*Ontario Bar Association*
*Issues in Charity Law: A Pot Pourri*

# Anti-Terrorism Legislation In Canada And Its Impact On Charities: An Overview

**October 22, 2002**

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# INDEX

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## A. INTRODUCTION

The following paper is intended to provide only a brief overview anti-terrorism legislation in Canada in relation to its impact on charities. As such, the paper is not intended to be a comprehensive analysis of all aspects of the legislation in question.

### 1. Overview of the Legislation

Canadian anti-terrorism legislation currently consists of three separate Acts, two of which have been passed and are now in force. These include 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*, 1st sess., 37th Parl., 2002 (assented to 18 December 2001, S.C. 2001, c. 41) [hereinafter "Bill C-36" or the *Anti-Terrorism Act*]; Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act*, 1st Sess., 37th Parl., 2001 (assented to 30 April 2002, S.C. 2002, c. 12) [hereinafter "Bill C-35" or the *Foreign Missions Amendment Act*]; and Bill C-55, *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*, 1st Sess., 37th Parl., 2001 (1st reading 29 April 2002) [hereinafter "Bill C-55" or *Public Safety Act*].

Bill C-36, the omnibus *Anti-Terrorism Act*, which was proclaimed in force on December 24, 2001, is an extremely complicated piece of legislation that involves co-ordinating the provisions of many federal Acts, including the *Criminal Code, Canadian Human Rights Act* and newly titled *Security Information (Charities Registration) Act*. Bill C-36 raises several concerns that innocent charities may be caught in its provisions, which include sweeping definitions of terms such as "terrorist activities", "terrorist group" and "facilitation" of terrorist activities; the establishment of a deregistration process for charities suspected of involvement in terrorist activities; and legislation pertaining to "terrorist financing".

Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act*, passed by the House of Commons on December 12, 2001 as part of its legislative anti-terrorist initiative, was proclaimed in force as of April 30, 2002. The purpose of this Act is to give effect to Canada's obligation to protect diplomatic personnel and foreign representatives. The amendments may be of concern to charities in their expansion of the definition of "international organization", "internationally protected person" and in the sweeping powers afforded to the RCMP in the part on "Security of Intergovernmental Conferences".

Bill C-55, the *Public Safety Act,* was introduced into the House of Commons on April 29, 2002 and has not been passed as of the writing of this paper. The *Public Safety Act* proposes to broaden the Financial Transactions and Reports Analysis Centre of Canada's (FINTRAC) power to collect and distribute financial information considered relevant to money laundering or terrorist financing. In addition, this Act allows for the designation of "controlled access military zones" by the Minister of National Defence.

In addition, regulations were issued under the amended *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Part IV of Bill C-36) on May 9, 2002. For a further commentary on the regulations and the above-mentioned pieces of legislation, please refer to www.charitylaw.ca and www.antiterrorismlaw.ca for articles and commentaries by the author.

2. International Context

In order to understand the legislative initiative behind the anti-terrorism legislation, the Acts in question must be viewed within the international context in which they have evolved. The preambles of the Anti-Terrorism Acts include references to "commitments" to international treaties and a response to developments in international law or participation in a global anti-terrorist initiative. The Canadian legislation purports to ratify or at least comply with 12 specific U.N. conventions concerning terrorism. Further obligations include U.N. Security Council Resolution 1373 adopted on September 28, 2001 and, specifically with regard to money laundering and terrorist financing, the intergovernmental Financial Action Task Force (FATF) and its 8 Special Recommendations issued in October of 2001. These documents explain Canada's international obligations to combat terrorism and shed light on the extent to which Canada's initiative is consistent with those obligations. They also provide a necessary overview of the international context facing charities that work in more than one jurisdiction as they seek to understand the new requirements that must be met in countries that are a part of international organizations such as the U.N.

Anti-terrorism legislation is not a phenomenon peculiar to North America or even Western Europe.

Rather, it is very much a worldwide phenomenon that can be seen in, among other countries, the United States, Australia, Singapore, the United Kingdom and China. Because each country is adopting its own unique legislation, charities that transfer funds abroad or work internationally now need to be aware of legislative developments in the countries where they work so they do not inadvertently find themselves caught by laws, in both Canada and other countries, concerning terrorist activity or financing of or support of terrorist groups.

