorist Financing 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

29

– Persons and entities authorized to engage in the business of dealing in securities or engaged in the business of foreign exchange dealing

- 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

30

- 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) and Terrorist Financing 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* (Ontario) for charities, which may be seen as authorizing charities to carry on the business of dealing in securities

31

- 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

32

- New Anti-Terrorism Legislation Introduced*
- On October 5, 2006, the Minister of Finance introduced Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act*
 - This new anti-terrorism legislation gives increased powers to government agencies to investigate charities and exempts lawyers from reporting obligations
 - One of the more substantive pieces of anti-terrorism legislation to be tabled in some time

33

- Proposed amendments applicable to charities and their legal counsel are amendments that would:
 - Bolster client identification, record-keeping and reporting measures applicable to financial institutions and intermediaries
 - Allow FINTRAC to disclose additional information to law enforcement and intelligence agencies, and other agencies
 - Allow CRA to disclose to FINTRAC, the RCMP and CSIS information about charities suspected of being involved in terrorist financing activities

34

- Exempt lawyers from reporting obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
- Exemption of lawyers from reporting obligations is the result of over four years of litigation and negotiation by the Federation of Law Societies and the federal government
- The Federation of Law Societies likely to soon agree to voluntarily undertake professional standards to combat money laundering and terrorist financing
- Proposed amendments would greatly increase level of information sharing among federal agencies that may investigate charities and their directors and officers, and also highlight the increasing focus on charities and their possible links to terrorism

35

6. The Risk to Charities

Triple Threat from Anti-terrorism Act

- 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 Anti-terrorism Act

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

36

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

37

Discrimination Concerns of Anti-terrorism Act

- 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

Negative Impact on Charities From Anti-terrorism Act

- 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

38

- Exposure of the charity and its board to third party liability on behalf of victims of 9/11-style “terrorist attacks”, i.e. 1 trillion dollar lawsuit 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 donation

Serious Penalties and Liability to Charities

- Directors could be charged with *Criminal Code* offences

39

- 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 by intended recipient charities

40

- 7. Developing a Due Diligence Response to *Anti-terrorism Act***
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 *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

41

- Global Standards Required for Charities That Operate Internationally*
- CRA “Charities in the International Context” stresses importance of taking into account “Best Practice” standards of international policy making institutions such as Financial Action Task Force and key jurisdictions, such as the United States and the United Kingdom
 - Increased information collection and sharing between countries concerning non-profit organizations which have been identified as “crucial weak point”
 - Important not only for charities that operate internationally, but those that transfer funds cross border, work with international partners and utilize foreign financial institutions

42

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 programs and ongoing assessments of projects
- Due diligence concerning umbrella associations
- Due diligence concerning “affiliated charities”

43

- Due diligence with regard 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

44

- Documenting due diligence through coordinating anti-terrorism policy statements
- Evidencing due diligence with CRA
- Evidencing due diligence with legal counsel

45

DISCLAIMER

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2006 Carters Professional Corporation
