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**CHARITIES AND COMPLIANCE
WITH ANTI-TERRORISM
LEGISLATION:**

THE SHADOW OF THE LAW

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A. INTRODUCTION

This paper examines Canada's recent legislative initiatives to combat terrorism and their impact on Canadian charities and those who advise them. The paper will demonstrate that recent anti-terrorism legislation directly affects many Canadian charities and their activities both inside and outside Canada. Charitable activities that were until recently 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, could result in the 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. Lawyers handling transactions on behalf of charitable clients or on behalf of estates dealing with charities may also find

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themselves in situations involving a legal duty to report under the new money laundering legislation.

While it is too early to say what the long-term impact of Canada's anti-terrorism legislation will be, it is clear it will have a profound impact upon the charitable sector and Canadian society in general. For example, even if the amendments to the *Criminal Code* are applied sparingly, their very existence, and the threat that they might be used against charities, will send reverberations throughout the charitable sector. 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 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 does 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. At the same time, new charities may find it more difficult to obtain charitable status, since the Charities Directorate of Canada Revenue Agency ("CRA", formerly Canada Customs and Revenue Agency) will likely be compelled to exercise greater degree of scrutiny when reviewing applicants for 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.

In order to see how the various parts of Canada’s anti-terrorism legislation interact with each other, as well as how the legislation may affect charities, this paper will examine some of the new anti-terrorism provisions under the amended *Criminal Code*, the amendments made to money laundering legislation, as well as new legislation providing for the de-registration of charities. However, given the complexities involved in the anti-terrorism legislation, the discussion that follows is by necessity of a cursory nature only and is neither detailed nor comprehensive in its scope or comments. For additional comments by the author on the topic of anti-terrorism legislation and charities, as well as access to resource materials, legislation and international conventions related to charities and anti-terrorism legislation, reference can be made to either www.antiterrorismlaw.ca or www.charitylaw.ca.

B. THE CONTEXT OF ANTI-TERRORISM LEGISLATION

1. Overview of Canada’s New Anti-terrorism Legislation

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 the Canadian *Criminal Code*.¹ Many other statutes, such as the *Immigration Act*,² 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 already in place. The

¹ 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 [hereinafter “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 [hereinafter *September 11: Consequences for Canada*].

² R.S.C. 1985, c. I-2.

events of September 11, 2001 have simply galvanized these efforts, giving them a sense of added urgency and political justification.

This paper focuses primarily on the three pieces of Canadian legislation introduced since September 11th, 2001 intended to combat terrorism. 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* [hereinafter “Bill C-36” or *Anti-terrorism Act*];³ Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act* [hereinafter “Bill C-35” or *Foreign Missions Act*];⁴ 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* [hereinafter “Bill C-7” or *Public Safety Act*]⁵ Although other statutes deal with issues related to terrorism, for the purposes of this paper, the above three pieces of legislation are collectively referred to as Canada’s anti-terrorism legislation (“Anti-terrorism Legislation”).

a) *Anti-terrorism Act*

Bill C-36, i.e., the omnibus *Anti-terrorism Act* that was proclaimed in force on December 24, 2001, is an extremely complicated piece of legislation that involves coordinating the provisions of many federal Acts, including the *Criminal Code*, *Canadian Human Rights Act*, and the *Proceeds of Crime (Money Laundering) Act*

³ 1st sess., 37th Parl., 2002 (assented to 18 December 2001, S.C. 2001, c. 41; proclaimed in force 24 December 2001).

⁴ 1st Sess., 37th Parl., 2001 (assented to 30 April 2002, S.C. 2002, c. 12; proclaimed in force).

⁵ 3rd Sess., 37th Parl., 2004 (1st reading in Senate 11 February 2004).

[hereinafter *Proceeds of Crime Act*]⁶ (including regulations that were issued on May 9, 2002). Part 6 of the *Anti-terrorism Act* also creates the new *Charities Registration (Security Information) Act*. The *Anti-terrorism Act* raises several concerns that innocent charities may be unwittingly caught within its provisions, which include the enactment of new criminal offences that are contingent on sweeping definitions of terms, such as “terrorist activities”, “terrorist group” and “facilitation of terrorist activities”; the establishment of a de-registration process for charities suspected of involvement in “terrorist activities”; and the development of broad new legislation to curtail “terrorist financing”.

b) *Foreign Missions Amendment Act*

Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act*, was passed by the House of Commons on December 12, 2001 as part of the Government of Canada’s legislative anti-terrorism commitment and 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 by granting certain privileges, immunities, and benefits to foreign diplomatic missions and consular posts, international organizations, and foreign state subdivisions. The object of the amendments is to modernize Canada’s privileges and immunities regime to comply with Canada’s existing commitments under international treaties and to respond to developments in international law. The amendments radically expand the definitions of “internationally protected person” and “international organization”, increasing the

⁶ Now renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17. This Act is discussed in greater detail in Part D of this paper.

likelihood that a charity pursuing its normal charitable operations might be unwittingly implicated in *Criminal Code* offences.

c) *Public Safety Act*

Bill C-7, the *Public Safety Act*, was granted Royal Assent on May 6, 2004. Bill C-7 is the latest version of the *Public Safety Act*, which was first introduced in the House as Bill C-42 (22 November 2001), re-introduced as Bill C-55 (29 April 2002) and again as Bill C-17 (31 October 2002). Among other provisions, Bill C-7 includes further amendments to the *Proceeds of Crime Act* proposing to broaden the government's power to collect and distribute financial information considered relevant to money laundering and terrorist financing. In its latest version as Bill C-7, the *Public Safety Act* purportedly removes or softens some of the more controversial provisions of earlier versions, such as the power to enact "controlled access military zones". However, controversial provisions instituting the unprecedented collection and sharing of detailed personal information concerning airline passengers in the final version of the *Public Safety Act* should still be of concern to charities, and therefore continued monitoring will be needed.

2. Canada's Anti-terrorism Legislation in Perspective

a) International Legislative Context

Anti-terrorism legislation is not a phenomenon peculiar to North America or even Western Europe. Rather, it is a worldwide phenomenon that can be seen in countries as diverse as the United States, Australia, Singapore, the United Kingdom and China. As each country is adopting its own unique type of anti-terrorism legislation based upon international convention, it is becoming essential for charities that transfer funds

or work abroad to be aware of the proliferation of Anti-terrorism laws internationally. To avoid inadvertently violating anti-terrorism laws in Canada or abroad, charities, and lawyers who advise them, must become familiar with the legislative developments in the countries where they carry on their work and with the underlying international conventions that anti-terrorism legislation in Canada and other countries attempts to address.⁷ Charities must also be concerned about who their potential international partners are with respect to possibly exposing the Canadian charity to anti-terrorism legislation in other countries, as well as similarly exposing the same international partners from unnecessary exposure to Canada's Anti-terrorism Legislation.

In order to understand the long-term impact of Canada's Anti-terrorism Legislation beyond September 11, Canada's legislative initiative must be viewed within the international context in which it has evolved. Over the last two or three decades, the international community has developed a broad range of measures that have attempted to combat terrorism. These documents range from non-binding resolutions, declarations, or recommendations of the United Nations General Assembly and various intergovernmental bodies, to binding multilateral conventions and Security Council resolutions. Canada has also been involved in several other international organizations or intergovernmental policy-making bodies, such as the G-8, G-20, the Financial Action Task Force on Money Laundering, the International Monetary Fund, and the World Bank as part of Canada's current commitment to combat terrorism.⁸

All of these bodies have and continue to take measures to curtail terrorism and

⁷ For an update on the United Kingdom's regulatory authority responsible for charities, its anti-terrorism policies and the consequences for Canadian charities see *Antiterrorism and Charity Law Alert No.2* available at <http://www.carters.ca/pub/alert/ATCLA/atcla2>.

⁸ Please see Schedule 1 for an overview of the global web of interrelated international obligations concerning the creation and implementation of domestic anti-terrorism legislation.

terrorist financing, and require considerably different levels of compliance from member states.

The enactment of Canadian legislation is directly related to developments in the international arena. This is reflected in the preambles of the three Acts making up the Anti-terrorism Legislation which include references to Canada's "commitments" to international treaties and its response to developments in international law or participation in a global anti-terrorism initiative. It is beyond the scope of this paper to examine the international context in detail, but the main international documents are highlighted below to provide a brief overview of the international dynamics behind the recent legislative initiatives in Canada.

b) United Nations Commitments

Over the years, the United Nations has issued a number of resolutions and declarations, and has concluded various conventions, all in an effort to combat terrorism. The *Anti-terrorism Act* purports to ratify or comply with 11 specific U.N. conventions concerning terrorism. Another significant United Nations obligation is Security Council Resolution 1373 adopted on September 28, 2001 [hereinafter "Resolution 1373"].⁹ These documents explain Canada's international obligations to limit terrorism and sheds light on the extent to which Canada's initiative is consistent with those obligations. They also provide a useful background to understanding the new legal paradigm facing charities that operate in multiple jurisdictions.

⁹ UN SCOR, 4385th Mtg., UN Doc. S/RES/1373(2001).

Multilateral Conventions referred to in the *Anti-terrorism Act* include the following:

- ◆ the Convention on the Safety of United Nations and Associated Personnel;¹⁰
- ◆ the Convention on the Suppression of Unlawful Seizure of Aircraft;¹¹
- ◆ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;¹²
- ◆ the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents;¹³
- ◆ the International Convention against the Taking of Hostages;¹⁴
- ◆ the Convention on the Physical Protection of Nuclear Material;¹⁵
- ◆ the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation;¹⁶
- ◆ the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;¹⁷
- ◆ the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;¹⁸

¹⁰ *Convention on the Safety of United Nations and Associated Personnel*, 9 December 1948, U.N. Doc. A/49/49.

¹¹ *Convention on the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105.

¹² *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177.

¹³ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 14 December 1973, 1035 U.N.T.S. 167.

