

---

**OSGOODE HALL LAW SCHOOL**  
**CLE Program**  
Legal Risk Management for  
Charities and Not-For-Profit Organizations

**Toronto – October 6, 2011**

---

**Charities and the Anti-terrorism Financing/  
Money Laundering Regime**

---

**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent**

[tcarter@carters.ca](mailto:tcarter@carters.ca)  
1-877-942-0001


© 2011 Carters Professional Corporation

**CARTERS**

**Carters Professional Corporation / Société professionnelle Carters**  
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce  
[www.carters.ca](http://www.carters.ca)   [www.charitylaw.ca](http://www.charitylaw.ca)   [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

Ottawa · Toronto  
Mississauga · Orangeville  
Toll Free: 1-877-942-0001

---

|  |   |
|--|---|
|   | <p>OSGOODE HALL LAW SCHOOL<br/>CLE Program<br/>Legal Risk Management for<br/>Charities and Not-for-profit Organizations<br/>Toronto – October 6, 2011</p> |
| <p><b>Charities and the Anti-terrorism Financing/ Money Laundering Regime</b></p> <p>By Terrance S. Carter, B.A. LL.B., TEP, Trade-mark Agent<br/>tcarter@carters.ca<br/>1-877-942-0001</p> <p>© 2011 Carters Professional Corporation</p> |   |
| <p>CARTERS PROFESSIONAL CORPORATION<br/>TOLL FREE: 1-877-942-0001</p>  | <p>Ottawa Toronto Mississauga Orangeville<br/>www.carters.ca www.charitylaw.ca www.anti-terrorismlaw.ca</p>   |

---

---

---

---

---

---

---

---

|   |  |
|---|--|
| 2   |  |
| <p><b>Overview of Topics</b></p> <ul style="list-style-type: none"><li>• Background and Overview</li><li>• <i>Criminal Code</i> Definitions</li><li>• Specific <i>Criminal Code</i> Offences &amp; Consequences</li><li>• The Charities Registration (Security Information) Act</li><li>• Proceeds of Crime and Terrorist Financing</li><li>• Summary of the Risk to Charities</li><li>• Proposed Victim Legislation in Canada</li><li>• Developing a Due Diligence Response</li></ul> <p>For more details, see articles "<i>The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for Balance</i>", "<i>The What, Where and When of Canadian Anti-Terrorism Legislation for Charities in the International Context</i>" and Anti-terrorism &amp; Charity Law Alerts at <a href="http://www.anti-terrorismlaw.ca">www.anti-terrorismlaw.ca</a> and <a href="http://www.charitylaw.ca">www.charitylaw.ca</a></p> <p><a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a></p> |  |

---

---

---

---

---

---

---

---

|  |  |
|--|--|
| 3  |  |
| <p><b>1. Background and Overview</b></p> <ul style="list-style-type: none"><li>• <i>Anti-terrorism Act</i> (Bill C-36) is a very complicated piece of legislation that coordinates the provisions of many federal acts and must be read in conjunction with:<ul style="list-style-type: none"><li>– <i>Foreign Missions Act</i> (Bill C-35)</li><li>– <i>Public Safety Act</i> (Bill C-7) and Regulations</li><li>– <i>Proceeds of Crime Act</i> (Bill C-25)</li></ul></li><li>• These 4 Acts are collectively referred to as Canada's anti-terrorism legislation</li><li>• The full impact of anti-terrorism legislation is only now beginning to be felt</li></ul> <p><a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a></p> |  |

---

---

---

---

---

---

---

---

4

- Charities need to become proactive in understanding the law and its impact on their operations as there are numerous and stringent consequences to the charity, and to its directors and officers personally
- Anti-terrorism Legislation impacts charities from three technical perspectives:
  - “Super *Criminal Code*” terrorist offences under the *Anti-terrorism Act*
  - New certificate process for the de-registration 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”)

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

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(1))
- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

6

- 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
- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

7

- Definitions also include actions taken against "internationally protected person"
  - *Foreign Missions 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
  - 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

8

*"Terrorist Group" Definition*

- "Terrorist group" is very broadly defined (S.83.01(1)):
  - An entity that has as one of its purposes or activities facilitating or carrying out of any terrorist activity; or
    - An "entity" includes trusts, unincorporated associations and organizations, and an association of such entities
  - A "listed entity"
    - (S.83.05) An entity that the government has reasonable grounds to believe:
      - 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

9

*"Facilitating a Terrorist Activity" 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 II.1 of the *Criminal Code* on Terrorism
- To "facilitate" a terrorist activity is for practical purposes devoid of a "*mens rea*" or guilty mind element

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

10

- 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
- Under the *Anti-terrorism Act*, unintentional actions of a charity may therefore result in a charity unwittingly committing an offence under the *Criminal Code*
- In addition, *mens rea* is no longer a necessity