## B. SUPER *CRIMINAL CODE* OFFENCES UNDER BILLS C-36 AND C-35

### 1. Creation of the "Super *Criminal Code*"

The amendments to the *Criminal Code* implemented by Bill C-36, and to a certain extent by Bill C-35, constitute in part the creation of a new type of criminal offence under the heading of terrorism. The assumption underlying these amendments is that the commission of certain offences, including the threat of or attempt to commit such offences, warrants an extraordinary approach in the methods of investigation, incarceration and punishment due to the very nature of those offences. These changes, which have no comparison in Canadian legal history and demonstrate a disturbing disregard for the principle of due process and the traditional requirement of *mens rea*, arguably amount to the creation of a 'super *Criminal Code*' within the normal *Criminal Code*.

### 2. Definition of "Terrorist Activity"

The definition of terrorist activities in section 83.01(1) of the *Criminal Code*, as amended by Bill C-36, is split into two disjunctive parts, (a) and (b).

Part (a) of the definition of "terrorist activities" incorporates ten offences that already exist under section 7 of the *Criminal Code*, each of which implements a specific U.N. Convention regarding terrorism.

Part (b) of the definition covers situations that may impact charities. These include:

- 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, a government or a domestic or an international organization to do or to refrain from doing any act;

and that:

- causes injury, substantial property damage or a serious interference with or serious disruption of essential services; and,
- includes conspiracy, attempt or threat to commit a terrorist activity; and
- includes being an accessory after the fact or counselling in relation to any terrorist act.

3. Definition of a "Terrorist Group"

A terrorist group under section 83.01(1) of the *Criminal Code*, as amended by Bill C-36, means either an entity that has as one of its purposes or activities facilitating or carrying out a terrorist activity or a "listed entity" as defined by section 83.05. This definition is very broad and covers situations that may impact charities. An "entity" includes trusts, unincorporated associations and organizations as well as an association of such entities. In addition to the obvious, such as an entity whose purposes or activities

include facilitating or carrying on of terrorist activities, a "listed entity" could include any entity that the government places on the list because it has reasonable grounds to believe the entity has knowingly carried out, attempted to carry out, participated in, or facilitated a terrorist activity, or an entity that is knowingly acting on behalf of, at the direction of, or in association with such entity.

4. Definition of "Facilitation"

The definition of "facilitation" in section 83.19(2) of the *Criminal Code*, as amended by Bill C36, is of particular concern. It is extremely broad and could extend to innocent people or organizations that simply happen to be in the wrong place at the wrong time. The definition states that 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.

Not only is *mens rea* diminished to the point of verging on a strict liability offence, but it is questionable whether an *actus reus* need occur, since the definition of facilitation does not even require that a terrorist activity be actually carried out, planned or even foreseen.

5. Specific *Criminal Code* Offences that May Impact Charities under Bill C-36

Considering the complexities of the anti-terrorism legislation, the co-ordination of several federal acts and the lack of empirical evidence concerning how the legislation will be implemented, both because of its relative novelty and the fact that much of the enforcement of these Acts is and will be conducted in secrecy, it is difficult to speculate concerning what sections of the revamped *Criminal Code* will in fact

affect charities. The most that can be done is to draw a few examples from the applicable *Criminal Code* provisions and give some examples of how a charity might be caught under those provisions. In this regard, some of the relevant *Criminal Code* provisions are:

- s. 83.03: Directly or indirectly providing or inviting the provision of property, financial or other related services that facilitates or carries 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, facilitating transactions or financial or related services for the benefit or at the direction of a terrorist group;
- s. 83.11: Financial institutions (which may include charities) are obligated to determine if they possess property of a "listed entity";
- s. 83.18: Directly or indirectly participating or contributing to any actions that enhances the facilitation of a terrorist activity;
- s. 83.21: Directly or indirectly instructing a person to carry out activities for the benefit 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 if property had or will be used, in whole or in part, to facilitate or carry out a terrorist activity

These *Criminal Code* provisions could lead charities to violate the *Criminal Code* in situations such as the following:

a) SCENARIO #1

A charity, through a fundraiser, requests the donation of medical supplies to be provided to an agent in the Middle East and gives instructions to the agent to use the supplies at a local hospital where the hospital might happen to treat or give medicine to a member of a "terrorist group" in an emergency situation.

b) SCENARIO #2

A charity, through a fundraiser, solicits funds for a programme to conduct aerial drops of food packages in Afghanistan where a few remaining members of the Taliban might conceivably receive a few of the food packages.

c) SCENARIO #3

A hospital foundation raises funds for the general operations of a hospital that provides medical care to student protestors at an anti-globalization protest who erect a road-block leading to an international economic summit.

d) SCENARIO #4

A religious denomination provides funding or other assistance to a local church that assists student protesters by providing sleeping facilities in its church basement in scenario c), above.

