
**UNIVERSITY OF OTTAWA
INTRODUCTION TO THE LAW OF CHARITIES AND
NON-PROFIT ORGANIZATIONS CML 4104A**

Ottawa – October 18, 2010

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

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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

Thursday, November 14, 2002, pg. A4

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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. Summary of the Risk to Charities
7. Recommendations for Change
8. Developing a Due Diligence Response

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

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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 *Bill C-25*
- *Bill C-17 combating Terrorism Act* received 2nd reading in April 2010, and will reintroduce investigative hearing and preventive detention
- The full impact of anti-terrorism legislation is only now beginning to be felt

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- Charities will need to become proactive in understanding the law and its impact on their operations or may face audits and revocation
- Anti-terrorism Legislation impacts charities from three technical perspectives:
 - “*Super Criminal Code*” terrorist offences under the *Anti-terrorism Act*
 - New certificate process for the deregistration of charities under the *Charities Registration (Security Information) Act* (“CRSIA”)
 - Money laundering legislation extended to include terrorist financing under *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“PCMLTFA”)

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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

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- 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

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- 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

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- 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 or G20 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

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- 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

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- “Facilitation” Definition*
- “Facilitation” is very broadly defined in . 83.19(2)
 - 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 is for practical purposes devoid of a “*mens rea*” or guilty mind element

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- 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 committing an offence under the *Criminal Code*
- In addition, “actus reus” or guilty act is no longer a necessity

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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

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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.83.14) 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 or medicine packages in Pakistan where members of the Taliban might receive some of the 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 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**

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Consequence of Criminal Code Offences

- **A charity that is found to be in violation of the *Criminal Code* provisions applicable to terrorism could face consequences on many fronts**
- **Not only might the charity be subject to the relevant penalties under the *Criminal Code* and possible inclusion as a “listed entity”, but it could also be subject to possible loss of charitable status under the CRSIA, as well as the freezing, seizure, restraint, and forfeiture of its charitable property**

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- Directors of charities could face fines, penalties, and even imprisonment
- Under section 83.08 of the *Criminal Code*, the assets of all “terrorist groups” can be frozen
- Under sections 83.13 and 83.14, a judge may make an order for the seizure or forfeiture of property that is owned or controlled by or on behalf of a “terrorist group” or that has been or will be used, in whole or in part, to “facilitate” a “terrorist activity”

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Inclusion as a Listed Entity

- There exists the latent potential that a charity could conceivably be included as a “listed entity” under s. 83.05 of the *Criminal Code*
- The *Criminal Code* authorizes the Governor in Council to establish such a list if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, he/she is satisfied that there are reasonable grounds to believe that:
 - “The entity knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or”
 - “The entity is knowingly acting on behalf of, at the discretion of or in association with an entity referred to [above]”
- The list was last updated March 5, 2010 and includes 42 organizations

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4. The Charities Registration (Security Information) Act (“CRSIA”)

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

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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

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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

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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

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“Under the Shadow of the Certificate Process”

- During testimony before Parliament committees reviewing Bill C-36 (now the *Anti-terrorism Act*), senior CRA officials have stated that the certificate provisions constituted a “prudent reserve power”, although never utilized to date
- The certificate process is the same as the security certificate process under the *Immigration Act* that the SCC ruled was unconstitutional in the *Charkaoui v. Canada (Citizenship and Immigration)* decision
- Senior CRA officials also confirmed during testimony the “voluntary deregistration” of charities and withdrawal of applications as a result of inquiries by CRA about possible terrorist connections

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5. Proceeds of Crime (Money Laundering) and Terrorist Financing Act (“PCMLTFA”)
Basic Provisions

- The PCMLTFA now includes the financing of terrorist activities
- The Act requires certain transactions to be reported to the Financial Transactions and Reports Analysis Centre of Canada (“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
- 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) and Terrorist Financing Act* is important for charities because:
 - Large cash and cross border transactions will be reported
 - Possible reporting duties for charities
 - i.e. exemption from registration under S.35 (2) 7 of the *Securities Act* (Ontario) for charities, which might be seen as authorizing charities to carry on the business of dealing in securities

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- Possible exposure of being reported by another entity
- Who the information goes to, i.e. FINTRAC, and then to RCMP, CSIS, and CRA
- What the information may be used for, i.e. revocation of charitable status or denial of registration

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The Impact of Bill C-25 on Charities

- 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*
- Bill C-25 received Royal Assent on December 14, 2006
- Bill C-25 gives significantly increased powers to government agencies to investigate charities

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- Some of the most important amendments in Bill C-25 that are applicable to charities are amendments that:
 - Bolster identification of charities and their directors, record-keeping and reporting measures applicable to financial institutions and intermediaries
 - Allow FINTRAC to disclose additional information, to both domestic and foreign law enforcement and intelligence agencies

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- Allow CRA to disclose to FINTRAC, RCMP and the Canadian Security Intelligence Service information about charities, including identifying information of the charities' directors and officers suspected of being involved in terrorist financing activities
- The amendments greatly increase the level of information sharing and collection among virtually all federal agencies that could potentially investigate or bring allegations and charges against charities and their directors and officers
- The amendments also highlight the increasing focus on, and investigation of, charities and their possible links to terrorism

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6. Summary of the Risk to Charities
Triple Threat from Anti-terrorism Legislation

- 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 Charities Registration Act