¹⁴ *International Convention against the Taking of Hostages*, 17 December 1979, 1316 U.N.T.S. 205.

¹⁵ *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, 1456 U.N.T.S. 124.

¹⁶ *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation*, 23 September 1971, 1589 U.N.T.S. 474.

¹⁷ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221.

¹⁸ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 U.N.T.S. 304.

- ♦ the International Convention for the Suppression of Terrorist Bombings [hereinafter Convention on Terrorist Bombings];¹⁹ and,
- ♦ the International Convention for the Suppression of the Financing of Terrorism [hereinafter Convention on Terrorist Financing].²⁰

C. “SUPER CRIMINAL CODE”: NEW DEFINITIONS AND IMPLICATIONS FOR CHARITIES

1. Creation of a “Super Criminal Code”

The amendments to the *Criminal Code* implemented by the *Anti-terrorism Act*, and to a certain extent by the *Foreign Missions Act*, constitute the creation of a new type of criminal offence under the heading of terrorism. The assumption underlying these amendments to the *Criminal Code* is that certain offences, specifically terrorism offences, including the threat of or attempt to commit such offences, warrant an extraordinary approach in the methods of investigation, incarceration and punishment due to the very nature of those offences.

The idea that some criminal offences are extraordinary in nature is not new. This principle has most recently received expression in the *Crimes Against Humanity and War Crimes Act*²¹ [hereinafter *War Crimes Act*]. However, even the *War Crimes Act* contains substantially more principles of natural justice than are to be found in the amendments to the *Criminal Code* provided for under the *Anti-terrorism Act*.²² The changes brought about by the *Anti-terrorism Act* are without precedent in Canadian legal history and demonstrate a

¹⁹ *International Convention for the Suppression of Terrorist Bombings*, 12 January 1998, U.N. Doc. A/RES/52/164.

²⁰ *International Convention for the Suppression of the Financing of Terrorism*, 10 January 2000, annex to UNGA Res. A/RES/54/109.

²¹ S.C. 2000, c. 24.

²² S. 10 specifically applies the rules of evidence and procedure in force at the time of proceedings and s. 11 allows the defendant all defences and justifications that are otherwise available under Canadian or international law at the time of the offence or proceedings.

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*. While it is beyond the scope of this paper to discuss in any detail the ramifications of this “Super *Criminal Code*”, this paper does review those areas of the amended *Criminal Code* that impact charities, with particular reference to the new definitions of “terrorist activity”, “terrorist group”, and “facilitation of terrorist activities or terrorist group,” implemented by the *Anti-terrorism Act*.

2. Definitions under the *Anti-terrorism Act*

a) “Terrorist activity”

The definition of “terrorist activities” in section 83.01(1) of the *Criminal Code*, as amended by s. 4 of the *Anti-terrorism Act*, is split into two disjunctive parts, parts (a) and (b).

Part (a) of the definition of “terrorist activity” incorporates ten offences that already exist under section 7 of the *Criminal Code*, each of which implements a specific U.N. Convention regarding terrorism. These provisions include various offences against “internationally protected persons” under subsection 7(3). Combined with section 431 of the *Criminal Code* and specifically the amended definition of “internationally protected persons” in the *Foreign Missions Act*, Part (a) of section 83.01(1), as will be seen later in this paper, could have a specific impact on charities in some situations.

The more familiar part of the definition of “terrorist activity” is contained in part (b) of section 83.01(1). It defines a “terrorist activity” as:

- b) an act or omission, in or outside Canada,
 - (i) that is committed
 - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (B) in whole or in part with the intention of intimidating the public, or a segment of 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, whether the public or the person, government or organization is inside or outside Canada, and
 - (ii) that intentionally
 - (A) causes death or serious bodily harm to a person by the use of violence,
 - (B) endangers a person's life,
 - (C) causes a serious risk to the health or safety of the public or any segment of the public,
 - (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
 - (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)

Both of these parts of the definition include conspiracy, attempt or threat to commit a terrorist activity, as well as being an accessory after the fact or counselling in relation to any "terrorist activity."

The requirement that an act be "committed in whole or in part for political, religious or ideological purposes, objectives or causes" is particularly concerning. It has been said that this provision represents the "criminalization of certain political, religious or

ideological motives”.²³ Canada’s international obligations simply require the government ensure that the acts contemplated by anti-terrorism legislation are:

under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.²⁴

The difference between ensuring a political, religious, or ideological consideration cannot be used as a defence, and incorporating such considerations as an integral part of the definition of the offence itself, is significant. At the very least, this should raise concern about the level of care with which the provisions were drafted and, more importantly, about the way in which they may be enforced.

For instance, comments made by authorities about law enforcement in the matter of terrorism do not inspire confidence that the enforcement of these provisions will take into consideration the legitimate right of dissent of charities within society. For example, in an article published in October 2001 (before Bill C-36, the *Anti-terrorism Act*, was introduced in the House of Commons, but in anticipation of what was to come in the subsequent legislation as evidenced by the fact that the article remained posted on the RCMP web site a year later in October 2002), a spokesperson for the RCMP stated that, “Since there is no definition in the *Criminal Code* for terrorism . . . , the RCMP prefers the term *criminal extremism*”.²⁵ [emphasis added] This is of particular concern when viewed in light of the comment that in the RCMP’s view,

²³ “New Terrorism Offences and Criminal Law”, *supra* note 1 at 156; for a discussion about the role of motive in criminal law and the ramifications of this approach, see the surrounding text. For further discussion refer to *September 11: Consequences for Canada*, *supra* note 1 at 25-28. See also, J. Travers, “9/11 fears turn chance remark into visit by Mounties” *The Toronto Star* (26 September 2002) A31.

²⁴ See Article 5 of the *Convention on Terrorist Bombings*, *supra* note 17, and Article 6 of the *Convention on Terrorist Financing*, *supra* note 18.

²⁵ H. Hamilton, “The Hands of Terror: Is Canada safe from the grasp of terrorists?” *RCMP Online* (4 October 2001) online: RCMP <<http://www.rcmp-grc.gc.ca/online/online000607.htm>> (last modified: 1 October 2002) at part I, para. 4.

“[protests] against genetically modified food and ongoing environmental concerns about water, forest preservation and animal rights are issues to watch”.²⁶ When applied to “political, religious or ideological purposes or causes,” the definition of “terrorist activity” could not only encompass activities that are rightly criminal (*although* not necessarily “terrorist”), but also potentially deter dissident views that in and of themselves have been and should continue to be tolerated in a free and democratic society.

b) “Terrorist group”

A “terrorist group” under subsection 83.01(1) of the *Criminal Code*, as amended by Bill C-36, is defined as:

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity [as defined in subsection 83.01(1) and discussed above], or
- (b) a listed entity, [as defined by section 83.05 and discussed below]

The definition of “terrorist group” is very broad and could include unsuspecting charities if they are not diligent. In this regard, the reference to “entity” casts a broad net by including trusts, unincorporated associations and organizations, as well as an association of such entities.

Even the inclusion of “listed entities”²⁷ is problematic, since, as discussed later in this paper, even some well-known charities could in theory find themselves a “listed entity” in consideration of the nature and location of the international humanitarian work that

²⁶ *Ibid.*, at part II, para. 4.

²⁷ Discussed in greater detail at p. 26, below.

they do if the Government felt that it had “reasonable grounds” to believe the entity had knowingly carried out, attempted to carry out, participated in, or *facilitated* a terrorist activity. Given the breadth in the definition of “facilitate” as explained below, the definition of “terrorist group” under either paragraph 83.01(1)(a) and (b) of the *Criminal Code* could apply to charitable organizations that have no direct or indirect involvement or intention to participate in “terrorist activities.” In this regard, the expansive definition of “terrorist group” may leave open the possibility that many legitimate charitable organizations in Canada could fall within the definition.

c) “Facilitation”

The definition of “facilitation” in section 83.19(2) of the *Criminal Code*, as amended by the *Anti-Terrorism Act*, is of even more concern. The definition is so broad that it has the effect of extending the definition of “terrorist activity” and “terrorist group” to otherwise innocent organizations and people that unwittingly may have become tarred by association with “terrorist activities” without any culpability or intent to be part of criminal activity. Subsection 83.19(2) states that:

- A terrorist activity is facilitated whether or not
- (a) the facilitator knows that a particular terrorist activity is facilitated;
 - (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or
 - (c) any terrorist activity was actually carried out.

This definition diminishes the *mens rea* element of the offence to the point that it verges on a strict liability offence. As mentioned previously, the *Criminal Code* already has in place numerous provisions to deal with terrorist offences. One of the primary purposes of amendments to the *Criminal Code* under Bill C-36, presumably,

should have been to highlight the qualitative difference between existing *Criminal Code* offences and the commission of offences in circumstances where it would be considered a “terrorist activity”. In other words, the ostensible intention of the *Anti-terrorism Act* should have been to demonstrate that the same act should be perceived to be more reprehensible when committed in circumstances that attribute an actual terrorist motivation to the accused, and to enact appropriate punishment under the assumption that existing penalties inadequately reflect the gravity of such offences.

It is a well-established principle of criminal law that the more serious a crime, the more specific the required intent needs to be. Consequently, the substantive curtailment of a *mens rea* requirement for the definition of “facilitation” of a terrorist offence is disturbing, since it does the opposite of being commensurate with the assured gravity of the offence or its punishment. Instead it exposes arguably innocent third parties who may have unwittingly had no intention or fore knowledge that their acts or omissions would be considered to be “facilitating” a “terrorist activity” in the same manner as an individual who has an actual *mens rea* element to their participating in a terrorist activity.

