

Charities and Compliance with Anti-Terrorism Legislation: A Due Diligence Response

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1. Introduction

As discussed in the first part of this article, “Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law,” published in volume 19, number 1 of *The Philanthropist*, a “new day” has arrived for charities in Canada. The new reality that charities face involves understanding several aspects of Canada’s anti-terrorism legislation, including the creation of a “Super *Criminal Code*,” new reporting obligations and record keeping resulting in a “new compliance regime,” and the possibility of deregistration under the *Charities Registration (Security Information) Act*, as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41, s. 6. Charities also now face the reality that authorities worldwide identify them as potential vehicles for the facilitation, or otherwise, of terrorist acts. The Financial Action Task Force on Money Laundering (FATF), a supra-national policy-making institution, identified charities (which they refer to as nonprofit organizations) as a “crucial weak point” in the global “war on terrorism.”¹ This article discusses how charities should educate themselves about requirements of the new anti-terrorism legislation and undertake all necessary due diligence measures to ensure compliance as best they can.

2. The Need for Due Diligence

Although due diligence is not a defence for violations of the new terrorism provisions of the *Criminal Code* as amended by the *Anti-terrorism Act* or against revocation of charitable status under these new laws, it is at the very

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least prudent to evidence a reasonable effort to comply. In any event, due diligence is required in accordance with the common law fiduciary duties of directors to protect charitable property. If a charity's assets are frozen or seized, the charity's directors and officers could be exposed to civil liability for breaching their fiduciary duty to protect the organization's charitable assets. If they are found to have been negligent, this could be a very significant liability quite apart from any possible criminal sanctions. Directors and officers may be able to protect themselves against a finding of negligence by demonstrating their intent to comply through exercising due diligence.

On a more practical level, the greatest benefit of exercising due diligence may be in its preventive effect. Although it may not provide a defence after the fact, it is one measure that a charity can use in advance to protect itself from unwittingly committing a violation. Due diligence can help avoid the kind of event or association that might lead a charity to be implicated under the anti-terrorism laws. By being more knowledgeable about the charity and its operations, officers will have more power to respond appropriately.

By exercising due diligence, the charity can identify potentially problematic individuals or organizations before it is too late. Due diligence can highlight programs that need to be restructured or discontinued in order to avoid exposure. It can alert officers to questionable donors and the potential need to decline donations. While no one can guarantee that due diligence will identify all possible risks, it can help to minimize a charity's exposure by eliminating the most obvious ones.²

3. In-House Due Diligence

a) Due Diligence Through Education

First and foremost, lawyers must educate their charitable clients, especially the executive, staff and directors, about the requirements of Bills C-35, C-36, and C-7 (discussed in part one of this article) and encourage them to develop a proactive response, as well as help them to create and implement an effective anti-terrorism policy. Charities should continually educate their directors, staff, members, donors, and agents about the applicable legal requirements. They should develop access to general resource materials on anti-terrorism legislation in Canada and in all other countries in which they operate.

Charities need to compare and coordinate educational materials with other charities, either directly or indirectly, through umbrella organizations. Communicating with other organizations can help charities learn from each other's mistakes and successes as everyone struggles to understand the full implications of these legislative initiatives. As they develop a body of material on the legislation and on their unique risks, charities need to provide on-going educational materials and presentations to board members, staff, volunteers, donors, and agents of the charity to keep them up-to-date about developments in the law and the enforcement of these laws.

b) Due Diligence at the Board Level

In light of the heightened expectations on charities under the anti-terrorism legislation, it is important to choose the directors of a charity very carefully. The importance for the organization in avoiding association with a director who may have ties to terrorist organizations is obvious. It would not be unreasonable to assume that the CRA may conduct CSIS security checks of board members of both new and existing charities. The discovery of even a suggested link between a director and a terrorist group could expose the charity to de-registration. Potential board members should therefore be advised that a CSIS security check might be carried out on them.

As the charity implements its new anti-terrorism policy statement and procedures, all new and existing board members should be required to complete disclosure statements so that an assessment of compliance with anti-terrorism legislation can be made. These disclosure statements should include consents from the directors to share the results of these statements with legal counsel, board members, executive staff, and nominating committee members, if applicable. Moreover, disclosure statements should be required regularly, for example yearly, in order to enable the charity to determine on-going compliance with anti-terrorism legislation. A director's consent to be a director should include an undertaking to immediately report any material change in the director's circumstances that might affect the disclosure statements.

