
CAIDP & CCIC CONFERENCE

Ottawa – May 13, 2015

The Three Hot Legal Issues for Charities Operating Abroad

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


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OVERVIEW OF ISSUES

- Maintaining Direction and Control of Foreign Activities
- The Complexities of Anti-Terrorism Legislation Compliance, Including Bill C-51
- The Impact of Anti-Bribery Legislation on Charities in the International Context

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ISSUE 1 - MAINTAINING DIRECTION AND CONTROL OF FOREIGN ACTIVITIES

A. REVIEW OF BASIC CRA REQUIREMENTS IN CARRYING OUT FOREIGN ACTIVITIES

- CRA Guidance on Canadian Registered Charities Carrying Out Activities Outside of Canada, CG-002 is available at
<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>
- Although it will not be discussed in this presentation, charities also need to be aware of a related CRA Guidance, Using An Intermediary to Carry Out a Charity's Activities Within Canada CG-004
<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntmdry-eng.html?rss>

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For resource materials on CRA requirements, see the following at [carters.ca](http://www.carters.ca):

- Canadian Charities Operating Outside of Canada
http://www.carters.ca/pub/article/charity/2013/TSC_CIL_vol9_no2_Oct2013.pdf
- Charity Law Bulletin 219 (CRA's Revised Guidance)
www.carters.ca/pub/bulletin/charity/2010/chylb219.htm
- Charity Law Bulletin 259 (Working through Intermediaries) www.carters.ca/pub/bulletin/charity/2011/chylb259.htm
- Charity Law Bulletin 307 (Foreign Activities Audit)
<http://www.carters.ca/pub/bulletin/charity/2013/chylb307.pdf>
- Charity Law Bulletin 323 (Foreign Corruption Issues)
<http://www.carters.ca/pub/bulletin/charity/2013/chylb323.pdf>
- Charity Law Alert # 37 (Anti-diversion Issues)
<http://www.carters.ca/pub/alert/ATCLA/ATCLA37.pdf>

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B. ONLY TWO WAYS A CHARITY MAY USE ITS RESOURCES

- A charity can conduct its activities outside of Canada in two ways

Make gifts to QDs

• List of "Qualified Donees" under the ITA

Conduct own activities

• By its own staff and volunteers
• Through third party intermediaries

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1. Making Gifts to Qualified Donees (QDs)

- Registered charities can make gifts to qualified donees
- "Qualified donee" is defined in the ITA
- QDs in Canada
 - Registered Canadian charities
 - Registered Canadian national arts service organizations
 - Registered Canadian amateur athletic associations
 - Housing corporations resident in Canada constituted exclusively to provide low-cost housing for the aged
 - A municipality in Canada



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- A municipal or public body performing a function of government in Canada
- Her Majesty in right of Canada or a province
- QDs outside Canada
 - Prescribed universities - listed universities outside Canada with student body that ordinarily includes students from Canada
 - Listed charitable organizations outside Canada to which Her Majesty in right of Canada has made a gift in past 24 months and pursue activities related to disaster relief or urgent humanitarian aid or in the national interest of Canada (see next slide)
 - The United Nations and its agencies (e.g., UNCDF, ILO, IFC, UNICEF)

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- Budget 2015 expands the definition of foreign charitable organizations to include foreign charitable foundations by amending the definition of QD to say "foreign charity" rather than "foreign organization"
- Funds to QDs are "gifts" under the ITA
- Not a CRA requirement to have a written gift document but they can be used to document terms of the gift
 - Deed of gift - usually a short document
 - Funding agreement - usually more detailed, sets out terms or restrictions of gift, for due diligence and monitoring purposes
- Charities cannot simply give monies or other resources to another organization that is not a qualified donee

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- Budget 2012 made two changes to the T3010 with regard to political audits and QDs:
 - The first change was the amendment to the definition of "political activity" under s. 149.1(1) of the Income Tax Act ("ITA"), which now includes "the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee"
 - The second change was the requirement that charities disclose more information concerning their political activities, including transfers to QDs and foreign funding
- Therefore gifts to QD's should include confirmation that they will not be used to support political activities