The breadth of the definition of “facilitation” is included in section 83.19, which sets out the offence of “facilitation of terrorist activities,” rather than in section 83.01, which is the general definitions section. The purported reason for this placement of the definition in amendments made November, 2001, to Bill C-36 was to ensure that “facilitation” require knowledge and intent as a specific *mens rea* criminal offence. However, the definition of “facilitate” under subsection 83.19(2) fails to make any reference to the previous subsection 83.19(1), which means it continues to apply to the

entire Part of the *Criminal Code* instead of to a particular section establishing a requirement of knowledge and intent. Moreover, section 83.01(2) specifically incorporates the definition of “facilitation” from subsection 83.19(2) to the whole Part of the *Criminal Code*. Thus, the broad definition of “facilitation” applies to all Criminal Code offences involving “facilitation” of terrorism without being moderated by any requirement for knowledge or intent referred to in section 83.19(1).

As a result, where there is a specific requirement for knowledge and intent for a criminal offence, “facilitating terrorist activity” now requires that there be only a very limited *mens rea* element, or guilty mind, and even less where there is no specific requirement for knowledge and intent at all, for example using and possessing property for facilitating or carrying out a terrorist activity under section 83.04(a). From a practical standpoint, charities could very well become involved unwittingly, in violating the *Criminal Code* in “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.

The relationship between the broad definition of “facilitation” with the corresponding lessening of a *mens rea* requirement on the one hand and Canada’s international commitments to adapt Anti-terrorism Legislation on the other is itself problematic. Resolution 1373 of the U.N. Security Council declares in paragraph 1(b) that all countries must:

Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

The international obligation with which Canada seeks to justify its Anti-terrorism Legislation requires, at a minimum, knowledge on the part of the facilitator of the nature of the activity or purpose to which the funds will be applied. By not requiring a clear *mens rea* element for *Criminal Code* offences, or even a minimum requirement of knowledge, Canada is stepping beyond its international obligations and, by doing so, violating well-established principles of natural justice, criminal law, and due process, without any purported justification from the context of international obligations.

It is also questionable whether an *actus reus* element of the offence need occur for the “facilitation” of a “terrorist activity” to take place under the *Anti-terrorism Act*. This is because the definition of “facilitation” does not require a “terrorist activity” actually be carried out, planned or even foreseen. This raises the prospect that a charity might be found guilty of facilitating a “terrorist activity” even though no terrorist act was ever planned, let alone committed. In a very real sense, a charity might now find itself “guilty by association,” without intending or in fact doing anything that actually ends up facilitating a “terrorist activity.”

- d) “Internationally Protected Persons,” “International Organizations,” and Political Protests

In addition to the amendments to the *Criminal Code* under the *Anti-Terrorism Act*, the combined effect of Part (a) of the definition of “terrorist activity” under the *Anti-Terrorism Act* and the provisions of the *Foreign Missions Act* will impact political protesters, among others, and raises concerns about the further application of the “Super *Criminal Code*” provisions in situations of what could now amount to

instances of what may be labelled as domestic terrorism Charities should be particularly concerned about the expanded definition of the terms “international organization” and “internationally protected person” and the sweeping powers afforded to the RCMP contained within the part on “Security of Intergovernmental Conferences” in the *Foreign Missions Act*.

i) Interaction of Definitions

Under paragraph 83.01(1)(a) of the *Criminal Code*, as amended by the *Anti-Terrorist Act*, the definition of “terrorist activities” includes actions taken against “internationally protected persons”. Section 2(1) of the *Foreign Missions Act* expands the definition of “international organization” to include “an inter-governmental conference in which two or more states participate”. In addition, the term “international organization” is expanded to include an “inter-governmental conference”, such as a meeting of the WTO or the G-8 in combination with S.2 of the *Criminal Code*, this extends the status of “internationally protected person”, to foreign representatives, including diplomats and other officials, possibly even low-level bureaucrats.

The means of transportation for, and the areas in which the “internationally protected persons” are to meet, are now protected under Section 431 of the *Criminal Code*. The interaction between the expanded definitions contained within Part (a) of the definition of “terrorist activity” in subsection 83.01(1) of the amendments to the *Criminal Code* and section 431 of the *Code* means that the definition of “terrorist activity” could include any threatening or commission of acts against such “internationally protected persons”, “official premises”, or

“means of transport” that is likely to endanger the life or liberty of such persons. As a result, protestors blocking a road to a WTO Conference or a G8 Summit could run the risk of committing a “terrorist activity” where the road-block is such that it is likely to endanger the life or liberty of protected persons participating in the conference.

ii) Application to Protestors at Inter-Governmental Conferences

As well as expanding the definitions of “internationally protected persons” and “international organizations”, the section 10.1 of the *Foreign Missions Act* provides the RCMP with the mandate to ensure the “proper functioning” of an “inter-governmental conference” and protection of “internationally protected persons”. Citing this legislation as authority, the RCMP established an “access control area” in downtown Calgary, nearly 100 km from the June 2002 G-8 Summit in Kananaskis. The RCMP established this “access control area” in anticipation of protests surrounding the G-8 Summit, claiming that it was not meant to affect “legitimate business in the area”.²⁸ In a notice published on the G8 Summit Security website entitled “Legal Information for Protesters”,²⁹ the RCMP advised that it would retain the authority to limit the *Charter*-guaranteed rights and freedoms of protestors when deemed necessary in order to ensure the “proper functioning” of the conference and the “protection of internationally protected persons”. It is apparent that the amended *Foreign Missions Act* is and

²⁸ Royal Canadian Mounted Police, News Release, “Access Control Area to Be Established in Downtown Calgary” (21 June 2002) online: RCMP <www.g8summitsecurity.ca/g8/news/nr-02-04.htm> (last accessed: 24 June 2002)

²⁹ This document is no longer available under the section “Information for Visitors” at <www.g8summitsecurity.ca> but was accessed in June/2002.

will be used for the purpose of controlling political protest at the discretion of the RCMP at events such as the G-8 Summit.

Previous versions of the *Public Safety Act*, Bill C-55 and Bill C-42, proposed to amend the *National Defence Act* by giving the Minister of Defence power to proclaim a broad “military security zone” or “controlled access military zone”. Among other things, many feared that this power could be used to subdue legitimate democratic dissent, a right that is guaranteed in the *Canadian Charter of Rights and Freedoms*. Bill C-7, as passed by the House of Commons on February 11, 2004 removes this provision in response to numerous concerns that were raised about the expansive powers it afforded to the government.³⁰ Nevertheless, the government may still create limited access zones by using royal prerogative or by justifying its actions, as they did during the G-8 Summit by referring to the duties imposed on law enforcement authorities under the *Foreign Missions Act*.

As the legislative guidelines for security and safety are redrawn through the anti-terrorism legislation, charitable organizations will need to be careful that they do not violate anti-terrorism legislation in situations where their charitable activities lead them to assist individuals who may be exercising rights of political dissent. This should be of particular concern for charities that may become involved, even peripherally, in areas of potential controversy and confrontation, such as native rights, the environment, animal rights, and the pro-life/abortion debate.

Charities, such as hospitals, that might provide medical assistance, or churches that might offer accommodation or other forms of assistance to protestors who infringe on a zone that has been designated limited access or interfere in a meeting that qualifies as an “international organization” will need to be aware of the consequences that could result from aiding or facilitating protestors in these situations. As well, Canadian charities that are involved in humanitarian, social justice, or civil libertarian issues and participate in public rallies or demonstrations may unwittingly become subject to martial law. Consequently, measures taken by the authorities for the protection of “internationally protected persons”, “international organizations”, and declared limited access zones, may pose a threat to members and volunteers of charitable organizations that operate and provide assistance within these theatres of potential conflict and confrontation.

3. Practical Implications for Charities

Whether or not a particular charity will be subject to prosecution under the “Super *Criminal Code*” provisions provided for under the *Anti-terrorism Act* remains conjecture at this time. The immediate practical concern for charities is not that they will be prosecuted under these provisions, but that they may be vulnerable to de-registration under the *Charities Registration (Security Information) Act*. This could happen where a charity may have become unwittingly involved in activities or with groups that meet the definition of “terrorist activity” or “terrorist group” under the *Criminal Code*, even if no criminal charges are brought against the charity. A charity may also find that it meets the broad and inclusive definition of “facilitating” a “terrorist activity” or “terrorist group” under the *Anti-terrorism Act*, which could result in the seizure or freezing of its assets. Considering the stigma,

suspicion, and loss of goodwill that this would have on a charity, the implications are both disturbing in theory and devastating in practice.

a) Specific Criminal Code Offences that may Impact Charities

In recognition of the complexities of the Anti-terrorism Legislation, the co-ordination of several federal Acts and the lack of evidence to date concerning how the legislation may be implemented 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 Amended *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 as amended by the *Anti-terrorism Act* where charities might be caught under those provisions. In this regard, some of the relevant *Criminal Code* provisions that may impact charities include the following:

- ◆ s. 83.02: Directly or indirectly providing or collecting property that is intended to be used or knowing that it will be used in whole or in part in a 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, directly or indirectly, transactions or financial or related services for the benefit or at the direction of a terrorist group;
- ◆ 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 a terrorist group;
- ◆ s. 83.22: Directly or indirectly instructing a person to carry out a terrorist activity; and,
- ◆ 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.

The interaction between the *Criminal Code* provisions amended by the *Anti-terrorism Act*, the *Foreign Missions Act*, and the *Public Safety Act* could lead to charities unwittingly violating the *Criminal Code* in numerous situations, including the following:

SCENARIO #1

A charity, through a fundraiser, requests the donation of medical supplies to be provided to a humanitarian organization in the Middle East as its agent 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.

SCENARIO #2

A charity, through a fundraiser, solicits funds for a programme to conduct aerial drops of food packages to the civilian population in Afghanistan where a few remaining members of the al Qaida (a “listed entity”) might conceivably receive a few of the food packages.

SCENARIO #3

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

SCENARIO #4

A religious denomination provides funding or other assistance to a local church that assisted the student protestors in scenario #3 by providing sleeping facilities in its church basement.

