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CANADIAN CHARITIES: THE FORGOTTEN VICTIMS OF CANADA'S ANTI-TERRORISM LEGISLATION*

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A. INTRODUCTION

As we remember the fifth anniversary of the terrorist attacks on New York City, Pennsylvania and Washington, D.C., which has served to justify the introduction of increasingly strict anti-terrorism legislative measures around the world, the threat of further attacks has not dissipated and the political will to eradicate terrorist organizations and their supporters remains strong. Charitable organizations remain a significant focus of the war on terror, and as such organizations have repeatedly, and arguably unjustifiably, been dubbed the "crucial weak point"[1] in the war on terror.

The co-ordinated attack on terrorist financing and activities has revealed that in many cases, charitable activities that were previously thought to be commonplace and uneventful may now lead to a charity becoming susceptible to criminal charges for having facilitated "terrorist activities" or for supporting "terrorist groups." This, in turn, may result in a charity losing its charitable status and its directors being exposed to personal liability. In addition, financial transactions involving charities may lead to allegations of terrorist financing or to the surveillance and monitoring of a charity's financial activities. And as the political grip on charities develops, there are calls by organizations like the Financial Action Task Force ("FATF") to

* This bulletin is a condensed version of a paper by the author, entitled "The What, Where and When of Canadian Anti-Terrorism Legislation for Charities in the International Context," last revised May 11, 2006, available at www.antiterrorismlaw.ca.
[1] FATF, Combating the Abuse of Non-Profit Organisations: International Best Practices (Paris: FATF, 2002) at 1.

require professionals, such as lawyers handling transactions on behalf of charitable clients or on behalf of estates dealing with charities, to report suspicious transactions to authorities.

It has become increasingly evident that charities, both in Canada and worldwide, have become one of the silent victims of the global anti-terrorism initiatives that have been carried out during the past five years. Charities face the uncertainty of whether overbroad legislation will be applied to their activities, a literally impossible task of ensuring strict compliance, and uncertainty as to whether they will be able to effectively continue their operations in the face of mounting restrictions.

In many instances, the enforcement of the law *per se* may not be the key issue. The concern may not be what the authorities *will do* in enforcing anti-terrorism legislation, but rather that they *may* enforce such legislation. As a result, part of the impact of Canada's anti-terrorism legislation may have as much to do with coping with a fear of the law as it will with coping with the law itself. This "shadow of the law" effect has already created and will continue to create a chill upon charitable activities in Canada, as charities hesitate to undertake programs that might expose them to violation of anti-terrorism legislation, and with it the possible loss of their charitable status. To counteract this implicit fear concerning the new anti-terrorism legislation, it will be important for charities and their advisors to understand the basics of Canada's anti-terrorism legislation so that charities will be able to better understand what due diligence steps should be taken in order to avoid violations of the legislation.

B. ANTI-TERRORISM LEGISLATION IN CANADA

Canada's anti-terrorism legislation has not been enacted in a legal vacuum. Most conceivable acts of terrorism have for some time been subject to prosecution in one way or another as criminal offences under the provisions of Canada's *Criminal Code*.[2] Many other statutes, such as the *Immigration and Refugee Protection Act*,[3] include provisions that deal with terrorism or people suspected of terrorism. The new provisions and the legislative amendments provided for under Canada's new anti-terrorism legislation have likely been under development for some time, purportedly in order to supplement the legislation that is

[2] R.S.C. 1985, c. C-46. See, for example, s. 7 for offences committed on aircraft. See also K. Roach, "The New Terrorism Offences and the Criminal Law" in R.J. Daniels, P. Macklem & K. Roach,. eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: Univ. of Toronto Press, 2001) 151 at 152-154 ["New Terrorism Offences and Criminal Law"]; see also K. Roach, *September 11: Consequences for Canada* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 29-33 [*September 11: Consequences for Canada*].

[3] S.C. 2001, c. 27.

already in place. The events of September 11, 2001 ("September 11") have simply galvanized these efforts, giving them a sense of added urgency and political justification.

The three legislative initiatives are Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to Enact Measures Respecting the Registration of Charities, In Order to Combat Terrorism* ("Bill C-36" or "Anti-terrorism Act");[4] Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act* ("Bill C-35" or "Foreign Missions Act");[5] and Bill C-7, *An Act to amend certain Acts of Canada, and to Enact Measures for Implementing the Biological and Toxin Weapons Convention, In Order to Enhance Public Safety* ("Bill C-7" or "Public Safety Act").[6] Although other statutes deal with issues related to terrorism, for the purposes of this article, the above three pieces of legislation are collectively referred to as Canada's anti-terrorism legislation.