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2. Conducting Own Activities

a) General CRA requirements

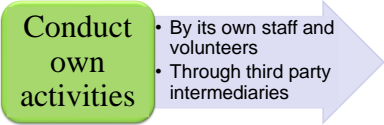
- Activities must be directly under the charity's direction, control and supervision and for which it can account for any funds expended = "own activities" test



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- CRA recognizes two ways to meet this test
 - A charity sending its own staff and volunteers on the ground to conduct the activities
 - Through third parties - "intermediaries"



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- Third party intermediaries do not have to be QDs, can be non-QDs such as for-profits, non-profit organizations (NPOs), international NGOs
- Activities funded are activities of the funding charity, not activities of the third party intermediaries (to meet "own activities" test)
 - A charity cannot fund third parties to help their programs
 - A charity must give funds to third party to conduct the charity's own program on behalf of the charity - i.e., it is the charity's programs
- Guidance states that "When working through an intermediary, a charity must direct and control the use of its resources" = "direction and control" is key

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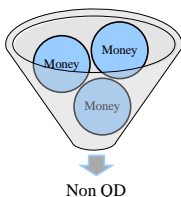
- Because of own activities test, difficult for a charity to contribute funds to be pooled with funds from other funders for a partner's program
- Before working with an intermediary and throughout the course of the arrangement, the CRA requires the charity to investigate the status and activities of the intermediary to ensure
 - The intermediary has the capacity to carry out the charity's activity (e.g., personnel, experience)
 - There is a strong expectation the intermediary will use the charity's resources as directed by the charity
- Must do appropriate due diligence of intermediary concerning anti-terrorism compliance issues

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- A charity cannot act as a "conduit" to funnel money to non QDs
 - A conduit is an organization that accepts donations for which it typically issues tax-deductible receipts and then funnels the money, without maintaining direction and control to a non-QD
 - To avoid being a conduit, the Canadian charity must have demonstrable direction and control over the use of its money



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- There are four common types of intermediaries that can be used:
 - Agency
 - Joint venture
 - Co-operative
 - Contract for Services
- CRA does not recommend using one type of intermediary over the other
- Regardless of which option is used
 - Must meet own activities test
 - Must maintain direction and control
 - Must have written agreement

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Agency

- A registered charity appoints an agent to act as its representative to carry out specific tasks on behalf of the charity

- The charity relies entirely on the agent to carry out its activities on its behalf
- Agents can be organizations or individuals and do not need to be qualified donees under the ITA or charities in their own country
- The common law principle that the acts of the agent are that of the principal does not automatically meet the own activities test unless the charity is in fact directing what the agent does
- Needs segregation of funds held by the agent

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- Liability concerns - actions of the agent are deemed to be actions of the principal, resulting in principal being vicariously responsible for the actions of the agent - can expose the charity to significant liability, both civil and criminal (e.g., anti-terrorism legislation, and child abuse)
- Insurance concerns - some insurers may be concerned about vicarious liability risks, may deny coverage, needs full disclosure to insurer
- Disbursement quota concerns - no charitable expenditure for the charity until the agent spends funds from the charity, charity has to monitor expenditure, affects timing of calculation of 3.5% disbursement quota

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Joint Venture

- A charity can carry on its activities jointly with other organizations or individuals through a joint venture relationship

- Joint venture participants pool their resources in order to accomplish their goal in accordance with the terms of a joint venture agreement
- The charity does not rely entirely on the joint venture participant to carry out activities for the charity but instead does so on a pooled basis
- A charity can work with non-QDs as long as the charity is exercising control over the activities proportionate to the resources it is providing and it can demonstrate this fact

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- Generally, a joint venture governing committee is required to establish, conduct and oversee the joint venture
- A charity must show that its share of authority and responsibility over a joint venture allows it to dictate, and account for, how its resources are used - e.g. 40% contribution of funding requires 40% of voting rights
- The charity may be out voted by the other joint venture participants and its resources used for purposes outside the agreement
- Therefore, the agreement should include a provision to allow the charity to discontinue devoting its resources to the joint venture if its resources are to be used for purposes other than those that have been previously agreed upon