6. Practical Implications for Charities

Whether or not a particular charity will be subject to prosecution under 'super *Criminal Code'* provisions remains to be seen. However, the practical concern for charities is that they may become unwittingly involved in activities that are in violation of the *Criminal Code* and, in doing so, become vulnerable to deregistration under the *Security Information (Charities Registration) Act* even if there are no criminal charges brought against the charity. In addition, a charity may find that it meets the broad and inclusive definition of "facilitation" of a terrorist activity and thereby find itself considered a "terrorist group".

In terms of consequences, not only might a charity be subject to the possible loss of charitable status under the *Security Information (Charities Registration) Act* as well as to *Criminal Code* charges, but the charity might also face the freezing, seizure, restraint, or forfeiture of its charitable property, and its directors could face fines, penalties, and even imprisonment.

## C. ***PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT***

Amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* by both Bill C-36 and Bill C-55 will mean that charities, their fundraisers and their legal counsel may be encompassed by the Act and be subject to the prescribed reporting duties outlined in the Act and its Regulations. These reporting duties have been referred to as a "New Compliance Regime" for financial entities, the definition of which may well include charities.

These amendments are part of a larger international context. They are part of Canada's commitment to comply with the *U.N. Convention on the Suppression of Terrorist Financing* and to fulfill Canada's obligations to the FATF and, more importantly, FATF's "Eight Special Recommendations" issued in October of 2001. One of the eight recommendations deals specifically with non-profit organizations, highlighting the potential for their misuse in the financing of terrorism. This specific focus can be seen reflected in the expansion of the definitions in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to include charitable organizations within its scope and in the creation of the deregistration process under the *Security Information (Charities Registration) Act.*

1. Information Gathering under the *Proceeds of Crime Act*

Bill C-55 also contains amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. The original act, the *Proceeds of Crime (Money Laundering) Act*, received Royal Assent on June 29, 2000. It was enacted to combat organized crime and establish the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), an independent government agency with a mandate to collect, analyze, assess and disclose information in order to assist in the detection, prevention and deterrence of money laundering. However, after the events of September 11th, its mandate was expanded by Part 4 of Bill C-36 to include terrorist financing and it was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("*Proceeds of Crime Act*").

Part 4 of Bill C-36 includes a number of reporting obligations on specified persons or entities that are to be phased in during 2002. The first reporting obligation, i.e. the reporting of suspicious transactions, took effect on November 8, 2001. Reporting entities, including financial entities, securities dealers, legal

counsel, accountants and real estate brokers, must now report all transactions to FINTRAC where there are "reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence."

Bill C-55 strengthens the ability of FINTRAC and other government agencies to collect and share compliance related information with various agencies that regulate and supervise banks, trust companies, securities dealers, lawyers, and accountants. It also expands FINTRAC's power to collect information from federal and provincial government agents for purposes related to law enforcement or national security. The expansion of the federal government's power to share and collect information with respect to compliance issues may have a significant indirect impact upon charities in at least two contexts. First of all, a charity that funds international programs may unwittingly become the subject matter of a reported transaction without being aware of it. For example, a charity's bank, its lawyers or its accountants may now either individually or collectively be required by law to report to FINTRAC any suspicious transactions or large cash transactions of the charity as specified in the legislation and regulations.

The second way in which FINTRAC can affect charities is related to the broad power granted under Part 6 of Bill C-36, the *Charities Registration (Security Information) Act* to the Solicitor General and the Minister of National Revenue to revoke or refuse to grant charitable status to a charity based on information connecting the charity to organizations that are involved in terrorist activities. Information collected by FINTRAC may be made available to, and used by, the Solicitor General or the Minister of National Revenue in considering whether to revoke an organization's charitable status or to deny a charitable status application, even though the subject charity may be prevented from adequately responding

to such information by the restrictions on disclosure of the information in Part 6.

