

UPDATE ON THE ANTI-TERRORISM ACT (BILL C-36): DEVELOPING A DUE DILIGENCE RESPONSE

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A. UPDATE ON THE ANTI-TERRORISM ACT (BILL C-36)

As discussed in earlier Charity Law Bulletins, the recent passage of the Anti-terrorism Act (Bill C-36) has fundamentally changed how charities do “business”, both in Canada and throughout the world. Charity Law Bulletin No. 10 dated October 25, 2001 provided an overview of concerns to charities arising from the proposed Bill C-36. Charity Law Bulletin No. 11 dated December 13, 2001 explained the changes that were made as a result of amendments introduced on November 22, 2001.

Since October 25, 2001, Bill C-36 received its Third Reading in the House of Commons on November 28, 2001 and then Royal Assent on December 18, 2001. It is now described as the *Anti-terrorism Act* (2001, c.41). However, to be consistent with earlier Charity Law Bulletins and seminar materials on this website, the *Anti-terrorism Act* will continue to be referred to in this Charity Law Bulletin as Bill C-36.

In addition to the passage of Bill C-36, other related legislation has been introduced, including Bill C-42, “*An Act to Amend Certain Acts of Canada and to Enact Measures for Implementing the Biological and Toxin Weapons Convention in order to Enhance Public Safety*”, which received its First Reading in the House of Commons on November 22, 2001, as well as Bill C-35, “*An Act to Amend the Foreign Missions and International Organization Act*”, which was passed by the House of Commons on December 4th, 2001.

All of the above legislation, as well as the International Anti-terrorism conventions that Bill C-36 refers to, can be now found at our new resource website of www.antiterrorismlaw.ca, hosted by Carter & Associates. The new website will be updated periodically as new materials become available dealing with anti-terrorism legislation. This site also includes links to other anti-terrorism legislation in other jurisdictions, including the United States and England.

B. DEVELOPING A DUE DILIGENCE RESPONSE TO BILL C-36

1. Introduction

Now that Bill C-36 has become law, the focus for charities in Canada will now become complying with the various and complex provisions of Bill C-36. Although due diligence measures do not constitute a defence to violations of Bill C-36, it is nevertheless important that charities develop a pro-active due diligence approach towards Bill C-36 to ensure that the charity complies, as much as possible, with the provisions

that are applicable to charities. In this regard, it will become important for charities to consider adopting an Anti-terrorism Policy Statement based upon a pro-active due diligence approach.

In this regard, the following outline has been prepared to summarize key considerations that should be taken into account by charities in adopting a due diligence approach towards compliance with Bill C-36, as well as developing and implementing an Anti-terrorism Policy Statement. It is important, however, that readers understand that what follows is only a general overview and must be customized for each individual charity to properly reflect the specific circumstances of its operations. Further, please note that not all of the considerations that are listed below will be appropriate to every charity or in every situation. In addition, a charity should obtain input and advice of legal counsel before adopting and implementing an Anti-terrorism Policy Statement.

2. Developing a Response

a) The Need For Due Diligence

- Charities will need to exercise due diligence to determine if there is compliance and/or risk with Bill C-36.
- Due diligence is not a defence for either Criminal Code offences or Part 6 certificates revoking charitable status.
- Due diligence, though, can be effective in avoiding possible violations of Bill C-36 before they occur and evidencing thoroughness in operations in order to counter allegations of facilitating terrorist activity.
- Undertaking due diligence is mandatory in accordance with the common law fiduciary obligations of directors to protect charitable property.

b) Due Diligence Through Education

- All aspects of due diligence should be reflected in an Anti-terrorism Policy Statement for the charity.
- Charities need to develop access to general resource materials on Bill C-36 and other anti-terrorism legislation.
- Charities need to compare and coordinate educational materials with other charities, either directly or indirectly, through umbrella associations.
- Charities need to provide educational materials and presentations to board members, staff, volunteers, donors and agents of the charity.

c) Due Diligence at the Board Level

- CCRA may conduct CSIS security checks of board members for new and existing charities.
- Potential board members should be advised that a CSIS security check may be carried out on them.
- Potential board members should be required to complete Disclosure Statements to determine compliance with Bill C-36.
- Consents from potential directors should be obtained to share the results of the Disclosure Statements with board members and with executive staff, as well as nominating committee members, if applicable.
- Consent to be a director should include an undertaking to immediately report any material change in the Disclosure Statements.
- Directors should be required to complete yearly Disclosure Statements to confirm compliance with Bill C-36.

d) Due Diligence at Staff and Volunteer Level

- Potential key staff persons should be advised that a CSIS security check may be carried out on them.
- Potential staff and volunteers should be required to complete Disclosure Statements to determine compliance with Bill C-36.
- Consents should be obtained from staff and volunteers to allow the charity to share the results of the Disclosure Statements with other executive staff and board members.
- Consents from staff and volunteers should include an undertaking to immediately report any material change in the Disclosure Statements.
- Staff and key volunteers should be requested to complete yearly Disclosure Statements to confirm compliance with Bill C-36.

e) Due Diligence Checklist of Charitable Programs

- A due diligence compliance checklist should be developed to determine whether charitable programs comply with Bill C-36 and the level of risk that might be encountered.