SCENARIO #5

A church bulletin publicizes a prayer vigil to take place on a continuous basis over two weeks in front of a new abortion clinic in the hope that in doing so there will be fewer abortions taking place at the abortion clinic. Some members of the church decide to participate on behalf of the church. During the two-week vigil, clients of the clinic complain that they cannot adequately access services at the clinic because of fear of intimidation from members of the prayer vigil even though those participating in the

vigil utter no threats against them. The owners of the abortion clinic are also upset because they have lost revenue over the two-week period of the prayer vigil.

SCENARIO #6

A charitable organization that deals with refugees finds a church or a group of individuals willing to sponsor a refugee claimant from a Southeast Asian country. The organization has interviewed the refugee, but does not know that the refugee's brother, who occasionally receives financial help from the refugee, may be linked to al Qaida.

In each of the above scenarios, the charity, its donors, third party, agents, and fundraisers, where applicable, could all be found to have been involved, either directly or indirectly, in a "terrorist activity" as a result of the interaction of the various definitions described above. Even if the charities are not involved directly in engaging in terrorist activity, they could be involved in "facilitating" a "terrorist activity" or a "terrorist group". As such, any charitable organization considering providing humanitarian aid or assistance to individuals or groups in circumstances such as those described above need to be aware that they could be involved in violating the *Criminal Code* as amended by Bill C-36.

b) Consequences of Violating Criminal Code Offences

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 *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.

i) Criminal Code Offences

The *Criminal Code* offences carry heavy penalties and directors of charities could face fines, penalties, and even imprisonment if the charity is found to be engaged in terrorist-related activities. For example, financing of terrorism is an indictable offence, carrying a maximum sentence of ten years, which could apply to directors of a charity found to be guilty of this offence.³⁰ Dealing in property or assets that have been frozen as belonging to a “terrorist group” could lead, on summary conviction, to a fine of not more than \$100,000 or to imprisonment for a term of not more than one year, or to both, or, on indictment, to imprisonment for a term of not more than ten years.³¹ Facilitating a “terrorist activity” is an indictable offence with a maximum penalty of imprisonment for a term not exceeding fourteen years.³²

ii) Inclusion as a “Listed Entity”

While the *Criminal Code* provisions apply to charities, a further concern for charities lies in the latent potential that a charity could conceivably be included as a “listed entity” under section 83.05 of the *Criminal Code*. Specifically, section 83.05 of the *Criminal Code* authorizes the Governor in Council to:

³⁰ ss. 83.02-83.04.

³¹ s. 83.12(1).

³² s. 83.19(1).

... establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are reasonable grounds to believe that

- (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
- (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

As of May 17, 2004 this list had expanded to include 35 organizations.³³

Nevertheless, it should not be taken for granted that a charity will not find its way onto the list. The procedure for being placed on or removed from the list is set out in sections 83.05-83.07 of the *Anti-terrorism Act* and is very similar to that used in the charities de-registration process, which is discussed later in this article. However, the listing process is even more problematic, since there is no notification or automatic quasi-judicial review process for a decision to list an entity. This puts the onus on organizations to review the list in order to determine if they are on it and to apply to be removed if they are found to be included in a case of mistaken identity. Each charity must also review the list regularly to ensure that it is not dealing, or has not dealt in the past, with an organization that is a “listed entity.”

There is also a separate United Nations list of terrorist organizations, the assets of which Canada is obligated to freeze under UN Security Council Resolutions 1267 and 1390. An entity that is not on Canada’s anti-terrorism list could still find itself in effectively the same position if a foreign government requested that

³³ The list is available online at: Solicitor General of Canada <http://www.sgc.gc.ca/national_security/counter-terrorism/Entities_e.asp> (last modified: 23 July 2003).

the United Nations place it on the U.N. list. Therefore, an entity that is not on Canada's anti-terrorist list could still find itself in effectively the same position in a situation where a foreign government requested the United Nations to place such organization on the U.N. list. Moreover, the U.N. list applies to individuals as well as to entities. In this regard, Canada maintains a separate list of U.N.-listed organizations under the *United Nations Suppression of Terrorism Regulations* pursuant to the *United Nations Act*.³⁴ As changes are made to the U.N. list, organizations and individuals are automatically added or removed from the corresponding Canadian list through amendments to the regulations.³⁵ This separate U.N. list of terrorist organizations should be of particular concern to organizations that work in, or have contacts in, areas of conflict. A human rights or mission board organization could even find itself subject to a concerted effort on the part of the government of a country in which it works to have the charity or an agent with whom the charity works placed on the list even though neither it nor the agent with whom it works is made a "listed entity" by the Canadian Government.

iii) Freezing or Seizure of Assets

The potential consequences of being listed or meeting the definition of a "terrorist group" are grave. Under section 83.08 of the *Criminal Code*, the assets of all "terrorist groups" can be frozen. No person in Canada or Canadian overseas may, either directly or indirectly, deal with any property of a "terrorist

³⁴ *United Nations Suppression of Terrorism Regulations*, SOR/2001-360.

³⁵ The Consolidated List of Names subject to the Regulations Establishing a List of Entities made under subsection 83.05(1) of the *Criminal Code* or the *United Nations Suppression of Terrorism Regulations* is available from the Office of the Superintendent of Financial Institutions (OSFI) website at http://www.osfi-bsif.gc.ca/eng/publications/advisories/index_supervisory.asp?#Supter

group” or facilitate any transactions regarding such property or provide any financial services in relation to such property. Under sections 83.13 and 83.14, a judge may make an order for the seizure or forfeiture of property that is owned or controlled by or on behalf of a “terrorist group” or that has been or will be used, in whole or in part, to “facilitate” a “terrorist activity”.

These provisions could mean that if a charity was found to be a “terrorist group”, either by being listed or by virtue of “facilitating” a “terrorist activity”, its charitable assets could be subject to seizure and forfeiture by the government. Likewise, if the charity accepted a donation from a “terrorist group”, its assets could also be subject to forfeiture for dealing in frozen assets. The judge would then make an order for the disposal of the assets. This in turn could expose the directors to civil liability for breach of their fiduciary duties to protect and preserve the charitable assets of the charity. Similar consequences could follow for the directors and the charitable assets of a charity from de-registration of the charity’s charitable status. For a discussion of the de-registration process and its implications for charities, see Part E of this paper, “De-Registration Under Part 6 of the *Anti-terrorism Act*”.

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

The *Proceeds of Crime (Money Laundering) Act* was originally enacted in 1991 and overhauled in the year 2000. It was originally enacted to combat organized crime in furtherance of Canada’s international obligations (particularly its commitments to the Financial Action Task Force, discussed in the next section of this paper) but, after the events of September 11th, 2001, 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*.³⁶ [hereinafter *Proceeds of Crime Act*] Regulations were adopted under the amended *Proceeds of Crime Act* and promulgated on May 9th, 2002.³⁷ [hereinafter *Proceeds of Crime Regulations*].

“Money laundering” is the process by which proceeds of criminal activity are processed to disguise their criminal origin so that the criminal(s) involved might be able to benefit from them without drawing attention to the criminal activity.³⁸ The goal of money laundering legislation is to combat crime by making it more difficult for criminals to convert the proceeds of their criminal activity into a more useable form, thus making criminal activity less profitable and thereby purportedly less attractive.

Criminals laundering money and terrorists seeking to finance terrorist activities use similar methods to achieve or maintain the appearance of legitimacy with respect to their activities.³⁹ Hence it is assumed that terrorist activity can be minimized by cutting off finances from terrorist organizations through the use of money laundering type legislation. The validity of this assumption is open to question, especially when the definition of terrorism itself is predicated on the requirement that such an act be based on a religious, political, or ideological motivation. In such cases, the availability of finances or the lack thereof may be only one element in a plan to commit a terrorist activity. Where the motivation exists to carry out a terrorist act, the

³⁶ For an in-depth discussion of the Act, see A. Manzer, *A Guide to Canadian Money Laundering Legislation*, (Markham: Butterworths, 2002).

³⁷ *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-781, s. 31(1).

³⁸ For a general discussion concerning the methods of money laundering, see Manzer, *supra* note 34, at 5.

³⁹ The primary difference is with respect to the phase of the suspicious transaction that is of concern. While tracking down money laundering transactions, the aim is to discover the criminal source of the funds, while with terrorist financing legislation the aim is to find the intended recipient who is expected to use the money in order to engage in terrorist activities. See Manzer, *supra* note 34, at 19.

perpetrators will find a means to execute their plan within whatever means are available, even if finances may be limited.

In this respect, it is interesting to note the comments made by the Horst Intscher, Director of the Financial Transactions & Reports Analysis Centre of Canada (FINTRAC), the government agency established to implement Canada's money laundering legislation,⁴⁰ in the agency's first annual report. Intscher stated that, "Suspected cases of terrorist financing often involve only small amounts of money, such as \$8,000 transactions, but there are often many 'clusters' of transactions that make them suspicious...The numbers on the terrorist financing side will always be smaller."⁴¹ He also stated that, of the approximately \$100 million in suspicious transactions the agency reported to law enforcement agencies in the first five months of reporting, only one percent, or less than \$1 million, is related to suspected terrorist-financing activities.⁴² Notwithstanding the very small amount of suspicious transactions attributed to charities, the full impact of the *Proceeds of Crime Act* continues to apply to charities, including thousands of legitimate charities that operate both inside and outside of Canada and have nothing to do with financing terrorist activities.

Regardless of the validity of the assumptions underlying terrorist financing legislation, the fact remains that these laws will now have a significant impact on Canadian charities, as well as lawyers who are involved in advising charities. Under the new provisions, charities may be subject to the prescribed record keeping and reporting duties outlined in the *Proceeds of Crime*

⁴⁰ For more on FINTRAC, see part D.2(a), below.

⁴¹ A. Dawson, "Agency flagged \$100 million in illicit cash" *The National Post* (6 November 2002) online: National Post <<http://www.nationalpost.com/national/story.html?id={EEE19D84-193D-44FE-9EC6-7A20E2B0D2E2}>> (last accessed: 6 November 2002).

⁴² *Ibid.* The first reporting requirements came into force on November 8, 2001 and the report covered the period to March 31, 2002.

