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**CANADIAN BAR ASSOCIATION/ ONTARIO BAR ASSOCIATION  
4<sup>TH</sup> NATIONAL SYMPOSIUM ON CHARITY LAW**

**Toronto - May 11, 2006**

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**The What, Where and When of Canadian  
Anti-Terrorism Legislation for Charities  
in the International Context**

**(Current to April 21, 2006)**

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**By Terrance S. Carter, B.A., LL.B.**

Assisted by Nancy E. Claridge, B.A., M.A., LL.B. and Sean S. Carter, B.A., J.D. Candidate

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### **INTRODUCTION**

As we approach the fifth anniversary of the terrorist attacks on New York City, Pennsylvania and Washington, D.C., which purportedly serves to justify the introduction of increasingly strict anti-terrorism legislative measures around the world, the threat of further attacks as such has not dissipated and the political will to eradicate terrorist organizations and their supporters remains strong. At the same time, we are entering a new political landscape, with organizations that have been previously “deemed” or “identified” as terrorist organizations coming into power in the Palestinian Territory, raising the question of how Western nations should respond, while natural- and man-made disasters like the tsunami are further complicating matters for organizations and their quest to provide assistance beyond national borders.

Charitable organizations remain a significant focus of the war on terror, as such organizations have repeatedly, and arguably unjustifiably,<sup>1</sup> been dubbed the “crucial weak point”<sup>2</sup> in the war on terror. Yet, as the

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\* This paper is an updated, revised and greatly expanded version of a paper by the author, entitled “The Impact of Anti-Terrorism Legislation on Charities: The Shadow of the Law,” last revised October 14, 2005, available at [www.antiterrorism.ca](http://www.antiterrorism.ca).

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global war on terror develops, it becomes clear that it is imprudent to look at the matter from a purely domestic point of view, and as such charities and their advisors need to look at compliance with anti-terrorism measures from a global perspective; the what, where and when of both Canadian and international anti-terrorism measures. While it is clear that Canada's anti-terrorism legislation has directly affected many Canadian charities and their activities both inside and outside of Canada, what is now becoming clearer is that anti-terrorism legislation from a number of nations now directly affects charities and their activities both inside and outside of Canada.

This paper therefore endeavours to examine anti-terrorism measures developed in the post-September 11 world in Canada, the United States, the United Kingdom, Australia, as well as the Financial Action Task Force on Money Laundering ("FATF"), and reviews their impact on Canadian charities and those who advise them. The co-ordinated attack on terrorist financing and activities has revealed that in many cases, charitable activities that were previously thought to be commonplace and uneventful may now lead to a charity becoming susceptible to criminal charges for having facilitated "terrorist activities" or for supporting "terrorist groups." This, in turn, may result in a charity losing its charitable status and its directors being exposed to personal liability. In addition, financial transactions involving charities may lead to allegations of terrorist financing or to the surveillance and monitoring of a charity's financial activities. And as the political grip on charities develops, there are calls by organizations like the FATF to require professionals, such as lawyers handling transactions on behalf of charitable clients or on behalf of estates dealing with charities, to report suspicious transactions to authorities.

With the three-year review of Canada's anti-terrorism legislation dying with other uncompleted measures prior to the federal Parliament proroguing in November 2005, it remains difficult to say what the long-term impact of Canada's anti-terrorism legislation will be. While stakeholders in the charitable sector will argue that anti-terror laws in Canada are overly broad and abusive, federal watchdogs have, as recently as early

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<sup>1</sup> Andrew Studd has noted that of approximately 189,000 charities registered with the Charity Commission in the United Kingdom, there is only one inquiry currently open into the potential links between a charity and terrorist organizations. Andrew Studd, "Charities, money laundering and terrorist financing" (Autumn/Winter Appeals 2005) *New Law Journal* 5. The Charity Commission's own statistics indicate that since 11 September 2001, they have evaluated concerns about twelve charities and conducted formal inquiries of ten. Two of the charities were closed down and another had its assets frozen: Charity Commission, *Charity Commission policy on charities and their alleged links to terrorism*, 4 October 2004 online: <http://www.charity-commission.gov.uk/tcc/terrorism.asp>. A point that has been made by scholars is that labeling charities as the "crucial weak point" in the war on terror ignores the fact that the most significant terrorist acts have been achieved with little funding. For example, the 911 Commission has indicated that the September 11 attacks were achieved on disbursements of \$303,671: Professor Margaret Beare (Address to the Second Annual Symposium on Money Laundering, Toronto, Osgoode Hall Law School Professional Development Program, 11 February 2006); Supt. Donald Panchuk (Address to the Second Annual Symposium on Money Laundering, Toronto, Osgoode Hall Law School Professional Development Program, 11 February 2006).