Once directors have passed the charity's screening procedures, they must exercise continued vigilance and due diligence in the conduct of the charity's affairs. Directors should continually educate themselves, and the members and donors of their charities, about legal developments in this area. They must also familiarize themselves with the activities of their own organization and about possible risk areas in the day-to-day work and programs of the charity itself and its affiliated organizations, donors, and agents. Directors must also continue to actively supervise the charity's staff and volunteers and to ensure that they meet the organization's policy requirements.

c) Due Diligence at the Staff and Volunteer Level

Like directors, existing and potential staff members in key positions should be advised that CSIS security checks might be carried out on them. They should be required to complete initial disclosure statements and consents and to provide an undertaking to immediately report any change in circumstance that might be relevant to their disclosure statements. Like directors, key staff members should also be required to complete these disclosures annually. Staff and volunteers, both current and prospective, should be required to complete disclosure statements and consents along with an undertaking to report any material change in circumstance that might be relevant to the disclosure statements. They should also be asked to complete yearly disclosure statements to permit an on-going review of compliance with anti-terrorist legislation.

d) *Due Diligence Checklist of Charitable Programs*

Each charity should develop a due diligence checklist in keeping with its own unique characteristics. The checklist should identify and eliminate potential risk areas for the charity, taking into consideration how the new legislation will apply to its programs. It must be designed to give guidance to the charity on how to continue to be effective in meeting its charitable objects and avoid unnecessary limitations on its activities. It should also enable the charity to assess the level of compliance of its charitable programs with anti-terrorism legislation and the level of risk each program might pose. All relevant aspects of anti-terrorism legislation and of the charity's anti-terrorism policy that apply to its charitable programs should be incorporated into the due diligence compliance checklist. The checklist should reflect the "Super *Criminal Code*," money-laundering, and terrorist financing provisions, and any relevant provisions in the *Foreign Missions Act* and the *Public Safety Act*.

Each existing and proposed charitable program should be evaluated in accordance with the due diligence compliance checklist. The checklist should be used as part of the initial decision about whether to undertake new programs. A comprehensive review of all on-going charitable programs should be conducted regularly, for example once a year, and the results of all due diligence audits should be communicated to the board of directors promptly.

e) *Due Diligence With Umbrella Associations*

Umbrella associations to which a charity belongs can expose the charity, the umbrella association itself, and other members of the association to the risk of being part of a "terrorist group." Charities should demand a high standard of diligence and be vigilant in monitoring the compliance of any umbrella associations to which they belong. Members of an umbrella association should be required to submit disclosure statements to determine compliance with anti-terrorism legislation. These statements should include consents that will allow them to be shared with the directors and members of the umbrella association. Consents from members should also include an undertaking to immediately report any material change in the disclosure statements. Members of the umbrella association should be required to submit updated disclosure statements annually to confirm on-going compliance with anti-terrorism legislation. Charities should also encourage umbrella associations to require their members to adopt their own anti-terrorism policy statements.

4. *Due Diligence Concerning Third Parties*

a) *Due Diligence Concerning Affiliated Charities*

Charities should conduct a comprehensive anti-terrorism audit of the organizations, individuals, and institutions they are affiliated with. This would include umbrella associations to which the charity belongs or, if the charity itself is an umbrella organization, other organizations that are members of the charity. It would also include other registered charities with which the charity

works, whether through informal cooperation or by formal joint venture or partnership agreements. Affiliated charities that either receive funds from the charity or give funds to the charity can put the charity at risk if they are do not comply with Bill C-36.

b) Due Diligence With Regard to Third-Party Agents

All third-party agents of a charity, including agents that act on behalf of a third-party agent, can expose the charity to liability by directly or indirectly being involved in the facilitation of a “terrorist activity.” In addition to reviewing third parties for potential risks, charities should encourage their agents to take their own steps to ensure compliance with the law by establishing anti-terrorism policies, regular audits, due diligence check-lists, etc. Agents should be required to provide releases and indemnities to the charity in the event of non-compliance.

c) Due Diligence Concerning Donors

Charities should exercise vigilance in monitoring the identity of donors, the manner in which the donor obtained the funds, and any donor restrictions on donated funds that could put the charity in contravention of anti-terrorism legislation. Charities must regularly review their donor lists for “listed entities” or organizations that may be terrorist groups, affiliated with terrorist groups, or inadvertently facilitating terrorist activity. They must also ensure that a donor would not be able to use any of the charity’s programs to permit the flow-through of funds directly or indirectly to a terrorist activity.