C. CANADA'S ANTI-TERRORISM ACT

The changes brought about by the Anti-terrorism Act are without precedent in Canadian legal history, and demonstrate a disturbing disregard for the principle of due process and natural justice. The amendments implemented by the Anti-terrorism Act arguably amount to the creation of a "Super *Criminal Code*" within Canada's existing *Criminal Code*. From a practical standpoint, charities could very well become involved unwittingly in violating the *Criminal Code* by "facilitating" a "terrorist activity" without actually intending to directly or indirectly support any terrorist activity whatsoever and without knowing or even imagining the ramifications of their actions. This concern is particularly relevant in the wake of recent natural disasters, such as the devastating tsunami that hit Southeast Asia in December 2004,[7] and the destructive earthquake in Pakistan in October 2005,[8] both of which have prompted an outpouring of international humanitarian support.

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

[4] S.C. 2001, c. 41. 41["Bill C-36" or "Anti-terrorism Act"].
[5] S.C. 2002, c. 12 ["Bill C-35" or "Foreign Missions Act"].
[6] S.C. 2004, c. 15 ["Bill C-7" or "Public Safety Act"].
[7] The 9.0 magnitude earthquake off the western coast of Sumatra, Indonesia, which was the cause of the tsunami, killed an estimated 275,950: National Earthquake Information Center, U.S. Geological Survey.
[8] The 7.6 magnitude earthquake killed an estimated 87,351 dead: National Earthquake Information Center, U.S. Geological Survey.

Criminal Code and inclusion as a "listed entity" but it could also be subject to possible loss of charitable status under the *Charities Registration (Security Information) Act,* as well as the freezing, seizure, restraint, and forfeiture of its charitable property.

D. PROCEEDS OF CRIME (MONEY LAUNDERING) ACT

The *Proceeds of Crime (Money Laundering) Act* was originally enacted in 1991 and overhauled in 2000. It was originally enacted to combat organized crime in furtherance of Canada's international obligations (particularly its commitments to the FATF), but after the events of September 11, it was amended again through Part 4 of the Anti-terrorism Act, which expanded its scope to include terrorist financing. The amended *Act* was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act.*[9] Under the new provisions, charities may be subject to the prescribed record keeping and reporting duties outlined in the Proceeds of Crime Act and its Regulations. These duties have been referred to as a new compliance regime for financial entities, the definition of which may well include charities. However, even if charities do not fall within the definition of a reporting entity, charities could still be subject to reporting by other reporting entities, such as a bank, an accountant or a life insurance company, without the charity's knowledge.

The expansion of the federal government's power to share and collect information with respect to terrorist financing compliance issues may have an indirect but significant impact upon charities. The information collected by FINTRAC and shared with various government and law enforcement agencies could lead to any of the consequences affecting a charity including investigation, criminal charges, listing, de-registration, as well as the freezing and seizing of assets. Whether any of these consequences materialize or not, the knowledge that the authorities are monitoring the activities of charities will have a detrimental chill effect upon the motivation and ability of charities to pursue their charitable objectives, particularly in the international arena.

[9] For an in-depth discussion of the Act, see A. Manzer, *A Guide to Canadian Money Laundering Legislation*, (Markham: Butterworths, 2002).

E. DEREGISTRATION UNDER PART 6 OF THE ANTI-TERRORISM ACT

Part 6 of the Anti-terrorism Act enacts the new *Charities Registration (Security Information) Act*.[10] This Act enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity. Such de-registration is initiated by the issuance of a "security certificate" against the charity or applicant for charitable status and could have consequences beyond simple de-registration for the charitable organization.

The security certificate and de-registration process raises several concerns from the point of view of basic principles of natural justice and due process. These factors are of even greater concern in light of the serious consequences of the issuance of the security certificate. De-registration not only entails a charity losing its ability to enjoy the tax benefits of charitable status, but there is also a possibility that the issuance of a security certificate might expose the charity or its directors to investigation and prosecution under the enhanced "Super *Criminal Code*" provisions. More importantly from a practical standpoint, there is the strong possibility that issuance of a security certificate could lead to the freezing or seizure of the charity's assets under sections 83.08 or 83.13-83.14 of the *Criminal Code*. This could lead to the bankruptcy, insolvency, or winding up of the charity, and, in turn, expose the charity's directors to civil liability at common law for breach of their fiduciary duties by not having adequately protected the assets of the charity.

