

**CARTERS**

BARRISTERS  
SOLICITORS  
TRADEMARK AGENTS

**CAGP 28<sup>TH</sup> NATIONAL  
CONFERENCE  
June 14, 2022**

**FOREIGN / NON-RESIDENT  
DONORS**

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### CAGP's 28th National Conference on Strategic Philanthropy Halifax – June 14, 2022



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### OVERVIEW



Issuing donation  
tax receipts



T3010 reporting



Donors'  
restrictions

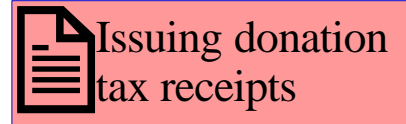


Crowdfunding



Know your  
donors

## A. DONATION RECEIPTS



- Donation tax receipts issued by Canadian charities to foreign donors may not be useful to them for income tax purposes
- Need to review application of tax relief tax treaties to cross border gifts and other applicable rules
- For example - *Canada-United States Income Tax Convention*
  - General restriction on deductibility - Charitable contributions by U.S. donors to organizations not created or organized in the U.S., a state or territory, the District of Columbia, or a possession of the U.S. do not provide donors with the benefit of tax deductibility
  - Some relief - Article XXI(5) of the Canada-U.S. Treaty
    - 1) Gifts to some Canadian colleges and universities
    - 2) Gifts to some Canadian charities
    - 3) Bequests to Canadian charities

(1) Gifts to Some Canadian Universities	<p>U.S. donors may make contributions to Canadian colleges or universities at which the donors, or the donor's family members, are or were enrolled</p> <p>Contributions will not be restricted to the donors' Canadian-source income, but usual U.S. donation limits still apply</p> <p>Include donations made by students, alumni and their family members, and "family" is defined in the treaty</p>
(2) Gifts to Some Canadian Charities	<p>U.S. donors who make charitable contributions to Canadian charities may claim charitable deductions with respect to the donors' Canadian-source income</p> <p>The Canadian charity must be a resident in Canada and is generally exempt from Canadian tax that could qualify in the U.S., to receive deductible contributions if it were a resident in the U.S. - complicated rules how this applies</p>
(3) Bequests to Canadian Charities	<p>U.S. imposes an estate tax on death, while Canada applies an income tax on capital gains deemed realized at death rather than an estate tax</p> <p>Article XXIX B of the Treaty is intended to coordinate the operation of the death tax regimes of the U.S. and Canada – technical rules</p>

- Possible for Canadian charities to have “friends of” organizations in the U.S. to receive gifts from U.S. donors
  - “Friends of” of organizations are separate public charities in the U.S.
  - Cannot be mere conduit, it must exercise control over its assets and gifts made to it
  - Needs to be properly structured – for example
    - Carefully structure the governance of the U.S. entity
    - Consider ways to align vision and mission of the two entities, *e.g.*, enter into an association agreement
    - Proper intellectual licensing of brand
    - Work with competent U.S. legal counsel

## B. T3010 REPORTING



### T3010 reporting

- T3010 requires reporting of foreign donors who donated over \$10,000 in line 3900 and Part 2 of Schedule 4, regardless of whether donation receipts were issued

(1)

### C10, Line 3900

- Answer “yes” -- if the charity received donations or gifts of any kind valued at \$10,000 or more from a donor, individual or otherwise, that was not resident in Canada and was not any of the following
  - a Canadian citizen, employed in Canada
  - a person carrying on business in Canada
  - a person that disposed of taxable Canadian property
- Also answer “yes” -- if the charity received multiple donations or gifts from the same donor in a fiscal period, and the cumulative value of these gifts is \$10,000 or more
- If answer yes, then complete Part 2 of Schedule 4

(2)

## Part 2 of Schedule 4

- For each foreign donor reported in line 3900, needs to report
  - Name of donor
  - Amount of the gifts received in the year
  - Whether the donor is an individual, organization, or government body
- Information reported in Schedule 4
  - Is not public information
  - But is for the CRA's use and may be shared as permitted by law (for example, with certain other government departments and agencies)

## C. COMPLY WITH DONORS' RESTRICTIONS

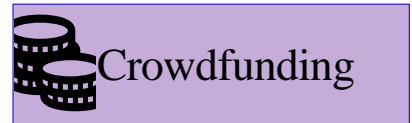


- If donors impose terms of the gift, need to ensure restrictions imposed by donors are complied with
  - Directors of charities have a fiduciary duty under common law to comply with limitations, conditions, terms of reference, directions or other restrictions imposed by donors
  - Failure to meet this duty may expose directors to personal liability for any loss or damages as a result of their breach of this duty
- Once a gift has been identified as a donor restricted charitable gift, it needs to be properly tracked and treated as a special purpose charitable trust – for example
  - Accurately track donor restricted funds in financial statements and financial records
  - Establish guidelines in identifying terms, restrictions, or conditions that apply to these gifts