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Co-operative

- A charity can work side by side with a co-operative participant to complete an activity
- The charity and the co-operative participants do not pool their resources and share responsibility for the project as a whole
- Each co-operative participant is responsible for only its own part of the project
 - e.g., a charity that provides care for the sick joins with an organization to build and operate a medical clinic in an isolated area - the charity provides qualified nursing staff at the clinic, but will not participate in other parts of the project, such as constructing the building, buying medicine, etc.

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Contract for Services

- A charity can retain an organization or individual to provide goods and/or services
- The charity must give specific instructions to its contractors
- The charity must exercise direction and control over the contractor and monitor the use of its resources
- The funds to the contractor is not a gift, donation or grant
- The contractor takes the funds to conduct activities on behalf of the charity, the activities are the charity's own activities

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- There are several advantages in using a contractor
- Limitations in liability - generally no vicarious liability, but plaintiff may argue that the charity had exercised too much control over and therefore should be vicariously liable
- Financial statements - assets transferred to the third party are not assets of the charity and do not need to be reflected in the charity's financials, may be important for presentation purposes for the charity
- Segregation of funds - generally not required
- Disbursement quota - assets transferred to contractor are considered to have been expended for the purposes of the charity's 3.5% disbursement quota
- Insurance - no prima-facie vicarious liability may make a contract of service more attractive to an insurer

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b) Capital Property in a Foreign Country

- In mid 2012, Appendix B of CRA's Foreign Activity Guidance was amended – now more challenging for a charity operating in a foreign jurisdiction to transfer ownership of capital property to a non QD
- It is now titled "What if a charity wants to transfer capital property to a non-qualified donee in a foreign country?"
- Transferring such ownership is now only permitted
 - If the foreign country prohibits foreign ownership of capital property
 - If the capital property is transferred to relieve poverty by assisting communities develop into self-sufficient communities
 - If the charity can show that it has made every reasonable effort to gift the capital to a QD and sell the capital property for FMV

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c) Direction and Control of Resources

- CRA requires registered charities to take all necessary measures to direct and control the use of its resources through an intermediary
- Although not formally required under the Guidance, CRA recommends that charities should have a written agreement in place with any intermediaries that they work with
- Exception - If the money spent on a one-time activity is \$1,000 or less
- Other forms of communication may be used to show direction and control, but a written agreement provides the best evidence

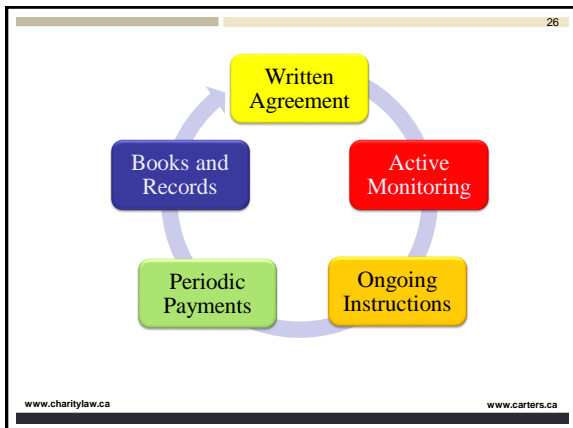
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- CRA recommends exercising direction and control by the following measures
 - Having and implementing a written agreement
 - Monitoring activities
 - Giving ongoing clear, complete, and detailed instructions to the intermediary
 - Making periodic transfers based on performance
 - Maintaining a record of steps taken to direct and control the use of its resources, as well as detailed books and records (in French or English)
- CRA does not provide black and white threshold or form to complete to evidence sufficient direction and control - what is sufficient depends on the facts in each case
- The larger the amount of funding, CRA would likely expect higher level of due diligence