All third parties associated with the charity, including donors, agents, and affiliated charities, should be required to provide appropriate disclosure statements, as well as releases and indemnities in the event of non-compliance with anti-terrorism legislation.

5. Documenting Due Diligence

a) Anti-Terrorism Policy Statements

An anti-terrorism policy statement is a charity’s obvious first line of defence to show that it has addressed possible risks and is making every effort to comply with applicable legislation. Along with the due diligence checklist, it is also a very effective tool to educate a charity’s directors and officers about the charity’s potential risks and liabilities. An anti-terrorism policy statement must be carefully thought out with the guidance of legal counsel. The full cooperation of the charity’s board and officers is necessary to make the policy statement reflect the individual needs and risks of each charity and to enable it to continue to meet its charitable objectives with the least possible interference. The process of preparing such a statement will, of course, require a comprehensive review of the charity’s operations in order to identify the charity’s risks and objectives. A charity’s anti-terrorism policy statement should include a requirement to complete a regular, comprehensive audit of

the charity's existing programs and of all new program proposals. These audits should be executed in accordance with the charity's due diligence checklist.

An appropriate policy adopted with the direction of legal counsel will give the organization guidance on how to document all other aspects of due diligence related to anti-terrorism, including all applicable documents, such as statements of disclosure and checklists. It will identify documents that could be filed with third parties, such as CRA, as a preventive measure, and describe how to meet reporting requirements in the event that there is an actual or potential violation. The anti-terrorism policy may be published on the charity's Web site, with excerpts possibly reproduced in the charity's reports and brochures, and in communications to donors.

b) Evidencing Due Diligence With CRA

The charity should forward to CRA as much evidence as possible of due diligence compliance. This would include a copy of the anti-terrorism policy, along with a request that CRA advise of any deficiencies in the policy statement. If the charity is considering embarking on a new program and is not clear whether the proposed program would result in non-compliance, a letter granting advance approval of the program should be sought from CRA. Copies of all agency agreements should be filed with a request that CRA approve the agreements specifically as they relate to compliance with anti-terrorism legislation.

c) Evidencing Due Diligence With Legal Counsel

Legal counsel is an important part of a charity's due diligence strategy. The very act of involving legal counsel can provide tangible evidence of due diligence and assist in insulating the charity and its directors from liability. Legal counsel can also help to identify risk areas and recommend strategies for addressing actual or potential risks. Legal counsel should review, comment on, and amend anti-terrorism policy statements, disclosure statements, due diligence compliance checklists, and the particulars of a charitable program. Legal counsel can also assist in communicating with CRA in evidencing due diligence compliance.

6. Conclusion

Anti-terrorism legislation has been institutionalized in Canada's legal and regulatory framework over the past several years. Charities, therefore, need to respond in kind by instituting concrete and lasting compliance and due diligence procedures to help minimize risk and liability. Considering that even the suspicion of contravening anti-terrorism provisions can have significant negative ramifications, it is imperative that charities diligently educate themselves about its requirements and undertake all necessary due diligence measures to ensure compliance as best they can. While there is no guarantee that due diligence will identify all possible risks, it can help to minimize a charity's

exposure to those risks, as well as minimize the exposure of directors to personal liability.

NOTES

1. For more information, please refer to *Anti-terrorism and Charity Law Alert No. 3*, available at <http://www.carters.ca/pub/alert/atcla/atcla03.pdf>.
2. For recent comments by the Canada Revenue Agency concerning standards for compliance with anti-terrorism legislation in Canada and other jurisdictions, see “Charities in the International Context” (available at <http://www.cra-arc.gc.ca/tax/charities/international-e.html>), as well as *Anti-terrorism and Charity Law Alert No. 5* (available at <http://www.carters.ca/pub/alert/ATCLA/atcla05.pdf>). Both of these publications were released after the preparation of this article.