- Review terms of the donor restrictions to determine
  - Whether the restrictions are charitable
  - Whether the restrictions are within the charitable purposes of the charity
  - Whether the restrictions are both possible and practicable
  - Whether the restrictions are acceptable to the charity
- If the restrictions are either impossible or impractical, then the charity may consider applying to the court for a *cy-près* court order to vary the terms of the donor restricted fund as near as possible to the original restrictions imposed by the donor
- Challenging when raised funds through crowdfunding (see section of presentation on crowdfunding)

## D. CROWDFUNDING

- Interesting issues re foreign donors who donated through crowdfunding
- Various crowdfunding platforms, e.g., [www.gofundme.com](http://www.gofundme.com); [www.globalgiving.org](http://www.globalgiving.org); [www.kickstarter.com](http://www.kickstarter.com); [www.launchgood.com](http://www.launchgood.com)
- Crowdfunding involves donation-based fundraising by appealing to a “crowd” (broad group or network of small donors) over a limited period of time (typically less than 50 days) and it may or may not involve service fees
- Crowdfunding campaigns may be supporter-driven or organization-driven
- Crowdfunding platforms establish their own terms of service governing the use and storage of personal information, the use of intellectual property, liability for representations made, jurisdiction, the withdrawal of funds from an account, and the payment of a flat percentage of each donation and other service fees



- Need to identify foreign donors, and presumably need to report those who donated over \$10,000 threshold in T3010
- Many other issues with crowdfunding, for example
  - Does the charity have control? - Organization-driven crowdfunding gives the charity greater control over the messages posted on its behalf
  - Are there restrictions on the use of the funds raised? - Identify and comply with donor expectations and/or restrictions – depends on the terms on the crowdfunding page what the funds raised are to be used for
  - Should donation receipts be issued?
  - Are they charitable funds?
  - Crowdfunding models that include donations via cryptocurrencies, or possibly even a “charitable cryptocurrency” offering raise other complicated legal issues, including the use of “smart contracts”

- Reporting to FINTRAC
  - Federal government extends Canada’s anti-money laundering and anti-terrorist financing (AML/ATF) legislative framework to crowdfunding platforms and certain payment service providers
  - Regulations were published in the Canada Gazette on April 27, 2022, but came into force on April 5, 2022
  - Charities and not-for-profits that receive donations from or otherwise engage with Emerging Funding and Payment Services would be required to record personal identifying information about the sender and recipient, and intended purposes of the crowdfunded donations, and transmit to FINTRAC, if it meets certain monetary thresholds - as if the donation was raised through the traditional banking system
  - Personal identifying information provided to FINTRAC may be shared with different agencies within the federal government, including CRA, along with other nations and their law enforcement agencies

## E. KNOW YOUR DONOR

### Know your donors

- Charities need to know who their donors are and who donated funds to the charity
- One of the key reasons to do this is to ensure the charity is not being used for money laundering, terrorism, or other illegal activities
- This is what CRA refers to as “know your donors” in their publications
- This is done by the charity finding out information about the donors and doing the usual due diligence searches on the donors
- This issue is especially relevant regarding foreign donors

## 1. Anti-terrorism Legislation

- *Anti-terrorism Act* is a complicated piece of legislation that coordinates the provisions of many federal acts (and regulations) and must be read in conjunction with:
  - *Criminal Code, Foreign Missions and International Organizations Act, Public Safety Act, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, Charities Registration (Security Information) Act, Justice for Victims of Terrorism Act, Anti-terrorism Act, 2015 (Previously Bill C-51) and Income Tax Act*
- These Acts are collectively referred to as Canada’s “Anti-terrorism Legislation”



- Anti-terrorism Legislation impacts charities from four technical perspectives:
  - Criminal law offences – “Super *Criminal Code*” offences under the *Anti-terrorism Act* (and Bill C-51)
  - Regulatory de-registration - A yet untested certificate process for the de-registration of charities under the *Charities Registration (Security Information) Act* (“CRSIA”)
  - Financial Scrutiny - Money laundering legislation extended to include terrorist financing under *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“PCMLTFA”)
  - Civil Liability – Creating a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters under the *Justice for Victims of Terrorism Act* (“JVTA”)
- See Chapter 20 “Anti-Terrorism and Money Laundering Issues for Charities” *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters  
<https://store.thomsonreuters.ca/en-ca/products/corporate-and-practice-manual-for-charities-and-not-for-profit-corporations-30842800>