2. Reporting Requirements under the *Proceeds of Crime Act*

The reporting requirements included in the amendments to the *Proceeds of Crime Act* under Bill C-36 and Bill C-55 will impact charities to the extent that charities are found to fall within the definition of entities required to report under the Act. This may occur indirectly under section 51(g) in Part 4 of Bill C-36, which states that persons and entities "authorized under provincial legislation to engage in the business of dealing in securities" have a statutory obligation to record and report the financial transactions referred to in the amended *Proceeds of Crime Act*. Under the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended, charities are generally exempted from the registration requirements for issuing and trading in securities. Specifically, section 35(2)7 of the *Securities Act* states that registration under the *Securities Act* is not required in order to trade in securities that are issued by an issuer organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not-for-profit, where no commission or other remuneration is paid in connection with the sale. As a result, in Ontario at least, where a charity fulfills the exemption requirements under subsection 35(2)7 of the Securities Act, it is arguable that the charity may, in some situations such as the raising of funds through the issuance of bonds, for itself or for member organizations of the charity, have become "authorized to engage in the business of dealing in securities." If so, a charity in Ontario, and possibly in other provinces with similar legislation, may be subject to the mandatory recording and reporting obligations imposed under the *Proceeds of Crime Act*.

Charities may also be included directly within the expanded definition of entities required to report

by the regulations under the *Proceeds of Crime Act*, released on May 9, 2002. The regulations now include definitions of "financial entity" and "money services business", which in some instances may include charities. For instance, the definition of "financial entity" includes "a company to which the *Trust and Loan Companies Act* applies". There are circumstances where a charity may be involved in trust activities that could require that a charity be registered under that Act. Also, the definition of "money services business" is in part defined as a "person or entity that is engaged in the business of remitting funds, or transmitting funds by any means, or through any person, entity or electronic funds transfer network." For instance, Canadian charities that transfer funds to a healthcare or relief organization internationally or even domestically, for instance, might fall under this definition and be required to report.

If charities do fall within the definitions of entities that are required to report, there will be serious consequences if those charities fail to report as required by the *Proceeds of Crime Act*. Charities will therefore need to be diligent in monitoring whether circumstances might have exposed them unwittingly to a duty to report under the *Proceeds of Crime Act*.

## D. DEREGISTRATION PROCESS UNDER THE *SECURITY INFORMATION (CHARITIES REGISTRATION) ACT*

1. Summary of Deregistration Process

Deregistration under the Charities Registration Act involves the issuance of a "security certificate" against a registered charity or an applicant for charitable status where there are reasonable grounds to believe that the organization has made, makes or will make resources available, directly or indirectly, to an entity that has engaged or will engage in a "terrorist activity" as defined in subsection 83.01(1) of the

*Criminal Code*. The process is initiated by the Solicitor General of Canada and the Minister of National Revenue who, if reasonable grounds are found, will jointly sign the security certificate. The registered charity or applicant for charitable status that is the subject of the security certificate is then informed of the issuance of the certificate and the certificate is given over for judicial consideration to a Federal Court judge.

During the judicial consideration stage of the process, the charity or applicant for charitable status receives a summary of the grounds giving rise to the issuance of the security certificate. This summary is comprised of the security and criminal intelligence information that the judge decides may be disclosed. The judge is specifically directed not to include any information that he or she determines would endanger national security or the safety of any person or that was obtained in confidence from a foreign state. Therefore, a charity's knowledge of the case against it and ability to respond may be severely limited.

If the security certificate is found to be reasonable by the Federal Court judge, then it is valid for seven years, during which time a registered charity is stripped of its charitable status or an applicant for charitable status is ineligible to obtain charitable status. The only opportunity for review of this decision is the right to apply to the Minister for a review based on a material change in circumstance. This right is more apparent than real when considered against the fact that, in the event that the judge's decision was based entirely on information that could not be disclosed, it would be very difficult for a charity to know what kind of change in circumstance would be relevant or sufficient for a review to be successful. Apart from this limited opportunity for review, there is no ability to apply for review or appeal to any court once a certificate is found by a Federal Court Judge to be reasonable.

