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ANTI-TERRORISM AND CHARITY LAW ALERT NO. 12

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NEW ANTI-TERRORIST FINANCING LAW HAS DIRECT IMPACT FOR CHARITIES

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A. INTRODUCTION

Charities face an escalating due diligence and compliance burden as a result of domestic and international anti-terrorism efforts. As charities have specifically been targeted as a "crucial weak point" in the "war on terror," their directors and advisors need to understand the increasingly expanding body of Canadian anti-terrorism legislation that directly impacts charities. Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act* ("Bill C-25"), which received Royal Assent on December 14, 2006, represents one of the most invasive and complex pieces of anti-terrorism legislation to be passed since 2001. Bill C-25 represents a concerted effort to increase the monitoring and oversight of the charitable sector and has a significantly negative impact on charities that transfer funds internationally.

B. FINTRAC AND ITS ROLE IN ANTI-TERRORIST FINANCING

Amendments in 2000 to an earlier version of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("*Proceeds of Crime Act*" or "Act") established the *Financial Transactions and Reports Analysis Centre of Canada* ("FINTRAC"). FINTRAC is an independent government agency with the mandate to collect, analyze, assess and disclose information in order to assist in the detection of money laundering and terrorist financing. The *Proceeds of Crime Act* makes it mandatory for various persons and entities to retain records containing specific information about certain financial transactions and to report

them to FINTRAC. FINTRAC reviews the information and, where financing of terrorist activity or money laundering is suspected, it releases the reported information to law enforcement and other government agencies. The Bill C-25 amendments greatly expand the type of information collected and dispersed by FINTRAC and inflates the number of agencies, both domestic and foreign, that are the potential recipients of the information.

C. INCREASE IN SOURCES AND TYPE OF INFORMATION COLLECTED

With Bill C-25's expansion of reporting entities, virtually any means of transmitting funds (i.e. banks, money order businesses, securities dealers) used by a charity may result in reports being made to FINTRAC. In several situations, a charity may find itself being subject to reporting obligations under the amended Act.

Bill C-25's amendments have also significantly expanded the nature of the information concerning the transaction and the parties involved. The *Proceeds of Crime Act* refers to this information, which is retained for up to five years, as "designated information," which may potentially be disclosed to both foreign and domestic government agencies.

Most pertinent to charities that transfer funds domestically and internationally is Bill C-25's expansion of designated information to include "the name, address, electronic mail address and telephone number of each partner, director or officer" of the charity and "any other similar identifying information." As such, a charity's directors and officers are now explicitly central to the anti-terrorism vetting that is being carried out by private sector financial service providers and government agencies. In light of this, vetting should now correspondingly be central to a charities' own due diligence procedures concerning its directors and officers and those of recipient organizations.

This information is now being checked against substantial international anti-terrorism financing lists as a result of Bill C-25. For example, the revised *Proceeds of Crime Act* now directly refers to the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, which includes lists of hundreds of individuals and entities. In addition, under section 65(1) of the *Proceeds of Crime Act*, as amended by Bill C-25, FINTRAC is specifically authorized to enter into agreements with foreign governments in order that FINTRAC may send and receive designated information between foreign agencies.

Bill C-25 excludes "designated donor information," which has a limited definition, from information that is to be shared with other agencies and foreign governments.

D. EXPANDING THE RECIPIENTS OF INFORMATION AND THE IMPACT FOR CHARITIES

One of the more pernicious amendments included in Bill C-25 is that much of the information to be sent to FINTRAC is based on an assessment of a "suspicion" of "attempted" acts of terrorist financing. Some likely scenarios that could result in an unwitting charity falling victim to the broad, all encompassing grounds to disclose information include: the recipient organization having a director who is suspected of having ties to supporting terrorism unbeknownst to the recipient organization; transferring funds for humanitarian aid to organizations working in "conflict areas"; or a financial institution used by the recipient organization in a transfer having been identified as complicit in some acts of supporting terrorism.

The reports detailing "suspicious" transactions that are sent to FINTRAC and passed on to various government agencies could have potentially disastrous consequences for a charity. These reports could be the basis for "facilitation" of terrorism charges under section 83.19 of the *Criminal Code*; potentially initiate the de-registration process under the *Charities Registration (Security Information) Act*; or even result in personal liability for the directors and officers of a charity. Even an initiation of an investigation under anti-terrorism provisions could lead to seizure or freezing of charitable property and immeasurable damage to public perception and donor confidence.

What raises the spectre of being investigated under suspicions of contravening anti-terrorism legislation is not only the expansion of the information being collected and retained by FINTRAC, but the burgeoning domestic and foreign sources to which this information is being disclosed. For example, the grounds to disclose information to Canada Revenue Agency ("CRA") have become very broad under the Bill C-25 amendments. Under section 55 of the *Proceeds of Crime Act*, the "designated information" would be disclosed to CRA if there where grounds to even "suspect" that the information is relevant to maintaining its charitable status. In addition, reports will be sent to CRA now if the information is potentially relevant to determining an application for charitable status. Once the report of suspicion reaches CRA, this information could essentially quash an organization's application for charitable status or result in the launching of an investigation under the de-registration process. Under the Bill C-25 amendments, the expanded designated

information could also be disclosed to the Canada Border Services Agency, CSIS and Communications Security Establishment.

E. CHANGES TO THE *INCOME TAX ACT*

The increasing monitoring and oversight of charities that is enabled by Bill C-25 is also plainly evident in its amendments to the *Income Tax Act*. The amendment to subsection 241(4) of the *Income Tax Act* significantly expands the scope of inter-agency information sharing concerning the enforcement of the *Charities Registration (Security Information) Act.* The amendments to the *Income Tax Act* also includes an addition to subsection 241(8) that allows CRA officials to freely disclose a variety of information about a charity to the RCMP, CSIS and FINTRAC that would be relevant to investigations under the terrorist activity and facilitation provisions of the *Criminal Code*.

The type of information that can now be disclosed to other agencies like the RCMP and CSIS under the amendments to the *Income Tax Act* includes "designated taxpayer information," a newly created and defined term. The expansive scope of designated taxpayer information includes the name, addresses and citizenship of current and former directors, trustees, agents and employees of a charity or applicant for charitable status. This designated taxpayer information also includes information available in broadly defined "commercially available databases."

Though Bill C-25 was introduced by the government to purportedly comply with international obligations, specifically those promulgated by the Financial Action Task Force ("FATF"), the legislation goes far beyond requirements of the broad and general international commitments. Many have noted that Canada, which is currently serving as the head of the FATF, is eager to demonstrate a "tough line" on terrorist financing to the global leaders of the war on terror, predominantly the United States and the United Kingdom.

Charities must now be proactive in their due diligence practices in order to minimize the risk of the charity being subjected to an investigation or de-registration because of information collected and distributed through the new powers outlined in Bill C-25. This will certainly prove to place an increasingly crushing burden on charities that transfer money, both in Canada and overseas. These due diligence and compliance procedures include the vetting of not only the recipient organization, but its directors and officers, financial institutions and the geographic area in which the recipient organization carries out its operations. The compliance and

due diligence requirements under the *Proceeds of Crime Act* are just one of many sources of obligations for charities in Canadian anti-terrorism law. Bill C-25 and its amendments highlight the increasing focus and investigation of charities and their possible links to terrorism, both domestically and internationally. Consequently, charities need to take careful note of this legislation in recognition of the increasing scrutiny of the charitable sector in Canada and the charity's responsibility to protect its charitable assets and programs.

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