## 2. Developing a Due Diligence Response to Anti-terrorism Act

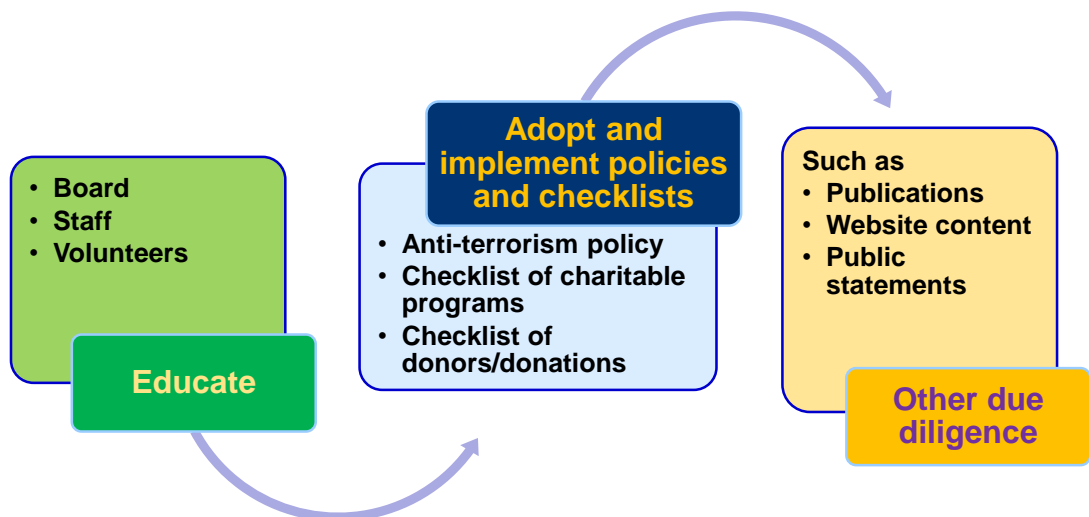
### (a) Need for due diligence

- 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

## (b) 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 Carters' Anti-Terrorism and Charity Law Alert #17 for commentary at <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>
- see also Carters' submission to Standing Finance Committee [http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD7864617/412\\_FINA\\_TFCA\\_Briefs%5CCartersProfessionalCorporation-e.pdf](http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD7864617/412_FINA_TFCA_Briefs%5CCartersProfessionalCorporation-e.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

## (c) Due diligence includes



## Donors and Donations Review

- Review all donors and donations to determine whether they are compromised by any connection or appearance of connection with terrorist activity, terrorist groups; or facilitating terrorist activity or terrorist groups; or whether they may be otherwise in violation of the Anti-Terrorism Legislation, including the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
- Set a threshold donations amount as part of the review process
  - Do initial review of a reasonable sampling of all new or proposed donors or donations below the threshold
  - Do review of all new and proposed donors or donations above the threshold

- Develop donors and donation review checklist
- Review the following to identify whether these are suspicious or of concern for any other reason under Anti-Terrorism Legislation in force at the time
  - Donor
  - Donor's possible motives
  - Nature of the transactions
- Keep permanent written record of each review

## Topics to include in review checklist

### Background of donor

- How was the donor brought into contact with the charity?
- Does the donor have a pre-existing relationship with the charity?
- Are there any concerns about the relationship between the donor and the charity?

### Evaluate the donor

- Is the donor listed among the Listed Entities, the U.N. List or the Terrorist Exclusion List?
- Do the donor's stated goals support or facilitate terrorist activities or terrorist groups?

### Origin of Funds

- Is there any reason to believe that the donor may have obtained the funds through an illegal activity?
- Is there any reason to believe that the donor may be directly or indirectly intending to support or facilitate terrorist activities or terrorist groups through a donation?

### Donor Restrictions

- Has the donor set restrictions on the donation?
- Is the donation restricted for use in a country where terrorist activities or support for terrorist activities is a particular concern?
- Could the restrictions operate as a conduit for monies to terrorist groups or for terrorist activities?
- Could the restrictions result in the monies financing or facilitating terrorist activities or terrorist groups?

## Make an assessment

- Level of any risk
- Nature of the risk
- Whether the risk can be minimized or eliminated
  - If the risk cannot be eliminated, has legal advice been sought and obtained?
- Impact of risk on the charity, its members and directors, and its charitable purposes
- Charity's willingness to accept this level of risk and its possible consequences

## If Review assessment determined donor/donation is linked to terrorism concerns

- If donor or donation is compromised by real or possible links to terrorist activities or terrorist groups
  - Do not accept the donation, or any further donations, from the donor
  - Return the donation to the donor along with a brief explanation that charity is unable to accept the gift
  - Keep a copy of the documentation

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