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- Written agreement
 - Having a written agreement and implementing its terms is key
 - Ensure the agreement accurately reflects the working relationship between the parties
 - Ensure the agreement is implemented
 - CRA's Guidance has requirements on what to be included in an agreement
 - Legal name and location of parties
 - Clear, complete, and detailed description of activities is communicated to the intermediary
 - Location where activities to be conducted
 - Right of the charity to inspect the activities and related books and records on reasonable notice

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- Make periodic transfers based on performance
- Give ongoing instructions
- For agency - segregate funds and maintain separate books and records
- For joint venture - mechanism to give proportionate degree of control
- Capital property (see above)
- Effective date and termination provisions
- Signature of all parties



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- Monitor and supervise the activity - i.e., receiving timely and accurate reports to make sure that its resources are being used for its own activities
 - progress reports
 - receipts for expenses and financial statements
 - informal communication via telephone or email
 - photographs
 - audit reports
 - on-site inspections by the charity's staff



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C. GETTING READY FOR A CRA AUDIT INVOLVING FOREIGN ACTIVITIES

1. Need For Pre-audit

- If a charity is engaged in activities outside of Canada using intermediaries, the question is not if you will be audited by CRA but rather when
- Therefore, for such charities, it is recommended that they carry out a "pre-audit" of their foreign activities to determine if there has been compliance with CRA requirements and whether they can evidence the same to CRA
- Purpose of a pre-audit compliance review is to:
 - Identify all foreign activities/projects of the charity (past, present and future contemplated);
 - Review whether there has been compliance with CRA requirements for each activity/project;

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- Compile all key documents for each activity/project;
- Engage in remedial steps, as necessary
- While CRA can audit any fiscal year of a charity, they generally will focus their audit some time within the last five (5) years of a charity's operations
- Therefore, these years should be the focus of a pre-audit, starting with the earliest financial year and working forward
- Such a pre-audit can be done by the charity itself, but involvement by legal counsel is recommended in order to establish solicitor-client privilege pertaining to the results of the pre-audit
 - The pre-audit should include retaining an accountant so that the work of the accountant will also be protected as privileged information between a solicitor and client

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2. Identification of Foreign Activities/Projects Engaged in by the Charity

- Need to set out parameters of the review within the last five years
- Start the process by undertaking careful review of the charity's annual general ledger for years in question
- In reviewing the general ledger, need to identify each and every transaction which involved transfer of charitable property (cash or gifts in kind) to a non-qualified donee



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- These identified transactions should be copied and pasted into a separate excel spreadsheet (to be done by each financial year) for easier reference
- With each transaction found, then the charity needs to preliminarily identify the following:
 - Who the non-qualified donee recipient of the charity's property is;
 - Nature of the relationship with the non-qualified donee, e.g. agency, contract for services;
 - Whether the non-qualified donee recipient has utilized another organization to do the project in question, e.g. sub-agent or sub-contractor;
 - Nature of activity/project for which charitable property was used;

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- Nature of charitable property transferred; and
- What, if any, written documentation re the transfer is immediately accessible
- Was the name of the non-qualified donee listed in T3010 of the charity and was it necessary to protect the name of the intermediary
- Need to prepare a summary memo identifying the transactions of potential concern, grouping them together as necessary and preliminarily identifying issues to be reviewed further with legal counsel (and the accountant)

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3. Determination if Charity's Foreign Activities Have Been Compliant with CRA Requirements

- Once all transactions involving non-qualified donees have been identified, together with preliminary info regarding the transactions, then need to focus on gathering together all documentation showing "direction and control" by the charity over the project/activity in question
- Normally this involves the creation of project folders for each foreign activity/project undertaken by the charity



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- Once created and completed, each project folder can be numbered and then cross-referenced to the applicable transactions on the charity's general ledger
- This will facilitate easy access to the applicable project folder in the event questions arise about a particular project (or transactions on the general ledger) during a CRA audit
- In each project folder, a compliance checklist of all the steps/documentation required by CRA should be attached to the inside cover