<sup>2</sup> FATF, *Combating the Abuse of Non-Profit Organisations: International Best Practices* (Paris: FATF, 2002) at 1.

2006, made claims that Canada has fallen behind global standards with respect to laws against terrorist financing.<sup>3</sup> Although that point is debateable, it is clear that Canada's counterterrorism measures 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 continue to 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 rather that they *may* enforce such legislation. As a result, part of the impact of Canada's anti-terrorism legislation may have as much to do with coping with a fear of the law as it will with coping with the law itself. This "shadow of the law" effect has already created and will continue to create a chill upon charitable activities in Canada, as charities hesitate to undertake programs that might expose them to violation of anti-terrorism legislation, and with it the possible loss of their charitable status. At the same time, new charities may find it more difficult to obtain charitable status, since the Canada Revenue Agency ("CRA") Charities Directorate will be compelled to exercise a greater degree of scrutiny when reviewing applications 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 more important anti-terrorism provisions under the amended *Criminal Code*, the amendments made to money laundering legislation, as well as 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 summary nature only, and is neither detailed nor comprehensive in its scope or comments. The paper will then turn to a brief review of the anti-terrorism legislation in the United States, the United Kingdom, Australia, as well as the guidelines provided by the Financial Action Task Force on Money Laundering ("FATF"), as these nations and organizations have proven to be highly influential in Canada's evolving response to terrorism. For additional comments by the

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<sup>3</sup> See e.g. Sandra Cordon, "Tighten laws against terrorist financing, Ottawa told" (*The Globe and Mail*, 17 April 2006, p. A4). The article reveals that the head of the Office of Superintendent of Financial Institutions, Nick Le Pan, has told Canada's new Finance Minister, Jim Flaherty that Canada needs to enhance rules to combat money laundering and terrorist financing in order to get closer to international standards. Le Pan indicated in a briefing note to the Minister that Canada's rules will come under scrutiny next year by the Financial Action Task Force on Money Laundering, which is discussed below.

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.antiterrorism.ca](http://www.antiterrorism.ca) or [www.charitylaw.ca](http://www.charitylaw.ca).

## PART I

### A. ANTI-TERRORISM LEGISLATION IN CANADA

Canada's anti-terrorism legislation has not been enacted in a legal vacuum. Most conceivable acts of terrorism have for some time been subject to prosecution in one way or another as criminal offences under the provisions of Canada's *Criminal Code*.<sup>4</sup> Many other statutes, such as the *Immigration and Refugee Protection Act*,<sup>5</sup> 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 events of September 11, 2001 ("September 11") have simply galvanized these efforts, giving them a sense of added urgency and political justification.

This part of the paper focuses primarily on the three pieces of Canadian legislation introduced since September 11, intended to combat terrorism and the financing of terrorist activities. The three legislative initiatives are Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to Enact Measures Respecting the Registration of Charities, In Order to Combat Terrorism* ("Bill C-36" or "Anti-terrorism Act");<sup>6</sup> Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act* ("Bill C-35" or "Foreign Missions Act");<sup>7</sup> and Bill C-7, *An Act to amend certain Acts of Canada, and to Enact Measures for Implementing the Biological and Toxin Weapons Convention, In Order to Enhance Public Safety* ("Bill C-7" or "Public Safety Act").<sup>8</sup> 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.

<sup>4</sup> R.S.C. 1985, c. C-46. See, for example, s. 7 for offences committed on aircraft. See also K. Roach, "The New Terrorism Offences and the Criminal Law" in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: Univ. of Toronto Press, 2001) 151 at 152-154 ["New Terrorism Offences and Criminal Law"]; see also K. Roach, *September 11: Consequences for Canada* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 29-33 [*September 11: Consequences for Canada*].

<sup>5</sup> S.C. 2001, c.27.

<sup>6</sup> S.C. 2001, c. 41. 41["Bill C-36" or "Anti-terrorism Act"].

<sup>7</sup> S.C. 2002, c. 12 ["Bill C-35" or "Foreign Missions Act"].

<sup>8</sup> S.C. 2004, c. 15 ["Bill C-7" or "Public Safety Act"].

1. 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 co-ordinating the provisions of many federal Acts, including the *Criminal Code*, *Canadian Human Rights Act*, and the *Proceeds of Crime (Money Laundering) Act*<sup>9</sup> (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.”

2. 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 and proclaimed in force as of April 30, 2002 as part of the Government of Canada’s anti-terrorism commitment to external bodies. 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 likelihood that a charity pursuing its normal charitable operations might be unwittingly implicated in *Criminal Code* offences.