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

11

*R. v. Khawaja and R. v. Thambathurai*

- The *Khawaja* case called into question the constitutionality of the “motive clause” in the definition of “terrorist activity” in s.83.19 of the *Anti-terrorism Act*
  - The court of appeal upheld the definition and found that *mens rea* is required notwithstanding that the provision does not make this a requisite element
  - Leave to appeal to SCC granted, tentatively scheduled to be heard April 2012
- The *Thambathurai* case was regarding s. 83.03(b) which deals with financing of terrorism
  - Mr. Thambathurai plead guilty to the charge of providing financial services knowing that they would benefit a “listed entity”
  - He was sentenced to 6 months in jail
  - Crown appeal of the sentence was dismissed

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

12

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

- (S.83.02) Directly or indirectly providing or collecting property that is intended or known to be used in whole or part in terrorist activity
- (S.83.03) Directly or indirectly providing or inviting the provision of property, financial or other related services 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, facilitating transactions or financial or related services for the benefit or at direction of a terrorist group

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

13

- (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, or enhancing the ability 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

14

*Impact of Criminal Code Offences on Charities*

- FACT SITUATION #1 – A charity, through a fundraiser in Canada, requests the provision of medical supplies to fund a 3<sup>rd</sup> party in the Middle East and gives instructions to the 3<sup>rd</sup> party 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 program to conduct aerial drops of food or medicine packages in Pakistan where members of the Taliban might receive some of the packages
- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

15

- FACT SITUATION #4 – 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 and its directors and officers being exposed to personal liability and even criminal prosecution

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

16

**4. 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

17

- Directors and officers 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"

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

18

- A further concern for charities is the latent potential that they could conceivably be included as a "listed entity" under s. 83.05 of the *Criminal Code* (referred to above)
  - The procedure for being placed on or removed from the list is set out in sections 83.05-83.07 of the *Anti-terrorism Act*
  - The onus is on an organization to review the list both to determine if they are on it and if an organization that they deal with is on it
  - The list was last updated August 24, 2011 and includes 44 organizations

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

19

**5. De-registration Under 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* (ss.4(1))

- Minister of Public Safety and Emergency Preparedness and Minister of National Revenue may sign a certificate that it is their opinion, based on information, that there are reasonable grounds to believe that a registered charity or an applicant:

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

20

- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

21

*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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---



22

*Referral to Federal Court Judge (s.5)*

- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

23

*Evidence to Be Examined in Private by Federal Court Judge (s.6)*

- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

24

*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 (s.13), but may be cancelled earlier upon an application based upon a material change of circumstances

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

25

*"Under the Shadow of the Certificate Process"*

- During testimony before Parliament committees reviewing 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 2007 case of *Charkaoui v. Canada (Citizenship and Immigration)* decision
- Senior CRA officials also confirmed during testimony the "voluntary de-registration" of charities and withdrawal of applications as a result of inquiries by CRA about possible terrorist connections

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

26

**6. 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

27

- 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
  - Large transactions and cross border
    - All cash transactions over \$10,000
    - Import or export of cash or other monetary instruments over \$10,000

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

---

28

- This is important for charities because:
  - Large cash and cross border transactions will be reported
  - Possible reporting duties for charities
  - 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

29

*The Impact of Proceeds of Crime Act 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*
- Received Royal Assent on December 14, 2006 and was partially in force in 2007 with remaining provisions in force in 2008
- Gives significantly increased powers to government agencies to investigate charities
- Some of the most important amendments 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

30

- Allow FINTRAC to disclose additional information to domestic and foreign law enforcement and intelligence agencies
- Allow CRA to disclose to FINTRAC, RCMP and CSIS information about charities, including identifying information about directors and officers suspected of being involved in terrorist financing activities
- 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
- Amendments also highlight the increasing focus on, and investigation of, charities and possible links to terrorism

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

31

**7. 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 CRSIA*

- Certification process is based on reasonable grounds to believe
- Limited access to information
- Normal rules of evidence do not apply

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

32

*Limited Defence*

- No due diligence defence available for charities for either *Criminal Code* offences or loss of charitable status under *CRSIA*
- 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

*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", and thus such charities may be scrutinized more than other

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

33

*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
- Exposure of the charity and its board to third party liability on behalf of victims of 9/11 type "terrorist attacks"
- A charity must now look not only at the donor and their funds, but also the means by which the donor raised its funds

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

34

*Serious Penalties and Liability to Charities*

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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

35

**8. Recommendations for Change**

- The final report of the House of Commons Subcommittee on its review of the *Anti-terrorism Act* was published March 27, 2007 and recommendations for change to CRSIA included the following:
  - Implement a “due diligence” defence for charities facing de-registration under S.4(1)(a)(b) and (c)
  - 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 para 4(1)(b) and (c)
  - Right to appeal for charities from a decision that a referred certificate is reasonable