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- Such a compliance checklist should include the following:
 - Name of contractor and project name
 - Name of sub-contractor, if applicable
 - Total funds transferred, together with interim fund transfers, if applicable
 - Required documents
 - Original project proposal
 - Board approval of project
 - Written agreement
 - Project designation(s) for contractor/agent
 - Wire transfer and/or letter
 - Any sub-agreement and designation(s), if applicable



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- Interim project reports and, if applicable, sub-project reports
- Final project reports and, if applicable, sub-project reports
- Photographs, brochures and other project evidence
- Any correspondence between the charity and contractor showing charity supervision
- On-site visit reports by charity's directors, staff and/or volunteers
- External auditor report of on-site visits
- Receipts/vouchers or explanation in lieu of receipts/vouchers
- Need to complete the checklist for each project folder and, in so doing, identify which steps have (or have not) been taken by the charity

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4. Engage in Remedial Steps, if Necessary

- Determining whether remedial steps are necessary and, if so, which ones to take, will depend on the charity's particular circumstances
- This issue should be carefully reviewed with the charity's legal counsel before remedial documents are prepared
- Possible remedial steps could include the following:
 - Preparation of confirming written agreement and/or sub-agreements by means of a memorandum of understanding
 - Needs to be dated at present but will be deemed effective as of the date in question
 - However, CRA generally is not accepting of "after the fact" documents but it can at least be a record of the bona fide intent of the parties



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- Preparation of confirming project designations and sub-project designations
- Preparation of confirming resolutions adopted by the charity's board of directors at the present time
- Preparation of any missing reports from contractors and/or subcontractors, or preparation of more fulsome reports if initial ones are unsatisfactory
- All "after the fact" confirming documentation must clearly show current date of preparation and signing when it relates back to an earlier effective date
- May want to consider the possibility of a voluntary disclosure to CRA upon advice of legal counsel

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ISSUE 2 –THE COMPLEXITIES OF ANTI-TERRORISM LEGISLATION COMPLIANCE, INCLUDING BILL C-51

A. BACKGROUND

- *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 and Income Tax Act*
- These Acts are collectively referred to as Canada's "Anti-terrorism Legislation"

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- Charities need to become proactive in understanding the law and its impact on their operations,
- Anti-terrorism Legislation impacts charities from four technical perspectives:
 - Criminal law offences – "Super *Criminal Code*" terrorist offences under the *Anti-terrorism Act*
 - 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")

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B. CRIMINAL CODE PROVISIONS UNDER ANTI-TERRORISM ACT THAT IMPACT CHARITIES


1. "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
 - 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

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- 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



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- 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

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2. "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



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3. "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

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4. Specific Criminal Code Offences That Could Impact Charities

- (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

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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, 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



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C. DE-REGISTRATION UNDER THE CHARITIES REGISTRATION (SECURITY INFORMATION) ACT ("CRSIA")

1. 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


2. 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:

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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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3. 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

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4. 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



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D. PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT ("PCMLTFA")

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

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- 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



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- 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

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E. JUSTICE FOR VICTIMS OF TERRORISM ACT (JVTA)

- Introduced in 2012 to establish a civil cause of action to allow victims of terrorism to sue perpetrators of terrorism and their supporters
- Claimant can suffer a loss or damage in or outside Canada, on or after January 1, 1985
- Loss or damage must arise out of an act or omission that is punishable under Part II.1 of the *Criminal Code*
- Can recover an amount equal to loss or damage proved to have been suffered

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- Claim can be against
 - A listed entity
 - A foreign state (whose immunity is lifted)
 - “other person”
 - that committed the act or omission or committed an act or omission for the benefit of a listed entity
- Requires a real and substantial connection to Canada or plaintiff must be a Canadian citizen or permanent resident
- Requires courts to recognize a judgment of a foreign court in favour of a person that has suffered loss or damage