3. 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 (November 22, 2001), re-introduced as Bill C-55 (April 29, 2002) and again as Bill C-17 (October 31, 2002). Among other provisions, Bill C-7 includes further amendments to the *Proceeds of Crime Act* proposing to broaden

<sup>9</sup> Now renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [“*Proceeds of Crime Act*”]. This Act is discussed in greater detail in Part C of this paper.

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.

#### 4. Canada's Anti-terrorism Legislation in Perspective

##### a) International Legislative Context

As indicated earlier, 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, or even those organizations that simply accept funds from foreign donors, 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. 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, FATF, the

International Monetary Fund, and the World Bank as part of Canada's current commitment to combat terrorism.<sup>10</sup> All of these bodies have and continue to take measures to curtail terrorism and 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 eleven specific U.N. conventions concerning terrorism. Another significant United Nations obligation is Security Council Resolution 1373 adopted on September 28, 2001.<sup>11</sup> 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.

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

- the Convention on the Safety of United Nations and Associated Personnel;<sup>12</sup>
- the Convention on the Suppression of Unlawful Seizure of Aircraft;<sup>13</sup>
- the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;<sup>14</sup>

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<sup>10</sup> See Schedule 1 for an overview of the global web of interrelated international obligations concerning the creation and implementation of domestic anti-terrorism legislation.

<sup>11</sup> UN SCOR, 4385<sup>th</sup> Mtg., UN Doc. S/RES/1373(2001) ["Resolution 1373"].

<sup>12</sup> *Convention on the Safety of United Nations and Associated Personnel*, 9 December 1994, U.N. Doc. A/49/49.

<sup>13</sup> *Convention on the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105.

- the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents;<sup>15</sup>
- the International Convention against the Taking of Hostages;<sup>16</sup>
- the Convention on the Physical Protection of Nuclear Material;<sup>17</sup>
- the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation;<sup>18</sup>
- the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;<sup>19</sup>
- the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;<sup>20</sup>
- the International Convention for the Suppression of Terrorist Bombings;<sup>21</sup> and,
- the International Convention for the Suppression of the Financing of Terrorism.<sup>22</sup>

## B. "SUPER CRIMINAL CODE": NEW DEFINITIONS AND IMPLICATIONS FOR CHARITIES

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.

<sup>14</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177.

<sup>15</sup> *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 14 December 1973, 1035 U.N.T.S. 167.

<sup>16</sup> *International Convention against the Taking of Hostages*, 17 December 1979, 1316 U.N.T.S. 205.

<sup>17</sup> *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, 1456 U.N.T.S. 124.

<sup>18</sup> *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation*, 23 September 1971, 1589 U.N.T.S. 474.

<sup>19</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221.

<sup>20</sup> *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.

<sup>21</sup> *International Convention for the Suppression of Terrorist Bombings*, 12 January 1998, U.N. Doc. A/RES/52/164 ["Convention on Terrorist Bombings"].

<sup>22</sup> *International Convention for the Suppression of the Financing of Terrorism*, 10 January 2000, annex to UNGA Res. A/RES/54/109 ["Convention on Terrorist Financing"].

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*.<sup>23</sup> 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.<sup>24</sup> The changes brought about by the Anti-terrorism Act are without precedent in Canadian legal history and demonstrate a disturbing disregard for the principle of due process and natural justice. The amendments implemented by the Anti-terrorism Act arguably amount to the creation of a “Super *Criminal Code*” within Canada’s existing *Criminal Code*. 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.

1. 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 section 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 negatively impact 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

<sup>23</sup> S.C. 2000, c. 24 [“*War Crimes Act*”].

<sup>24</sup> Section 10 specifically applies the rules of evidence and procedure in force at the time of proceedings and section 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.

- (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.”<sup>25</sup> 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.”<sup>26</sup>

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

<sup>25</sup> “New Terrorism Offences and Criminal Law,” *supra* note 4 at 156, and 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 4 at 25-28. See also, J. Travers, “9/11 fears turn chance remark into visit by Mounties” (*Toronto Star*, 26 September 2002, A31).

<sup>26</sup> See Article 5 of the *Convention on Terrorist Bombings*, *supra* note 21, and Article 6 of the *Convention on Terrorist Financing*, *supra* note 22.

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 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 website a year later), 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*.”<sup>27</sup> This is of particular concern when viewed in light of the comment that in the RCMP’s view, “[protests] against genetically modified food and ongoing environmental concerns about water, forest preservation and animal rights are issues to watch.”<sup>28</sup> 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 the Anti-terrorism Act, 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.

<sup>27</sup> 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 [emphasis added].

<sup>28</sup> *Ibid.* at part II, para. 4.

Even the inclusion of “listed entities”<sup>29</sup> 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 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 subsection 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 who unwittingly become tarred by association without any culpability or intent to be part of terrorist activity. Subsection 83.19(2) defines “facilitation” as follows:

For the purposes of this Part, 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.