F. FATF

The Financial Action Task Force on Money Laundering ("FATF") is an inter-governmental body established by the G7 group in 1989 with the purpose to develop policies to combat the laundering of drug money. This original mandate has been refocused to join the war on terrorism. FATF now breaks its work into three principal areas: (1) setting standards for national anti-money laundering and counterterrorist financing programmes; (2) evaluating the degree to which countries have implemented measures that meet those standards; and (3) identifying and studying money laundering and terrorist financing methods and trends.[11] Two documents form the primary policy issued by FATF: *The Forty Recommendations*[12] and the *Nine Special Recommendations on Terrorist Financing*.[13] Together, these two policies set the international standard for combating the financing of terrorism, of which money laundering is considered a key factor. In

[10] *Charities Registration (Security Information) Act* (being part VI of the *Anti-terrorism Act*, *supra* note 4)
[11] FATF website, www.fatf-gafi.org.
[12] FATF, *The Forty Recommendations* (France: FATF, 2003) [40 Recommendations].
[13] FATF, *Nine Special Recommendations on Terrorist Financing* (France: FATF, 2004) [Special Recommendations].

the words of FATF, the policies "provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing."[14]

Although FATF has no legislative authority, it is proving to have increasing influence over policy dealing with counterterrorism measures in member nations. As one commentator has observed, "cumulatively, the international arena has created significant pressure for all states to modify frequently introspective and protectionist domestic laws and financial regimes to accommodate [anti-money laundering and countering of the financing of terrorism] obligations."[15] On a purely policy level, the ability of a non-elected body to have such control over domestic policy is disturbing, especially when it is not plainly evident who may be pulling the strings of the policymakers at FATF. While FATF makes it clear that member countries are free to develop their own methods for complying with the 40 Recommendations and the Special Recommendations, the reality is that there are limited means in order to comply and avoid sanctions.

G. GLOBAL STANDARDS REQUIRED FOR CHARITIES THAT OPERATE INTERNATIONALLY

Due diligence procedures for charities that operate internationally are not only important as a response to Canada's anti-terrorism initiatives, but are the only prudent course of action in the face of emerging global standards concerning NGOs and charities. CRA's publication "Charities in the International Context"[16] stresses the importance of taking into account "Best Practice" guidelines that are promulgated by relevant international policy making institutions, such as FATF, and by key jurisdictions, such as the United Kingdom and United States.[17] These "Best Practice" guidelines are reflective of an emerging global standard of due diligence procedures that are becoming accepted as the benchmark for international charitable operations.

In addition, it has become apparent that a charity need not have operations in one of the key jurisdictions spearheading the "war on terrorism" for their operations to be subject to monitoring by agencies of these key jurisdictions for compliance with their "Best Practice" standards.[18] This is especially true for charities that

[14] 40 Recommendations, *supra* note 12 at 1.
[15] Daniel P. Murphy, "Canada's AML/CFT Response and the Financial Action Task Force" (Paper presented to the Second Annual Symposium on Money Laundering, Toronto, Osgoode Hall Law School Professional Development Program, 11 February 2006) at 4.
[16] Canada Revenue Agency, "Charities in the International Context," online: http://www.cra-arc.gc.ca/tax/charities/international-e.html> last accessed: 23 August 2005.
[17] For a further discussion of these issues please reference *Anti-terrorism and Charity Law Alert No. 5*, available at http://www.carters.ca/pub/alert/atcla/atcla05.pdf.
[18] Department of the Treasury of the United States, "2003 Money Laundering Strategy" online: <http://www.treas.gov/offices/enforcement/publications/ml2003.pdf> [last accessed: 24 August 2005].

operate in areas that may be considered a "conflict zone" by a particular jurisdiction, subjecting the charity to heightened levels of surveillance and monitoring. The consideration of international "Best Practice" guidelines is also important for charities that engage in cross-border funds transfers, work with international partners, or utilize foreign financial institutions, as they may be subject to the same type of scrutiny.