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- This is important for charities because
 - Unintentional direct or indirect support of a terrorist organization could result in a claim being brought against the charitable organization in relation to terrorist acts
 - Multi-million dollar suits won in foreign jurisdictions, such as the U.S., where defendants may not have defended the claim based on the court's apparent lack of jurisdiction and/or where victims have been unsuccessful in collecting damages, can be enforced in Canada

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F. THE IMPACT OF BILL C-51 ON CHARITIES AND NOT FOR PROFITS

- Bill C-51 (passed the House of Commons), short-titled *Anti-Terrorism Act, 2015*:
 - enhances the powers given to the Canadian Security Intelligence Service (“CSIS”) “to address threats to the security of Canada”
 - provides law enforcement agencies with enhanced ability to disrupt terrorism offences and terrorist activity
 - makes it easier for law enforcement agencies to detain suspected terrorists “before they can harm Canadians”
 - creates new terrorism-related offences, including the offence of “promoting terrorism in general”
 - expands the sharing of information between government institutions

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- Bill C-51 will have an effect upon charities as follows:
 - The broad definition of an “activity that undermines the security of Canada” which includes “any activity [...] if it undermines the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada” in the *Security of Canada Information Sharing Act*;
 - The lack of details concerning how the definition and its examples will be interpreted is a cause for great concern for charities in terms of privacy as well as what will be an “activity” and what will undermine the security of another state

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- The *Secure Air Travel Act* will provide a new no-fly list that fails to contain identifying information that would assist in differentiating individuals who land on the list
- A new broad offence in the *Criminal Code* for “advocating or promoting the commission of terrorism offences **in general**”
 - Charities carrying out activities in conflict zones will need to carefully review programs, activities and partners in order to determine whether the risk to the organization and its reputation of becoming unintentionally involved in this offence exists



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G. DEVELOPING A DUE DILIGENCE RESPONSE TO ANTI-TERRORISM ACT

1. 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

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2. 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 Charity Law Alert #17 for commentary at <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>
- see also Carter's submission to Standing Finance Committee http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD7864617/412_FINA_TFCA_Briefs%5CCartersProfessionalCorp-oration-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

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- It is a step in the right direction but lacks overall usefulness from a practical standpoint and raises some potential concerns:

- 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

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3. What Does Due Diligence Include

- Education at both the board level and at the staff and volunteer level
- Anti-terrorism policy and checklist of charitable programs and ongoing risk assessments of projects
- "Getting to know"
 - umbrella associations
 - "affiliated charities"
 - third party agents, i.e. foreign financial institutions and recipient organizations, subcontracting organizations, etc.
 - donors
- Due diligence concerning publications, website, public statements, etc.

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ISSUE 3 - THE IMPACT OF ANTI-BRIBERY LEGISLATION ON CHARITIES IN THE INTERNATIONAL CONTEXT

A. BACKGROUND

- In some areas of the world, employees and agents of a charity may be put under pressure to provide "bribes" to officials to carry out their charitable programmes
- "Bribery" is generally understood to mean "offering, promising or giving someone a financial or other advantage to encourage them to perform their functions or activities improperly" (Charity Commission of England and Wales)
- Charities are prohibited from engaging in bribery, since to do so would constitute giving an unacceptable private benefit in violation of the charity's charitable purpose

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B. SOURCES OF LIABILITY

1. The Corruption of Foreign Public Officials Act

- Charities need to be aware of the possible application of Canada's *Corruption of Foreign Public Officials Act*
 - Section 3(1) of the Act prohibits bribery of foreign public officials when the bribe is intended "to obtain or retain an advantage in the course of business"
 - In Section 2, "business" is defined as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere", whether or not it is conducted for profit
 - This definition of "business", and the reference to "undertaking of any kind", could impact charities carrying on activities outside of Canada where;
 - Their foreign programs include a "related business" activity permitted under the ITA, or

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- a charitable program that involves an inherently commercial element, like microfinance, or even constructing a hospital or a school
- Section 3(4) of the Act currently permits "facilitation payments" to be undertaken "to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions..." by excluding such situations from the prohibition on bribery
 - However, the amendments introduced by Bill S-14, which received Royal Assent on June 19, 2013, will repeal this exemption on a date to be fixed by order of the Governor in Council,
 - This means that in the future charities could be exposed to potential criminal liability for activities which are currently permitted under the "facilitation payment" exemption