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

36

**9. 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>
- Volume 5 of the Report deals specifically with terrorist financing and Chapter VI deals with links to the charitable sector

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

37

- The 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
  - There is a danger of utilizing broad terminology adopted by the *Criminal Code* as it has the potential of defining innocent charitable activities as terrorism or facilitating terrorist activity
  - This has an overreaching effect

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

38

**10. Proposed Victim Legislation in Canada**

- Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act etc.*, which is referred to as the Safe Streets and Communities Act, was introduced September 20, 2011
- There are 5 parts to Bill C-10, and of particular interest is Part I which includes reforms to deter terrorism by amending the *State Immunity Act*
- The stated purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters
- Ss. 4(1) allows any person that has suffered loss or damage in or outside Canada on or after January 1, 1985, as a result of an act or omission that is punishable under the *Anti-terrorism Act*, to bring an action to recover losses or damages

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

39

**11. Effects Felt Around the World**

- In reality, it's not just Canadian charities that feel the effects of anti-terrorism legislation; a ripple effect is felt around the world
- Some examples of the far-reaching effects include:
  - The Center for Human Rights and Global Justice published a report on the effects of U.S. counter-terrorism policies on women and sexual minorities around the world
    - Found that anti-terrorist finance laws prevent resources from reaching the intended recipients; immigration bars are re-victimizing victims; and securing the government's relationship with Muslim communities is making women in these communities unsafe

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

40

- Recent U.S. legislative developments extended the controversial provisions of the Patriot Act dealing with wiretaps, business records searches, and surveillance of "lone wolves," without an equivalent introduction of any civil liberty protections
  - U.S. anti-terror laws can extend their application to non-U.S. residents and events by very tenuous threads including travel by individuals to or through the U.S.

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

41

- Recent U.S. Supreme Court decision on *Holder* focused on the constitutionality of a U.S. Code which makes it a federal crime to knowingly provide material support/resources to a foreign terrorist organization
  - The court found that the mental state required for a violation is knowledge about the organization's connection to terrorism, not specifically intent to further the organization's terrorist activities

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

42

- For international relief organizations, compliance with counter-terrorism laws could mean having to breach neutrality standards which may constitute a violation of the *Universal Declaration of Human Rights*, which guarantees non-discrimination in the delivery of services and benefits
  - Any measures taken by nations to prevent and combat terrorism must fully comply with human rights and international humanitarian law, which includes the obligation to facilitate humanitarian assistance to vulnerable populations

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

43

**12. 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
- However, it can be effective in avoiding possible violations of the *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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

44

*Global Standards Required for Charities That Operate Internationally*

- CRA's policy on *Charities in the International Context* stresses the importance of taking into account "Best Practice" standards of international policy making institutions such as the Financial Action Task Force ("FATF") and key jurisdictions, such as the United States and the United Kingdom
  - The FATF identified non-profits as an area of concern in its *Special Recommendations on Terrorist Financing*

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

45

- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---



46

- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

47

- In March 2007, the Best Practices were supplemented by the publication "Risk Matrix for the Charitable Sector" ("Risk Matrix"), which identifies risk factors that would make full compliance with the Best Practices essential
- 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

48

*CRA's Checklist for Charities on Avoiding Terrorist Abuse*

- CRA released a *Checklist for Charities on Avoiding Terrorist Abuse* in April 2009 (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/vtb-eng.html>), see also Anti-Terrorism and Charity Law Alert #17 at <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf> )
- 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:

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

49

- It does not provide charities with an understanding of anti-terrorism legislation nor potential penalties;
- It creates an undue sense of simplicity compared to the detailed guidance of other jurisdictions;
- It serves as a reference only while delegating the provision of actual guidance to other jurisdictions and quasi-governmental bodies referred to within the checklist; and
- Its recommendations are at times excessive; for example, the recommendation to not only know the individuals using a charity's facility but to also know the topics being discussed and materials being distributed

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

50

*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"
- Due diligence with regard to third party agents, i.e. foreign financial institutions and recipient organizations, subcontracting organizations, etc.
- Due diligence concerning donors

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

51

- 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
- Evidencing due diligence in communicating on a proactive 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

www.carters.ca www.charitylaw.ca

---

---

---

---

---

---

---

---

|  |  |
|--|--|
| <b>CARTERS</b><br>BARRISTERS<br>SOLICITORS<br>TRADEMARK AGENTS   | <b>Disclaimer</b>  |
| <p>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 the 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.</p> <p>© 2011 Carters Professional Corporation</p> |  |
| CARTERS PROFESSIONAL CORPORATION<br>TOLL FREE: 1-877-942-0001  | Ottawa Toronto Mississauga Orangeville<br><a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a> |

---

---

---

---

---

---

---

---