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 life insurance company, without the charity's knowledge.

Lawyers are currently exempt from the reporting and record-keeping provisions of Part I of the *Proceeds of Crime Act* pending the results of a constitutional challenge by the Federation of Law Societies.⁴³ If this appeal is unsuccessful, then lawyers will be subject to Part I reporting requirements. Even if the appeal is successful, however, lawyers will continue to be subject to the current reporting obligations under the Act dealing with large cash transactions with a value in excess of \$10,000 and cross border transactions that could result in lawyers having to report their charitable clients. In any event, lawyers will need to be able to advise their charitable clients regarding their legal obligations in this area. Furthermore, as volunteer directors on boards of charities, lawyers will have a fiduciary obligation under the subjective standard of care as a director to be aware of *Proceeds of Crime Act* and how it will impact their own organizations.

Even where lawyers or their charitable clients are not themselves subject to a duty to report, the process of being subject to the monitoring of financial transactions under the *Proceeds of Crime Act* for the purposes of detecting criminal behaviour will likely involve intrusive monitoring of the financial activities of otherwise innocent charities and organizations that deal with them. The amendments to the *Proceeds of Crime Act* brought about by both the *Anti-terrorism Act* and the *Public Safety Act* mean that charities, their fundraisers and their legal counsel may be drawn into

⁴³ Law Society of Upper Canada, "Update on money laundering legislation" (Notice to the Profession) in *Ontario Reports* (25 October 2002) viii [hereinafter "LSUC notice"].

the ambit of the *Act*, possibly as entities required to report, in addition to being the subjects of such reports.

1. International Context

The amendments to the *Proceeds of Crime Act* are clearly part of a larger international drive to curtail the financing of terrorism involving large international organizations, such as the International Monetary Fund, the World Bank, the G-8 and G-20 Finance Ministers' groups, as well as various regional organizations. The amendments reflect the implementation of Canada's commitment to comply with the *International Convention on the Suppression of Terrorist Financing* and Canada's desire to implement the recommendations of the Financial Action Task Force on Money Laundering ("FATF").

FATF was established by the G-7 Summit in Paris in July 1989 to examine measures to combat money laundering. FATF is an inter-governmental body whose purpose is the development and promotion of policies, both at the national and international levels, to combat money laundering and terrorist financing. The Task Force is therefore a policy-making body, which works to generate the necessary political will to bring about national legislative and regulatory reforms to combat money laundering. In addition to its 29 member countries, FATF works with FATF-style regional bodies and representatives of bodies such as the IMF, Interpol, and the European Central Bank (ECB).

FATF functions through the issuance of recommendations that incorporate commitments on the part of member countries to bring their legislation into compliance with the recommendations. . Following the events of September 11th, FATF held an extraordinary session in Washington, D.C. on October 29-30, 2001. At that meeting, FATF expanded its

mandate to include terrorist financing and to establish standards for the prevention of terrorist financing, tracking down and intercepting terrorists' assets, and the pursuit of individuals and countries suspected of participating in or supporting terrorism. As a result of this meeting, FATF issued a set of eight *Special Recommendations on Terrorist Financing*. These eight Special Recommendations commit members to:

- a) Take immediate steps to ratify and implement the relevant United Nations instruments.
- b) Criminalize the financing of terrorism, terrorist acts and terrorist organisations.
- c) Freeze and confiscate terrorist assets.
- d) Report suspicious transactions linked to terrorism.
- e) Provide the widest possible range of assistance to other countries' law enforcement and regulatory authorities for terrorist financing investigations.
- f) Impose anti-money laundering requirements on alternative remittance systems.
- g) Strengthen customer identification measures in international and domestic wire transfers.
- h) Ensure that entities, in particular non-profit organisations, cannot be misused to finance terrorism.⁴⁴

⁴⁴ FATF, News Release, "FATF Cracks down on Terrorist Financing" (31 October 2001) online: OECD <http://www1.oecd.org/fatf/pdf/PR-20011031_en.pdf> (last accessed: 8 November 2002) [hereinafter "FATF News Release"].

Recommendation eight deals specifically with non-profit organizations, highlighting the potential for their misuse in the financing of terrorism. The full text of the recommendation provides as follows:

VIII. Non-profit organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.⁴⁵

Subsequent to identifying non-profits as an area of concern in its *Special Recommendations on Terrorist Financing*, the FATF issued a report on October 11, 2002, entitled *Combating the Abuse of Non-Profit Organizations: International Best Practices*.⁴⁶ This report identifies non-profit organizations as “a crucial weak point in the global struggle to stop such funding at its source” because of their perceived potential misuse as conduits for terrorist financing. The report subsequently outlines specific recommendations, expressed as ‘international best practices’, that apply to both non-profit organizations and regulatory authorities.⁴⁷ This special focus on non-profit organizations is reflected in the expansion of the definitions in the *Proceeds of Crime Act* to include charitable organizations within its scope and in the creation of the deregistration process under the *Charities Registration (Security Information) Act*. This same focus is also highlighted in FINTRAC’s first annual report, which states:

⁴⁵ *Ibid.*

⁴⁶ For a summary and commentary on the FATF report *Combating the Abuse of Non-Profit Organizations: International Best Practices* and the consequences for Canadian charities refer to *Antiterrorism and Charity Law Alert No.3* (7 August 2003) available at www.antiterrorismlaw.ca

⁴⁷ *Special Recommendations on Terrorist Financing*, online: FATF <http://www1.oecd.org/fatf/SRecsTF_en.htm>

Terrorist financing operates somewhat differently from money laundering but no less insidiously. While terrorist groups do generate funds from criminal activities such as drug trafficking and arms smuggling, they may also obtain revenue through legal means. Supporters of terrorist causes may, for example, raise funds from their local communities by hosting events or membership drives. In addition, some charity or relief organizations may unwittingly become the conduit through which donors contribute funds that may eventually be used to commit a terrorist act. The funds are then routed to the recipient terrorist organizations through both informal networks and the formal financial system.⁴⁸

2. Proceeds of Crime (Money Laundering) and Terrorist Financing Act and Regulations

a) Creation and role of FINTRAC

One of the objectives of the amendments to the *Proceeds of Crime Act* in 2000 was to establish the FINTRAC. The amendments to the *Proceeds of Crime Act* under the *Anti-terrorism Act* significantly expand the role and powers of FINTRAC. It was originally created as an independent government agency to combat organized crime 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, 2001, its mandate was expanded through Part 4 of the *Anti-terrorism Act* to include terrorist financing.

The *Proceeds of Crime Act* makes it mandatory for various persons and entities to keep and retain records containing specific detailed information about certain financial transactions and to report these transactions to FINTRAC. FINTRAC reviews the information and where financing of terrorist activity or money laundering is suspected,

⁴⁸ *Report of the Financial Transactions and Reports Analysis Centre of Canada: Building a Solid Foundation*, online: FINTRAC <http://www.fintrac.gc.ca/publications/annualreport/2002/AR_e.pdf> (last modified: 5 November 2002) at 10 [hereinafter "FINTRAC Report"].

FINTRAC may release some of the reported information to law enforcement and other government agencies. As already mentioned, FINTRAC reported approximately \$100 million in transactions to law enforcement and government agencies in its first five months of reporting with only partial reporting requirements in force. Based on the provided information, the government agencies may proceed to investigate the subject transactions, to detain and search the subject persons, and possibly to seize and forfeit the property in question.

The amendments to the *Proceeds of Crime Act* strengthen 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. The amendments also expand FINTRAC's power to collect information from federal and provincial government agents for purposes related to law enforcement or national security. Bill C-7, *The Public Safety Act*, contains a corresponding amendment to the *Office of the Superintendent of Financial Institutions Act*, which will permit the Superintendent to disclose to FINTRAC information related to compliance by a financial institution. In other words, FINTRAC will be permitted virtually unlimited access to collect information from various government databases related to national security, law enforcement, and financial regulation.⁴⁹ Since such a broad power to share financial information could affect charities and donors, as well as lawyers acting on behalf of charitable clients or serving on boards of charitable organizations, it should be of vital concern for lawyers to know the nature of the information FINTRAC will be sharing and how it will obtain such

⁴⁹ The FINTRAC Report states, at 6: "As well, we identified government and commercial databases of interest to FINTRAC and concluded an agreement with the RCMP to gain access to a national law enforcement database."

information. This is all the more important because of the possibility that lawyers themselves may find they are under a duty to report to FINTRAC under certain circumstances.

b) General Description of Reporting Entities

Not every person or entity has the statutory obligation to record and report the transactions defined in the *Proceeds of Crime Act*. Section 5 of the *Act* defines the reporting persons and entities as follows:

- (a) authorized foreign banks within the meaning of section 2 of the *Bank Act* in respect of their business in Canada, or banks to which that Act applies;
- (b) cooperative credit societies, savings and credit unions and caisses populaires regulated by a provincial Act and associations regulated by the *Cooperative Credit Associations Act*;
- (c) life insurance companies or foreign life insurance companies to which the *Insurance Companies Act* applies or life insurance companies regulated by a provincial Act;
- (d) companies to which the *Trust and Loan Companies Act* applies;
- (e) trust companies regulated by a provincial Act;
- (f) loan companies regulated by a provincial Act;
- (g) persons and entities authorized under provincial legislation to engage in the business of dealing in securities, or to provide portfolio management or investment counselling services;
- (h) persons and entities engaged in the business of foreign exchange dealing;
- (i) persons and entities engaged in a business, profession or activity described in regulations made under paragraph 73(1)(a);
- (j) persons and entities engaged in a business or profession described in regulations made under paragraph 73(1)(b), while carrying out the activities described in the regulations;
- (k) casinos, as defined in the regulations, including those owned or controlled by Her Majesty;
- (l) departments and agents of Her Majesty in right of Canada or of a province that are engaged in the business of

accepting deposit liabilities or that sell money orders to the public, while carrying out the activities described in regulations made under paragraph 73(1)(c); and
(m) for the purposes of section 7, employees of a person or entity referred to in any of paragraphs (a) to (l).