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- The *Corruption of Foreign Public Officials Act* section 3(2) states that every person who contravenes section 3(1) (i.e., prohibiting bribery) is "guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years"
- There is a similar indictable offence under section 4(2) of the *Corruption of Foreign Public Officials Act* for falsifying books and records for the purpose of bribing a foreign government official or for hiding such bribery in contravention of section 4(1) of the *Act*

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2. Other Canadian Criminal Provisions

- Sections 465(1) and 465(3) of Canada's *Criminal Code*:
 - Makes it illegal to conspire to commit an indictable offence and states that if an individual conspires, while in Canada, to commit an act outside of Canada that is an offence both inside Canada and where the act is to be committed, the individual will be deemed to have conspired to commit that act in Canada

3. International Criminal Provisions

- The laws of the jurisdiction in which a charity operates may also serve as a source of criminal liability for a charity's employees and agents who engage in bribery
- A Canadian charity might fall under the jurisdiction of the U.S. *Foreign Corrupt Practices Act* if it makes payments through the U.S. banking system or sells goods of U.S. origin or with U.S. content

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- It is possible that a Canadian charity that has any of these affiliations to the U.S. and is engaging in bribery could be subject to the anti-bribery provisions in the U.S. *Foreign Corrupt Practices Act*

4. Contractual Obligations


- The Department of Foreign Affairs, Trade, and Development (DFATD), generally includes anti-corruption clauses in its requests for proposals, contract documents, and loan or contribution agreements
- As a result, charities that collaborate with the DFATD on foreign activities may be contractually bound to refrain from engaging in bribery

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C. PROPOSED MEASURES IN BUDGET 2015

- Federal Budget 2015 proposes to introduce a new government-wide integrity framework for its procurement and real property transactions to ensure that the government does business with "ethical" suppliers in Canada and abroad
- This will have a broad impact on other federal legislation and agencies that deal with anti-corruption in Canada, potentially including those who deal with charities and not for profits, including the DFATD and its grants relating to international development project



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- Along with compliance with Canada's Corruption of Foreign Public Officials Act, the Budget's proposed integrity framework could very well reflect the existing "Integrity Framework for Procurement" promulgated by Public Works and Government Services Canada, which has been criticized by corporations caught by early 2014 amendments
 - The amended Integrity Framework includes the introduction of a blacklist period of 10 years following a conviction or guilty plea for bribery
- Criticisms of the existing Integrity Framework included:
 - it is too rigid and expansive;
 - the blacklist applies for too long a period;

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- there is no appeal process or carve-out for good conduct following an offence;
- companies that have been convicted in international jurisdictions are treated as if they had been convicted under Canadian law
- Charities and not for profits should take careful note of and monitor what the new government wide "integrity framework" entails as it might have implications for their operations and their ability to work with and receive funding from the federal government in the future



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D. ANTI-BRIBERY PREVENTATIVE MEASURES

- Canadian charities wanting to prevent their organization from becoming involved with bribery may wish to consult six recommended principles for preventing bribery, generated by the United Kingdom ("UK") Ministry of Justice:
 1. Proportionate procedures: Organizations should adopt bribery prevention procedures that are proportionate to the bribery risks they face and to the nature, scale and complexity of their activities
 2. Top-level commitment: Leaders of organizations should committed to preventing bribery and foster a culture in which bribery is unacceptable


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3. Risk assessment: Organizations should periodically assess and document the nature and extent of its exposure to risks of bribery
4. Due diligence: Organizations should apply due diligence procedures, using a proportionate and risk based approach, to mitigate bribery risks
5. Communication (including training): Organizations should use communication and training to ensure their bribery prevention policies and procedures are embedded and understood throughout their organization
6. Monitoring and review: Organizations should monitor and review their bribery prevention policies and make improvements as necessary

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