- Certification process is based on reasonable grounds to believe
- 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 under *Charities Registration Act*
- 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 Anti-terrorism Act

- Charities with political, religious and ideological purposes may be more 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

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- 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

- Charities can lose their charitable registration
- Directors could be charged with *Criminal Code* offences

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- 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
- 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

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7. Recommendations for Change

House of Commons Subcommittee Report Recommends Major Changes to Anti-terrorism Legislation

- The final report of the House of Commons Subcommittee on its review of the *Anti-terrorism Act* was published March 27, 2007
- Selected recommendations for change to CRSIA include the following:
 - Implement a “due diligence” defence for charities facing deregistration under S.4(1)(a)(b) and (c)

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- CRA should consult with charitable sector and develop “made in Canada ‘best practice’ guidelines” to assist charities in their due diligence assessments
- Institute a *mens rea* requirement into paragraphs 4(1)(b) and (c)
- Right to appeal for charities from a decision that a referred certificate is reasonable

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Report of the Air India Inquiry – Terrorist Financing

- The final report of the Air India Inquiry was released on June 17, 2010
- For more information see Anti-Terrorism and Charity Law Alert #21 at <http://www.carters.ca/pub/alert/ATCLA/ATCLA21.pdf> and Alert # 22 at <http://www.carters.ca/pub/alert/ATCLA/ATCLA22.pdf>
- Selected findings regarding anti-terror financing laws include the following:
 - Neither FINTRAC nor CRA are sufficiently incorporated into the flow of intelligence to maximize attempts at detecting terrorist financing

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- The lack of prosecutions indicates a possible lack of “significant success”
- Terrorists can use charities and NPOs as a way to finance their activities, although it is not possible to state how many registered Canadian charities have been involved in terrorist financing
- CRA has reported that a significant number of charities related to terrorism have been denied registration – these denials are based on traditional CRA powers and not new powers from the anti-terrorism legislation

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- CRA has been making use of its intermediate sanctions which include monetary penalties and suspension of registration
- Charity status is more difficult to obtain due to the new terrorist financing requirements
- Air India Inquiry recognized that
 - Measures to defeat the use of charities for terrorist financing should not unnecessarily impede the valuable activities of legitimate organizations
 - The work of honest charities should not be hindered by unrealistic guidelines or best practices and therefore any guideline or best practice guideline should be developed in close proximity with the charity sector

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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
 - 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

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Global Standards Required for Charities That Operate Internationally

•CRA “Charities in the International Context”, last updated by CRA July 16, 2010, stresses importance of taking into account “Best Practice” standards of international policy making institutions such as Financial Action Task Force (“FATF”) and key jurisdictions, such as the United States and the United Kingdom

•Financial Action Task Force on Money Laundering

- The FATF identified non-profits as an area of concern in its *Special Recommendations on Terrorist Financing*

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- The FATF then issued a report on October 11, 2002, followed by an interpretive note on the policy released on February 21, 2006, which outlines specific recommendations applicable to non-profits and regulatory authorities
- The FATF primary policy documents, *The Forty Recommendations* and *The Nine Special Recommendations on Terrorist Financing*, set the international standard for combating the financing of terrorism
- Although the FATF has no legislative authority, it is proving to have increasing influence over policy dealing with counterterrorism measures in member nations

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- United States Department of the Treasury
 - The US Treasury Department has made the oversight and regulation of charities and NGOs a particular focus of its recent anti-terrorism initiatives
 - The US Treasury Department’s “Anti-terrorist Financing Guidelines: Voluntary Best Practices for US Based Charities” (“Best Practices”), revised in 2005, has become an international benchmark for operating charities
 - These Best Practices appear to carry the force of law and failure to comply with them ensures increased scrutiny from authorities

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- In March 2007 the Best Practices were supplemented by the US Treasury Department publication “Risk Matrix for the Charitable Sector” (“Risk Matrix”), which identifies risk factors that would make full compliance with the Best Practices essential (see Appendix A)
- US Treasury Department publications, including the Best Practices and the Risk Matrix, have been subsequently mirrored in several key FATF policy documents dealing with the oversight and regulation of charities
- Important not only for charities that operate internationally, but those that transfer funds cross border, work with international partners and utilize foreign financial institutions

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CRA’s Checklist for Charities on Avoiding Terrorist Abuse

- CRA released *Checklist for Charities on Avoiding Terrorist Abuse* in April 2009 at www.cra-arc.gc.ca/tx/chrts/checklists/vtb-eng.html , see Anti-Terrorism and Charity Law Alert No. 17 at <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf> for commentary
- Checklist comprised of a list of 11 questions for charities to ask themselves regarding areas of potential risk of abuse by terrorists or other criminals
- It is a step in the right direction but lacks overall usefulness from a practical standpoint and raises some potential concerns:

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- Does not provide charities with an understanding of anti-terrorism legislation or potential penalties
- Creates an undue sense of simplicity compared to the detailed guidance of other jurisdictions
- Serves as a reference only while delegating the provision of actual guidance to other jurisdictions and quasi-governmental bodies referred to within the checklist
- Recommendations are excessive at times, i.e. recommendation to not only know the individuals using a charity’s facility but also know the topics being discussed and materials being distributed

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

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- 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

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- Evidencing due diligence in communicating on a pro-active basis with CRA when the charity may become aware of a problem
- Evidencing due diligence with the involvement of legal counsel
- Documenting due diligence through the development and careful implementation of a comprehensive anti-terrorism policy statement

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