2. Concerns Involving the Deregistration Process

The security certificate and deregistration process raise several concerns from the point of view of well-established principles of natural justice and due process. These concerns include the following:

- No knowledge or intent is required;
- The provision is retroactive – past, present and future actions can be considered;
- "Confidential" information considered may not be disclosed to the charity, even if it was relied upon in making the determination of reasonableness, which may severely handicap the ability of the charity to present a competent defense;
- There is no ability for appeal or review by any Court;
- No warning is issued or opportunity given to the charity to change its practices;
- The justification for the certificate is based on the low standard of "reasonable belief";
- The burden of proof is shifted, requiring the charity to respond and prove its innocence; and,
- Normal rules for the admissibility of evidence do not apply.

## E. RISKS TO CHARITIES FROM ANTI-TERRORISM LEGISLATION

The range of activities contemplated by the anti-terrorism legislation is extremely broad. The potential consequences facing charities include everything from loss of charitable status to possible conviction for violating *Criminal Code* and money laundering provisions, which can entail monetary penalties and seizure or forfeiture of charitable property or even incarceration for the directors of the charity. These consequences are all the more serious when considered against the lack of procedural

safeguards that are taken for granted in normal Canadian criminal law.

1. Fairness

Bill C-36 raises several concerns about lack of fairness. First of all, there is a lack of procedural fairness in relation to limited access to and disclosure of information. In light of the far-reaching ramifications of a decision to issue a certificate, which include the possibility that the directors of the charity might, by implication, be subject to criminal investigation under the terrorism provisions of the *Criminal Code*, it is of serious concern that the normal rules of evidence do not apply to the deregistration process.

2. Limited Defence

There is no due diligence defence available for charities in the event of super *Criminal Code* offences or the loss of charitable status. Furthermore, the knowledge or intent required for offences involving facilitation of terrorist activities has a lower threshold than for other *Criminal Code* offences, and is not even necessary for the provisions leading to loss of charitable status.

3. Discrimination

Under this legislation, charities with political, religious and ideological purposes will be suspect because they in part meet the definition of "terrorist activity". As a result, religious, ethnic and environmental charities may be scrutinized more than others, possibly resulting in discrimination against charities with "religious or ideological" purposes. These could include, for example, organizations involved in issues related to the environment or genetically modified foods. For more information in this

regard, please refer to Anti-terrorism law alert #1, available at www.antiterrorismlaw.ca.

4. Negative Impact on Charities From Bill C-36

Enforcement of the anti-terrorism legislation will have a negative impact upon the general public's perception of charities, by associating charities in general with the possibility of financing terrorism. The legislation could also have a "chill effect" on future charitable activities for international religious and humanitarian NGO's in other countries. Organizations will be much more reluctant to get involved in overseas operations, humanitarian or otherwise, when such activities may lead to loss of charitable status or even *Criminal Code* violations. Co-operative efforts between domestic and international organizations may also be hindered because international organizations may be concerned about exposure to Bill C-36, and Canadian charities will be concerned about anti-terrorism laws in other countries. Charities could also be exposed to third party liability claims on behalf of victims of 9/11-type of terrorist attacks (ie., a 1 trillion dollar law suit against, among others, Saudi Arabian charities commenced by the victims of the 9/11 attack).

The legislation will also have a significant impact on the day-to-day operations of charities, which must now look not only at the donor and its funds, but also the means by which the donor raised its funds in determining whether to accept donations. Directors of charities could be exposed to criminal charges under the super *Criminal Code* for terrorist activities of another organization without having knowledge that such terrorist activities were intended. Actions committed by an agent of a charity involved in international operations could expose both the charity and its directors to liability without their knowledge or any terrorist intent on their part.

The financial consequences of the anti-terrorism legislation are potentially disastrous to directors. In addition to the risks already identified from provisions of the new legislation, directors are also accountable for their common law fiduciary duties with regard to charitable property. This could lead to personal liability for directors if the charity is found to have been in contravention of anti-terrorist legislation and unnecessarily expose the property of a charity to government scrutiny. Charities and directors may also be vulnerable financially as a result of possible lack of insurance, since fines, penalties and *Criminal Code* charges may not be included in normal insurance coverage. Gifts by donors to a charity that is a terrorist group may put the donors, whether another charity or an individual, at risk of violating the *Criminal Code* and will therefore require donors to make appropriate inquiries of intended recipient charities.