While none of these categories directly name charities, charities could be brought into the scope of the *Proceeds of Crime Act* indirectly, either as companies to which provincial trust company legislation applies or as entities authorized under provincial legislation to engage in the business of dealing in securities. These possibilities are described in more detail below.

c) General Description of Subject Transactions

Not every financial transaction needs to be reported, although the scope of the *Act* is in fact very broad. According to the *Act*, reporting persons or entities must record and report the following transactions that occur in the course of their business activities:

i) Suspicious Transactions

Part 1 of the *Proceeds of Crime Act* requires the individuals and entities defined in the *Act* to report:

every financial transaction that occurs in the course of their activities and in respect of which there are *reasonable grounds to suspect* that the transaction is related to the commission of a money laundering offence⁵⁰
[emphasis added]

“Suspicious transaction” is not defined in the *Act*, nor are details provided as to what would constitute “reasonable grounds” to suspect a relation to the

⁵⁰ s. 7.

commission of a money-laundering offence.⁵¹ Some possible considerations include the identity of the parties, the destination country of the funds, and patterns in transactions. Under the latter, “suspicious transactions” could in some circumstances capture tax-structured transactions, which might include certain large donations.⁵² Under such broad definitions, Canadian charities could become the subject of such reports without any awareness that they have been reported when they carry on international operations in transferring funds to foreign jurisdictions in the normal course of their operations such as, for example, in the support of missionary bases.

ii) Prescribed Transactions

In addition to suspicious transactions, the *Proceeds of Crime Act* creates an absolute obligation for reporting entities to report “prescribed” transactions. The Act requires that reporting entities keep records of and report “every prescribed financial transaction that occurs in the course of their activities.”⁵³ Under the current and proposed regulations, the “prescribed transactions” can be of two kinds: large cash transactions or transfers of cross-border currency and monetary instruments.⁵⁴ Large cash transactions are essentially any cash transactions of \$10,000 or more within Canada, whereas cross-border currency and monetary instruments applies to any import or export of \$10,000 or more,

⁵¹ FINTRAC and FATF have both issued suggested guidelines on how one might identify suspicious transactions. For more information see: FINTRAC, *Guideline 2: Suspicious Transactions* (Ottawa: FINTRAC, 9 May 2002), online: FINTRAC http://www.fintrac.gc.ca/publications/guide/2_e.asp (last modified: 31 May 2002); and FATF, *Guidance for Financial Institutions in Detecting Terrorist Financing* (Paris: FATF, 24 April 2002), online: Organisation for Economic Co-Operation And Development <http://www1.oecd.org/fatf/pdf/GuidFITF01_en.pdf> (last accessed: 7 November 2002).

⁵² Manzer, *supra* note 34, at 20.

⁵³ s. 9(1).

⁵⁴ See *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184; and *Cross-Border Currency and Monetary Instruments Reporting Regulations*, C. Gaz. 2002.I.1949.

either in cash or by monetary instruments.⁵⁵ Combined with the possibility that “suspicious transactions” will be reported, the automatic reporting of large cash transactions and cross-border currency and monetary instruments means that virtually any transaction involving a substantial amount of money to a Canadian charity that engages in overseas work could be the subject of a report by a reporting entity.

3. Impact of the *Proceeds of Crime Act* and Regulations on Charities

a) Information Gathering under the *Proceeds of Crime Act*

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 that are discussed in Part C.4(b) above, 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.

In this regard, a charity that funds international programs may unwittingly become the subject matter of a reported transaction without even being aware of it. For example, a charity’s bank, its lawyers or its accountants may now either individually or

⁵⁵ See for example, *Proceeds of Crime Regulations*, ss. 12-13, 21-22, 24-25, 28-29, and 32-33.

collectively be required by law to report to FINTRAC any suspicious transactions (currently not applicable to lawyers), large cash transactions, or cross border transactions of the charity as specified in the legislation and regulations. Moreover, such reporting entities are specifically enjoined not to let the organization that is the subject of the report know, either directly or by implication, that they have made such a report.⁵⁶ On the other hand, if FINTRAC suspects terrorist financing or money laundering activity based on its analysis of the reports it receives, it may release the reported information to law enforcement and other government agencies. Based on this information, government agencies may take action to investigate the subject transactions, retain and search the subject persons, lay charges, and seize the property in question for forfeiture.

The information reported to FINTRAC can also affect charities through the broad powers granted under Part 6 of the *Anti-terrorism Act*, (the *Charities Registration (Security Information) Act*), to the Solicitor General and the Minister of National Revenue. Information collected by FINTRAC may be made available to, and used by, the Solicitor General and the Minister of National Revenue in considering whether to revoke an organization's charitable status or to deny a charitable status application.⁵⁷

The reporting requirements may also have an impact on charitable fundraising involving any large cash donations or the funding of international projects. This may unduly deter *bona fide* donors from making significant donations to Canadian

⁵⁶ *Proceeds of Crime Act*, s. 8; see also Manzer, *supra* note 34, at 10-11, regarding the difficulties this creates for reporting entities. Essentially, the implications are that reporting entities are required to obtain detailed information for all transactions, not only reported transactions, in order not to tip a client off about an intended report.

⁵⁷ This process is discussed in greater detail under the next part (Part E) of this paper.

charities, especially organizations that the donors are not intimately familiar with, or discourage Canadian charities from transferring much-needed funds to support projects in foreign jurisdictions. A Canadian charity that transfers charitable funds to a foreign charity under an agency or joint-venture agreement may find itself becoming the subject of a reported transaction to FINTRAC.

b) Reporting Requirements under the *Proceeds of Crime Act*

The reporting requirements included in the amendments to the *Proceeds of Crime Act* may also impact charities to the extent that some charities involved in certain activities may be found to fall within the definition of entities that are required to report under the *Act*. This may occur indirectly under paragraph 5(g) of the revised *Act*, 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*. Paragraph 5(g) could apply to charities by virtue of the fact that charities in Ontario for example, are exempted from the requirements for registration under the *Securities Act* and therefore could, in some situations, be considered to be “authorized to engage in the business of dealing in securities” under section 5(g) of the revised *Proceeds of Crime Act*, whether or not they in fact engage in said activities.

In this regard, Paragraph 35(2)7 of the *Securities Act*⁵⁸ 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

⁵⁸ R.S.O. 1990, c. S.5.

not for profit, where no commission or other remuneration is paid in connection with the sale thereof.

In Ontario, where a charity fulfills the exemption requirements under paragraph 35(2)7 of the *Securities Act* and becomes involved in a related business of issuing securities for a profit, such as the issuance of bonds by a church denomination at a low interest rate in order to reinvest the monies received in market securities or in loans to member congregations at a higher interest rate, may have become both “authorized” and “engaged” in the business of dealing in securities for the purposes of paragraph 5(g) of the *Proceeds of Crime Act*. If so, it might become subject to the mandatory recording and reporting obligations of the *Proceeds of Crime Act*. This could also happen in other provinces with similar securities legislation.

Charities may also be included within the expanded definition of reporting entities set out in 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 situations may include charities. Specifically, the regulations state that a “financial entity” includes “a company to which the *Trust and Loan Companies Act* applies”. In this regard, where a national charity incorporated by a special act of Parliament or under the *Canada Corporations Act* receives monies from other charities in order to pool those monies for investment purposes, the receiving charity might be involved in trust activities that could require it to be registered under the federal *Trust and Loan Companies Act*. If so, then the charity would have become a reporting entity for the purposes of the *Proceeds of Crime Act*.

As well, a “money services business” is defined in the same regulations 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, or of issuing or redeeming money orders, traveller's cheques or other similar negotiable instruments.”⁵⁹ These activities could include a charity that is involved in the related business of transferring funds to third party agents internationally or even domestically in return for an administrative service fee. Whether CRA would find such an arrangement to be an acceptable charitable activity is doubtful, given the position by CRA that a charity cannot act as a conduit to forward funds to non-qualified donees even when an agency agreement is entered into. However, the reality is that many charities at times do become involved in transferring monies to third party agents for a fee and therefore may unwittingly come under a duty to report such transactions under the *Proceeds of Crime Act*.

Whether or not the reporting requirements under the *Proceeds of Crime Act* apply to a charity depends on whether or not the charity's activities in these areas can be considered a “business”, or a “related business” under the *Income Tax Act*. In this regard, the term “business” is not defined in either the *Proceeds of Crime Act* or the Regulations. The *Income Tax Act*,⁶⁰ on the other hand, has a broad definition of “business”. In section 248(1) it states that:

"business" includes a profession, calling, trade, manufacture or undertaking of *any kind whatever* and ... an adventure or concern in the nature of trade but does not include an office or employment. [emphasis added]

⁵⁹ *Proceeds of Crime Regulations*, *supra* note 35, s. 1(2).

⁶⁰ R.S.C. 1985 (5th Supp.), c. 1. Other legislative definitions for “business” can be found in: the *Canada Evidence Act* R.S.C. 1985, c. C-5, s. 30(12); and the *Competition Act*, R.S.C. 1985, c. C-34, s. 2, which specifically includes “the raising of funds for charitable or other non-profit purposes” under the definition of “business”.

This definition might conceivably apply to the activities of a charity. CRA, however, does not consider the activities of a charity engaged in pursuing its charitable objectives to be that of a “business”. In a recent consultation paper on this topic, CRA states that it does not apply the broad definition of “business” as stated in the *Income Tax Act* to charities, rather that “business” in the charitable context is limited to “commercial activities, or more precisely, the seeking of revenue by providing goods and services to people in exchange for a fee”.⁶¹ Where a charity is permitted by CRA to carry on a business under the *Income Tax Act* is with regard to a “related business” where the business is linked to and subordinate to its charitable purpose, similar to the example referred to above.⁶²

However, even if a charity is not involved in “carrying on a business” or a “related business” under the *Income Tax Act*, the charity might still be found to have been “authorized to be engaged in a business” or “engaged in a business” for the purposes of the *Proceeds of Crime Act*, since the determination of “business” in the *Proceeds of Crime Act* may not necessarily be interpreted the same as under the *Income Tax Act*. The courts may need to be called upon to determine what the definition of “business” is under the *Proceeds of Crime Act*.