Furthermore, information collected during the monitoring of a charity's operations by agencies of these key jurisdictions may well directly impact the charity, regardless of whether it is based or has operations in the jurisdiction that has conducted the investigation and monitoring. This is primarily due to the increased sharing between countries of information collected concerning non-profit organizations over the past few years. Information obtained by foreign jurisdictions that is shared with Canadian authorities may well be sufficient for Canada to launch its own investigations or processes under its anti-terrorism legislation. This may result in the commencement of preliminary procedures for the deregistration process under the *Charities Registration Act.* Being aware of international "Best Practice" due diligence guidelines and demonstrating compliance with them by implementing due diligence procedures in the operations of a charity can help minimize such risks associated with operating internationally.

H. DUE DILIGENCE RESPONSE

Although due diligence is not a defence for violations of the anti-terrorism laws in Canada and abroad, or against revocation of charitable or tax exempt status under tax laws, effective due diligence is, at the very least, necessary in order to show a desire to comply. Apart from compliance with anti-terrorism laws, maintaining due diligence is also mandatory in accordance with the common law fiduciary duties of directors to protect charitable property. While due diligence is not a defence against anti-terrorism charges, the anti-terrorism laws do not abrogate directors' fiduciary duties to the charity and its donors. As such, it can provide powerful protection for directors against complaints at common law. 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 organizations' 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.

One of the most significant benefits of exercising due diligence may be in its preventive effect. While it may not provide a defence after the fact, when a violation has already occurred, 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 occurrence of the kind of event or association that might lead to 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. Through 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 the need to decline donations from questionable donors. While no one can guarantee that due diligence will identify all possible risks, it can certainly help to minimize a charity's exposure by eliminating obvious risks.

I. DOCUMENTING DUE DILIGENCE: ANTI-TERRORISM POLICY STATEMENTS

An anti-terrorism policy statement is a charity's obvious first line of defence to show that it has addressed the possible risks to the charity 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 in order 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. In fact, a charity's anti-terrorism policy statement should include a requirement to complete a comprehensive audit of the charity's existing programs on a regular basis and of all new program proposals as part of the initial review to decide whether to undertake a new program. These audits should be executed in accordance with the due diligence checklist which reflects the unique characteristics of each charity.

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 preventive measures 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 website, with

excerpts possibly being reproduced in reports and brochures of the charity, as well as in communications to donors.

J. CONCLUSION

It has been a scant five years since the terrorist attacks on the U.S. on September 11, 2001, brought about a "new day" for charitable organizations operating in Canada and around the world. The collective insecurity flowing from this and other terrorist acts has purportedly served as a justification for the introduction of extraordinary laws aimed to curb the threat of further terrorist attacks and the ability of such terrorist organizations to mobilize. At the same time, nations must determine the appropriate response to significant humanitarian crises that heighten the risk of diverting charitable funds and assets into the hands of terrorist organizations, as well as the perplexing situation in the Palestinian Territory with the recent rise of Hamas to legitimate political power.

The legislative experience has been the same in other common law countries. The singular focus with which governments, such as the United States and the United Kingdom, have implemented new counterterrorism measures means that the international charitable landscape has been irrevocably changed. No longer is it prudent for charities participating in international initiatives or soliciting from international donors to ignore the new international political reality. The ramifications of anti-terrorism legislation for charities in Canada are broad and unprecedented. The legislation will necessitate a concerted proactive and vigilant response on the part of charities, their directors, executive staff and legal counsel. Charities will therefore need to diligently educate themselves about its requirements, and undertake all necessary due diligence measures to ensure compliance as best they can. Lawyers, in turn, who either advise charities or volunteer as directors of charities will need to become familiar with this challenging and increasingly complex area of the law.

It is no longer adequate to be only familiar with the laws of other nations; it is now a necessity to know the what, where and when of Canadian **and** international anti-terrorism legislation in order for a charitable organization to operate effectively outside of Canada. And despite the drastic measures that many countries have taken in the months and years following the terrorist attacks on the U.S., many governments remain intent upon obtaining greater powers, often at the expense of the fundamental freedoms which those countries purport to defend, leading one to reluctantly conclude that what we have seen to date may only be a precursor to a harsher and even more impractical international regulatory environment for the charitable

sector in the future. Unless the public, the charitable sector and governments recognize the impact of anti-terrorism legislation and enforcement on charities and those that depend on their operations, charities will continue to be the one of the silent victims of these ongoing initiatives worldwide.

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