- A due diligence compliance checklist should incorporate all aspects of the anti-terrorism policy that apply to a charitable program.
- Each existing and proposed charitable program should be evaluated in accordance with the due diligence compliance checklist.
- The results of the due diligence compliance checklist should be communicated to the board of directors.
- A due diligence compliance checklist of all charitable programs should be completed on a regular basis, i.e. once a year.

f) Due Diligence With Umbrella Associations

- Umbrella associations to which a charity belongs can expose the charity, the umbrella association, and other members of the umbrella association to the risk of being part of a “terrorist group”.
- Members of an umbrella association should be required to complete Disclosure Statements to determine compliance with Bill C-36.
- Consents should be obtained from members to share the results of the Disclosure Statements with the directors of the umbrella association, as well as with its members.
- Consents from members should include an undertaking to immediately report any material change in the Disclosure Statements.
- Members of the umbrella association should be required to complete yearly Disclosure Statements to confirm compliance with Bill C-36.
- Members of the umbrella association should be required to adopt their own Anti-terrorism Policy Statements.

g) Due Diligence Concerning “Affiliated Charities”

- “Affiliated charities” means for the purposes of this discussion, other registered charities which the charity works in conjunction with, either through informal cooperation or by formal joint venture or partnership agreements.

- Affiliated charities that either receive funds from the charity or give funds to the charity can create risks to the charity if they are not complying with Bill C-36.
- Affiliated charities should be required to complete Disclosure Statements to confirm compliance with Bill C-36.
- Affiliated charities should undertake to immediately report any material change in the Disclosure Statements.
- Affiliated charities should be required to complete yearly Disclosure Statements to confirm compliance with Bill C-36.
- Affiliated charities should be required to provide releases and indemnities to the charity in the event of non-compliance with Bill C-36.
- Affiliated charities should be required to adopt their own Anti-terrorism Policy Statements.

h) Due Diligence With Regards to Third Party Agents

- All third party agents of a charity can expose a charity to liability by directly or indirectly being involved in the facilitation of a “terrorist activity”.
- Agents that act on behalf of a third party agent for a charity may also expose the charity to liability.
- All direct and indirect third party agents should be required to complete Disclosure Statements to determine compliance with Bill C-36.
- Agents should undertake to immediately report any material change in the Disclosure Statements.
- Agents should be required to complete yearly Disclosure Statements to confirm compliance with Bill C-36.
- Agents should be required to provide releases and indemnities to the charity in the event of non-compliance with Bill C-36.
- Agents should be required to adopt their own Anti-terrorism Policy Statements.

i) Due Diligence Concerning Donors

- Need to regularly review list of donors of a charity to check for “listed entities” or organizations that may be terrorist groups.

- Are restrictions imposed by donors on the use of funds that could lead to violations of Bill C-36?
- Is a donor able to use a program of a charity to permit the flow through of funds directly or indirectly to a terrorist activity?

j) Documenting Due Diligence through Anti-terrorism Policy Statements

- Anti-terrorism Policy Statements should be adopted by charities to document all aspects of due diligence on Bill C-36, including all applicable documents, such as statements of disclosure and checklists.
- The board of directors should appoint a committee and a key staff person to develop, implement and review the charity's Anti-terrorism Policy Statement.
- The Anti-terrorism Policy Statement should set out reporting requirements in the event that there is an actual or potential violation of Bill C-36.
- The Anti-terrorism Policy Statement may be published on the charity's website, with excerpts possibly being reproduced in reports and brochures of the charity, as well as communications to donors.

k) Evidencing Due Diligence With CCRA

- A charity should download as much evidence of due diligence compliance to CCRA as possible.
- A copy of the charity's Anti-terrorism Policy Statement should be forwarded to CCRA with a request that CCRA advise of any deficiencies in the policy statement.
- If a new program of a charity may result in possible non-compliance with Bill C-36, then a letter requesting approval in advance of the program should be sought from CCRA.
- Copies of all agency agreements should be filed with CCRA with a request that CCRA approve the agreements, specifically as they relate to compliance with Bill C-36.

l) Evidencing Due Diligence With Legal Counsel

- Involvement of legal counsel can provide tangible evidence of due diligence, as well as assisting to insulate the charity and its board of directors from liability.

- Legal counsel can be utilized to review, comment and amend:
 - Anti-terrorism Policy Statements;
 - Disclosure Statements;
 - Compliance Checklist; and
 - The particulars of a charitable program.
- Legal counsel can also assist in communicating with CCRA in evidencing due diligence compliance.

C. CONCLUSION

Each charity will need to determine if an Anti-terrorism Policy Statement is necessary. In the event that one is required, the more thorough the Anti-terrorism Policy Statement is, then the more evidence there will be that due diligence has addressed by the charity. This, in turn, may result in increased opportunities to avoid liability exposure from violations of Bill C-36 for both the charity and its board of directors. In this regard, the suggested considerations set out above may prove to be of assistance in developing an Anti-terrorism Policy Statement.

DISCLAIMER:

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