If charities do fall within the definitions of entities that are required to report under the *Proceeds of Crime Act*, then there are serious consequences if such charities fail to do so. As such, charities will need to be diligent in monitoring whether circumstances

⁶¹ CRA, *The Related Business Provisions for Charities in the Income Tax Act* (Consultation Document) online: CRA <http://www.cra-adrc.gc.ca/tax/charities/consultation_policy-e.html> (last modified: 5 May 2002) at para. 6 [hereinafter *Related Business*].

⁶² *Ibid.*

may have exposed them to unwittingly coming under a duty to report under the *said Act*.

E. DE-REGISTRATION UNDER PART 6 OF THE ANTI-TERRORISM ACT

1. The Process: Part 6 of Bill C-36 *Charities Registration (Security Information) Act*

Part 6 of the *Anti-terrorism Act* enacts the new *Charities Registration (Security Information) Act*.⁶³ 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.

a) Grounds for the Issuance of a Security Certificate

Under the new legislation, a security certificate can be issued against an existing charitable organization 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, jointly sign the security certificate. However, the *Act* does not define "reasonable grounds" nor does it give examples of the kinds of factors that could be considered reasonable grounds.

⁶³ *Charities Registration (Security Information) Act* (being part VI of the *Anti-terrorism Act*, *supra* n. 3).

b) Judicial Consideration of the Certificate

The judicial consideration stage of the de-registration process is meant to address the issue of procedural fairness and to give the charity an opportunity to respond to the claims made against it. However, the judicial consideration process itself raises several concerns about aspects of the procedural fairness that this involves.

The charity must be served notice of the issuance of a certificate as soon as this has been signed by the Ministers. A minimum of seven days after the charity has been served, the certificate must be submitted to a judge of the Federal Court for a determination of its reasonableness. The charity is then given the opportunity to respond to the issuance of the certificate. However, this right is severely limited due to a number of factors related primarily to the unavailability of information.

During the judicial consideration stage of the process, the judge must give the charity or applicant for charitable status a summary of the grounds that gave rise to the issuance of the security certificate. This summary is comprised of security and criminal intelligence information that, in the judge's opinion, may be disclosed under the *Act*. In practice, the charity's right to respond is limited by the resulting imbalance of information. The de-registration process therefore raises concerns about the breadth of information available to the judge and the Ministers, and the potential lack of information available to the charity.

c) Evidence

Section 7 of the *Charities Registration Act* states that “any reliable and relevant information” may be admitted into consideration by a Federal Court judge “whether or not the information is or would be admissible in a court of law”. The determination of the reasonableness of the security certificate would be based in part upon this broad base of information available to the court for its consideration. This should be of concern to charities since it means that, despite the serious consequences of a security certificate, section 7 of the *Charities Registration Act* effectively waives the ordinary rules governing the admissibility of evidence for the purposes of the Federal Court review of the certificate.

Another provision within the *Charities Registration Act* that raises concerns about the fairness of the process is paragraph 8(1)(a), which also deals with evidence to be considered by the Federal Court Judge. Paragraph 8(1)(a) states that “information obtained in confidence from a government, an institution or an agency of a foreign state, from an international organization of states or from an institution or agency of an international organization of states” can be relied upon in determining the reasonableness of the certificate, even though it cannot be disclosed to the charity in question. Furthermore, the judge is to decide on the relevance of such information after hearing arguments from the Minister seeking to include it. The charity is not given an opportunity to argue the relevance of such evidence or cross-examine it to challenge its credibility. However, even if it were granted the opportunity, the charity could not argue the relevance or credibility of evidence to which it has no access.

Whether the information is ultimately relied upon or not, the determination takes place entirely in the absence of the charity or its counsel.

Paragraph 6(1)(b) of the *Charities Registration Act* grants the judge considering the certificate discretionary power to decide whether any information “should not be disclosed to the applicant or registered charity or any counsel representing it because the disclosure would injure national security or endanger the safety of any person.” Combined with the possible exclusion of foreign or government evidence, this raises the possibility that much of the security information and intelligence reports considered by a Federal Court judge might be deemed too sensitive to disclose to the affected charity. In fact, it is altogether possible for a charity to be de-registered based entirely on information to which it has no access.

d) Effect of Certificate

After a Federal Court judge has determined that a security certificate is reasonable, the Ministers must publish the certificate in the *Canada Gazette*. Once it is published, the charity is stripped of its charitable status. The certificate is effective for seven years after which the Ministers would have to start the process over again if they feel the organization is still a risk. However, by that time the charity would not likely be still in existence.

e) Appeal

Finally, after a certificate is issued, subsection 11(5) of the *Charities Registration Act* precludes any avenue for judicial appeal or review, other than a limited right to apply

to the Ministers to review the certificate if there has been a material change in circumstances. However, considering that a charity might not even know what information the security certificate was based on in the first place, it would be very difficult for it to know when its circumstances might have changed materially. In any event, once a charity has been de-registered, it is highly unlikely any organizational infrastructure or support base would remain to launch an application to reconsider the certificate for a material change in circumstance.

f) Concerns about the De-Registration Process

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 important from a practical standpoint, however, 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 entail 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 adequately protecting the assets of the charity.

The lack of procedural safeguards available to a charity subject to de-registration is of serious concern in light of these potentially serious consequences to a charity and its directors. Some specific concerns about the process include the following:

- ◆ No knowledge or intent is required;
- ◆ The provision is retroactive – past, present and future actions can be considered;
- ◆ Normal rules for the admissibility of evidence do not apply;
- ◆ “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 defence;
- ◆ No warning is issued or opportunity given to the charity to change its practices;
- ◆ There is no ability for appeal or review by any Court;
- ◆ The justification for the certificate is based on the low standard of “reasonable belief”; and,
- ◆ The burden of proof is shifted, requiring the charity to respond and prove its innocence, even where it may not really know what the charges are against it.

During the judicial consideration of the certificate, the charity is given the opportunity to respond. However, because of the limitations on disclosure of information to the charity, a charity’s knowledge of the case against it and ability to respond may be severely limited. The effect of these limitations will, in essence, impose a burden of proof on the charity that it cannot meet. The “reasonability” of a security certificate under these circumstances may effectively be a foregone conclusion. This concern is borne out by experience under similar provisions in the *Immigration Act* that have

been in force for over ten years, which indicate Federal Court judges usually endorse security certificates.⁶⁴

If the security certificate is found to be reasonable by the Federal Court judge, then the certificate 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. Given that there is no right to appeal a security certificate, that the ordinary rules of evidence have been waived, and that evidence deemed to be injurious to national security or a person's safety is not to be disclosed to the charity, it is difficult to see how the de-registration process could be considered fair, notwithstanding CRA's recent suggestion to the contrary.⁶⁵

F. GENERAL CONCERNS ABOUT ANTI-TERRORISM LEGISLATION

The range of activities contemplated by the Anti-terrorism Legislation is very 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 other areas of Canadian law.

⁶⁴ C. Freeze, "Powerful antiterror tool rarely employed by Ottawa" *The Globe and Mail* (30 October 2002) A9.

⁶⁵ "The New Anti-terrorism Law: Impact on Charities" *Registered Charities Newsletter* (Spring 2002 – No.12) online: CRA <http://www.cra-adrc.gc.ca/tax/charities/newsletters/news12-e.html#P15_2557> (last modified: 30 July 2002). See also *Charity Law Bulletin* #16 (20 September 2002) online: Carter & Associates <<http://www.carters.ca/pub/bulletin/charity/2002/chylb16.pdf>> (last accessed: 11 November 2002).

1. Fairness

Bill C-36 raises several concerns about lack of fairness. Most importantly, there is a lack of procedural fairness that results from 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 the “Super *Criminal Code*” offences or the loss of charitable status. Defences that are usually available for other *Criminal Code* violations are not available. Furthermore, the knowledge or intent required for offences involving facilitation of terrorist activities has a lower threshold than for other comparable *Criminal Code* offences, and is not even necessary for the provisions leading to loss of charitable status. This abrogates Canadians’ rights in order to fulfill Canada’s international obligations and, in doing so, goes far beyond the requirements of those obligations. The lack of information available to the charity about the grounds for the issuance of the certificate severely limits its ability to put forth an adequate response or defence to the allegations made against it.

3. Discrimination

Under this legislation, charities with political, religious and ideological purposes will now become inherently suspect because they in part meet the definition of “terrorist activity”. As a result, religious, ethnic and environmental charities may be scrutinized more than other

charities, possibly resulting in discrimination against charities that have “religious or ideological” purposes. These could include, for example, organizations involved in issues related to the environment or genetically modified foods. It could apply to minority religious groups, ethnic social groups and charities, but it could also apply to mainline religious groups and related charities. For more information in this regard, reference can be made to *Antiterrorism and Charity Law Alert No.1 (30 April 2002)*, available at www.antiterrorismlaw.ca.

4. Negative Impact on Charities From Bill C-36

a) Public Perception

The enactment, implementation and enforcement of the Anti-terrorism Legislation will have an ongoing negative impact upon the general public’s perception of charities by associating charities in general with the possibility of assisting the financing of terrorism. People will be less open to give to charitable operations, especially to organizations that they are unfamiliar with when their donation might expose them to criminal charges for facilitating terrorist activities. However, even if a donor is willing to give to an organization or if the donor is a long-time supporter of a given organization, the donor may hesitate to give large donations as the public becomes more aware of the full impact of Anti-terrorism Legislation, in particular the *Proceeds of Crime Act*, in realizing that a large donation might expose the financial activities of a donor to government scrutiny.