## F. DEVELOPING A DUE DILIGENCE RESPONSE

### 1. The Need for Due Diligence

As already mentioned, due diligence is not a defence for violations of the new terrorism provisions of the *Criminal Code* or against revocation of charitable status under these new laws. However, maintaining due diligence is mandatory in accordance with the common law fiduciary duties of directors to protect charitable property, which can help to protect directors and charities from possible complaints at common law. Moreover, while due diligence is not a defence, it can still be effective in preventing possible violations of Bill C-36 before they unwittingly occur.

2. In-House Due Diligence

First and foremost, lawyers must educate their charitable clients, especially the directors and staff, about the requirements of Bills C-35, C-36, and C-55, encouraging them to develop a proactive response and assisting them in the creation and implementation of an effective anti-terrorism policy. Directors of charities should continually educate themselves and the members and donors of their charities about the legal requirements. However, directors should also educate themselves about the activities of their own organization and about possible risks, with respect to the actual work of the charity itself, as well as with regard to affiliated organizations, donors, and agents.

A charity's anti-terrorism policy should include a requirement to complete a comprehensive audit of the charity's existing programs on a regular basis and of all proposed programs as part of the initial review to decide whether to undertake the program. Such an audit should be executed in accordance with a due diligence checklist to be developed in keeping with the unique characteristics of each charity and how the new legislation will apply to that particular charity. Disclosure statements by board members, staff, and volunteers can help identify and respond to possible areas of concern before they become a problem.

3. Due Diligence concerning Third Parties: Agents, Donors, Other Charities

Charities should also 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. All third party agents of a charity, including agents that act on behalf of a third party agent for a charity, can expose the charity to liability by directly or indirectly being involved in the facilitation of a

"terrorist activity". In addition to auditing third parties for potential risks, charities should encourage third parties to take their own steps to ensure compliance with the law by establishing anti-terrorism policies and audits, due diligence check-lists, etc.

Charities should exercise vigilance in monitoring incoming donations with respect to the identity of the donor, and the manner in which the donor obtained the funds, as well as with regard to any donor restrictions on the 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 one of the charity's programs to permit the flow-through of funds directly or indirectly to a terrorist activity.

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

4. Documenting Due Diligence

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. An appropriate policy adopted with the direction of legal counsel will also give the organization guidance on how to document all other aspects of due diligence on Bill C-36, including all applicable documents, such as statements of disclosure and checklists, as well as on 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.

The charity should forward as much evidence of due diligence compliance to Canada Customs and Revenue Agency ("CCRA") as possible. This would include a copy of the anti-terrorism policy, along with a request that CCRA advise of any deficiencies in the policy statement. If it is not clear if a proposed new program would result in non-compliance, a letter granting advance approval of the program should be sought from CCRA. Also, copies of all agency agreements should be filed with CCRA with a request that CCRA approve the agreements, specifically as they relate to compliance with anti-terrorism legislation.

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. However, legal counsel can also help to identify risk areas and recommend strategies for addressing risks in order to insulate the charity and its board from liability as much as possible.

## G. CONCLUSION

The passage of the anti-terrorism legislation package has, in many respects, brought about a "new day" for charities in Canada and abroad. The creation of the super *Criminal Code* means that many traditional charitable activities will be vulnerable in being construed as either terrorist activities or, more likely, to be considered, directly or indirectly, in support of or facilitating those who may have participated in or supported a terrorist activity.

Furthermore, outside of the realm of carrying out or facilitating terrorism, charities are faced with the "New Compliance Regime" in financial transactions and record keeping. Thus, the legislation not only requires adherence to the super *Criminal Code*, but may compel the individual charity to take on the responsibility of reporting those entities or transactions that may violate it.

The deregistration process particularly brings the legislation home to charities as they are singled out as potentially viable contributors to terrorism. There should be no illusions about the issuance of a security certificate, a process that is devoid in many ways of traditional legal safeguards and potentially cloaked in a veil of confidentiality and secrecy.

The ramifications of anti-terrorism legislation for charities in Canada are broad and unprecedented. They will necessitate a concerted proactive and vigilant response on the part of charities, their directors and staff, and legal counsel for the charity. The substantial part of this legislation is now in force and charities will need to quickly educate themselves about its requirements and undertake all necessary due diligence

measures to ensure compliance as best they can.

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