Even if donors are not protective of their privacy, they could still hesitate to donate to a charity when there is a possibility that their donation might not end up going to fulfill

their intended purpose in the event that the charity's assets became subject to seizure. This would have a significant impact on charities' ability to pursue its charitable objectives in a climate where many charities are already struggling to secure sufficient support to be able to continue their operations.

b) The "Chill Effect" on Future Charitable Activities

The legislation could also have a "chill effect" on future charitable activities particularly for international religious and humanitarian NGO's working in other countries. Organizations might become 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. Due diligence to avoid situations that might bring about liability will be costly, difficult, and often ineffective, using up valuable resources that should be going to the pursuit of the charitable or humanitarian objects of the organization.

Co-operative efforts between domestic and international organizations may also be hindered because international organizations may be concerned about exposure to Canadian Anti-terrorism Legislation, especially when they realize how far Canada's laws go beyond its actual international obligations. Conversely, Canadian charities will be deterred from involvement overseas because of concern about becoming subject to Anti-terrorism laws in other countries.

Canada's Anti-terrorism Legislation will also have a significant impact upon 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 other organizations without having knowledge whether “terrorist activities” might result. Actions committed by an agent of a charity involved in international operations can now expose both the charity and its directors to liability without their knowledge or any terrorist intent on their part.

c) Financial Consequences

The financial consequences of the anti-terrorism legislation are potentially disastrous to charities and their directors. In addition, charities could also be exposed to third party liability claims on behalf of victims of September 11th-type terrorist attacks such as a \$1-trillion law suit naming Canadian charities along with Saudi Arabian charities commenced by the victims of the attacks.⁶⁶ The risks to the charity range from loss of tax benefits to freezing and seizure of charitable property, being included as a “listed entity” and to possible winding up of the corporation.

d) Director and Donor Liability

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 exposed the property of a charity to government scrutiny or seizure. Charities and directors may also be vulnerable financially as a result of possible lack of insurance,

⁶⁶ S. Bell, “Canadian organizations named in U.S. \$1 trillion law suit over September 11” *The National Post* (29 August 2002).

since fines, penalties and *Criminal Code* charges may not be included in normal insurance coverage for directors and officers.

Gifts by donors to a charity that is a terrorist group may also put the donors, whether another charity or an individual, at risk of violating the *Criminal Code*, which will therefore require donors to make appropriate inquiries of, intended recipient charities.

e) Indiscriminate Application

The broad definitions of terms such as “terrorist activity” and “terrorist group” fail to distinguish between organizations working under a dictatorial regime and those working under a democratic regime. These definitions raise the question whether citizens of a repressive country who are legitimately fighting for freedom might be considered “terrorist groups”. Some relevant examples might include the African National Congress, student groups in China that are involved in demonstrations such as the one at Tiananmen Square in 1989, or more recently, student groups supporting independence in East Timor or southern Sudan.

If these groups can be caught under the Anti-Terrorist Legislation, Canadian charities that provide medicine, food, and other assistance to such groups might be considered to be committing criminal offences such as “facilitating” and financing these “terrorist groups”. On the other hand, a company that operates in the same country through a partnership with the government, thus effectively financing the government’s dictatorship, would be free to pursue its business interests. In that case, the definitions would be too broad or vague. In the absence of judicial interpretation clearly defining the limits of these terms to avoid such indiscriminate application, the result may be to

severely curtail Canadians' ability to support freedom and democracy through the world.

f) The “Shadow of the Law”

As significant as the impact of the Anti-terrorism Legislation can be, a major concern about the Anti-terrorism Legislation may not be in its direct application, but rather in its indirect impact in creating a fear of the legislation by virtue of the “shadow of the law”. Even if none of the *Anti-terrorism Act* is enforced against a charity, the very existence of the legislation will have a prejudicial impact on charities.

5. Impact on Lawyers

Lawyers need to realize that anti-terrorism legislation, as it relates to charities, can have a direct impact on them. They could find themselves under a duty to report, or as subject of a report, under the *Proceeds of Crime Act* when handling monies on behalf of a charity. Lawyers advising, counselling, or facilitating the activities of a charity could also find themselves considered to be facilitating a “terrorist activity.”

Finally, the *Anti-terrorism Act* may have an impact on lawyers who serve as volunteer directors for charities involved in international and in domestic activities that may fall under the provisions of the Anti-terrorism Legislation.

G. DUE DILIGENCE RESPONSE

1. 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, at the very least, it is necessary to show a desire to comply. 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.

On a more practical level, however, the greatest benefit from 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.

2. 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, encouraging them to develop a proactive response and assisting them in the creation and implementation of 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 will be 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. In this regard, it would not be unreasonable to assume that 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 such Statements with legal counsel, board members, executive staff, and nominating committee members, if applicable. Moreover, such disclosure statements should be required regularly, for example yearly, in order to enable the charity to determine compliance with Anti-terrorism Legislation on an on-going basis. The directors' 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 determined to meet the requirements of the its anti-terrorism initiatives, 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 with respect to the day-to-day work and programs of the charity itself, as well as its affiliated organizations, donors, and agents. Directors must also continue to actively supervise the staff and volunteers of the organization and to ensure that staff and volunteers meet the organization's policy requirements.

c) Due Diligence at 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. Staff and key volunteers should also be requested to complete yearly disclosure statements to permit an on-going review of compliance with anti-terrorist legislation.

d) Due Diligence Checklist of Charitable Programs

A due diligence checklist should be developed in keeping with the unique characteristics of each charity. The checklist should identify and eliminate potential

risk areas for the particular charity, taking into consideration how the new legislation will apply to its unique programs. At the same time, it must be designed in order 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. The due diligence checklist should be designed to enable the charity to assess the level of compliance of its charitable programs with Anti-terrorism Legislation and the level of risk that each of its programs 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, as well as 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. All new and proposed programs should be screened using the due diligence checklist as part of the initial decision of whether to undertake a program or not. A comprehensive review of all on-going charitable programs should also be conducted on a regular basis, for example once a year. The results of all such 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 disclosure statements should include consents to share the results of the Statements with the directors of the umbrella association, as well as with its members. The 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 members of the umbrella association to adopt their own Anti-terrorism policy statements.

3. Due Diligence Concerning Third Parties

a) Due Diligence Concerning Affiliated Charities

Charities should also conduct a comprehensive Anti-terrorism audit of the organizations, individuals, and institutions they are affiliated with. This would include (as mentioned above) 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 in conjunction 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 not complying 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 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 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 and 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 with Anti-terrorism Legislation.

c) Due Diligence Concerning Donors

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 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 with whom 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

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 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.

b) Evidencing Due Diligence With CRA

The charity should forward as much evidence of due diligence compliance to CRA as possible. This would include forwarding 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 it 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. Also, copies of all agency agreements should be filed with CRA with a request that CRA approve the agreements specifically as they relate to compliance with the Anti-terrorism Legislation.

c) Evidencing Due Diligence With Legal Counsel

Legal counsel is an important part of the due diligence strategy of a charity. The very act of involving legal counsel can provide tangible evidence of due diligence and can assist in insulating the charity and its directors from liability. However, legal counsel can also help to identify risk areas and recommend strategies for addressing actual or potential risks. Legal counsel should review, comment 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.

H. CONCLUSIONS

The passage of this anti-terrorism legislation has, in many respects, brought about a “new day” for Canadian charities operating in Canada and abroad. The creation of a “Super Criminal Code” could implicate many traditional charitable activities as being “terrorist activities” or “facilitating” those who may have participated in or supported a “terrorist activity”. At the very least charities are now faced with a "New Compliance Regime" in financial transactions, record keeping and various reporting obligations. Failure to comply with any aspect of the new anti-terrorism legislation could result in the de-registration of a charity or possible issuance of a security certificate, a process devoid of normal legal safeguards and avenues to provide an informed defence.

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. A substantial part of the anti-terrorism legislation is now in force and 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.

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Schedule 1

Overview of the Global Web of International and Domestic Anti-terrorism Initiatives

United Nations Based International Conventions and Resolutions

Security Council Resolutions

- 1368 (2001)
- 1373 (2001)
- 1377

United Nations International Conventions

- International Convention for the Suppression of the Financing of Terrorism (2000)
- International Convention for the Suppression of Terrorist Bombings (1998)
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988)
- Convention on the Physical Protection of Nuclear Material (1980)
- International Convention against the Taking of Hostages (1979)
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)
- Convention for the Suppression of Unlawful Seizure of Aircraft (1970)

Multilateral Policy Making Institutions

Financial Action Task Force (FATF)

- The Forty Recommendations (2003)
- Combating the Abuse of Non-Profit Organizations: International Best Practices (2002)
- Eight Special Recommendations on Terrorist Financing (2001)

Regional Organizations

European Union

- Europol Convention (2002)
- EU Council Regulation No 2580/2001 (2001)
- European Convention on the Suppression of Terrorism (1977)

Bilateral Security Agreements

Canada and the United States

- 32 Point Smart Border Agreement (2002)
- Various Memoranda of Understanding

National Anti-terrorism Legislation

Canada

- Bill C-36 The Anti-terrorism Act (2002)
- Bill C-7 Public Safety Act 2002
- Bill C-35: An Act to amend the Foreign Missions and International Organizations Act
- Bill C-45: An Act to amend the Criminal Code (Criminal Liability of Organizations)

United States

- Domestic Security Enhancement Act of 2003 (Proposed)
- Homeland Security Act 2002
- USA Patriot Act 2001

United Kingdom

- Anti-terrorism, Crime, Security Act 2001
- Terrorism Act 2000

Australia

- Suppression of the Financing of Terrorism Act (2002)
- Security Legislation Amendment (Terrorism) Bill 2002
- Criminal Code Regulations (2002)

New Zealand

- Terrorism Suppression Act 2002
- Counter-terrorism Bill 2002

This schedule was created for discussion and general illustration purposes only. This is not a comprehensive list of all the legislative initiatives that have been launched at the international or domestic level.