A plain reading of this subsection implies the *mens rea* element of the offence has been diminished to the point that it verges on a strict liability offence. In her appearance before the House of Commons Standing Committee on Justice and Human Rights, Justice Minister Anne McLellan stated that the purpose for moving the definition of “facilitate” from section 83.01 (the definitions section) to section 83.19 was to respond to criticism that the separation of the definition from the offence was confusing and failed to clearly emphasize that facilitation must be “knowing.”<sup>30</sup> Yet, it is precisely the lack of clarity in the legislative drafting that perpetuates the peril in which innocent third parties currently find themselves.

<sup>29</sup> Discussed in greater detail in B.2.b)ii) below.

<sup>30</sup> Anne McLellan, “Notes for the Justice Minister” (Appearance before the House of Commons Standing Committee on Justice and Human Rights – Bill C-36, November 2001).

The stated purpose of subsection 83.19(2) is to capture circumstances in which the person is prepared to assist a terrorist group without specifically knowing the specific objective,<sup>31</sup> yet its wording can be read as nothing more than a qualification of the fault element of subsection 83.19(1), which provides that “every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”

As Eunice Machado has argued,

Reading the legislation in its best possible light, one can interpret subsection (2)(a) as emphasizing the word “particular” which would mean that the facilitator need not know which terrorist activity is being assisted. The accused need merely know that they are somehow assisting in a terrorist activity. Similarly, subsection (2)(c) can be understood to mean that the act of aiding is itself the offence regardless of the plan’s outcome. However, subsection (2)(b) provides a temporal problem for the *mens rea* minimal requirement of “knowledge.” How can a person knowingly facilitate a terrorist activity that has not even been foreseen, much less planned? This provision may be meant to catch those who know that they are aiding terrorists without regard for the unlawful acts that the terrorists may potentially commit. However, the *mens rea* requirement is seriously distorted by requiring knowledge of future, possible offences.<sup>32</sup>

Thus, the broad definition of “facilitation,” in subsection 83.19(2), which applies to all *Criminal Code* offences involving “facilitation” of terrorism, has not been moderated at all by any requirement for knowledge or intent referred to in section 83.19(1).

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. This concern is particularly relevant in the wake of recent natural disasters, like the devastating tsunami that hit Southeast Asia in December 2004,<sup>33</sup> and the destructive earthquake in Pakistan in October 2005,<sup>34</sup> both of which have prompted an outpouring of international humanitarian support. Despite the desperate need for aid in these areas, charities must still comply with the significant legal requirements in providing aid, regardless of their size or

<sup>31</sup> Richard G. Mosley, “Preventing Terrorism. Bill C-36: The Anti-Terrorism Act 2001” (Paper presented to the Terrorism, Law & Democracy: How is Canada Changing following September 11? Conference, March 2002) 145 at 165. Mr. Mosley is the Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada.

<sup>32</sup> Eunice Machado, “A Note on the Terrorism Financing Offences” (2002) 60 U.T. Fac. L. Rev. 103 at 105.

<sup>33</sup> The 9.0 magnitude earthquake off the western coast of Sumatra, Indonesia, which was the cause of the tsunami, killed an estimated 275,950: National Earthquake Information Center, U.S. Geological Survey.

<sup>34</sup> The 7.6 magnitude earthquake killed an estimated 87,351 dead: National Earthquake Information Center, U.S. Geological Survey.

the method of providing assistance. At the same time, the potential application of anti-terrorism legislation is heightened, in part, because these areas have been identified as one of the central operating area for several terrorist organizations.<sup>35</sup> The chances of contravening anti-terrorism legislation are heightened even more when charities are not able to deliver aid directly and support local recipient or donee organizations in the regions. The charities, in this situation, are potentially accountable for the recipient organization's actions and are therefore responsible for conducting due diligence investigations of the recipient organizations.

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 exact 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 had no intention or foreknowledge 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 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-

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<sup>35</sup> For more discussion on this topic, see e.g. Terrance S. Carter and Sean S. Carter, "Anti-terrorism legislation requires due diligence from tsunami relief agencies" (*The Lawyers Weekly*, 11 March 2005, p. 9); Terrance S. Carter and Sean S. Carter, "The Implications for Charities of Anti-Terrorism Initiatives on Humanitarian Assistance for Southeast Asia" in *Anti-Terrorism and Charity Law Alert No. 6* (11 January 2005), available at [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca).

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 instances of what may now be labeled 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-Terrorism 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 section 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.”<sup>36</sup> In a notice published on the G8 Summit Security website entitled “Legal Information for Protesters,”<sup>37</sup> 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 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.<sup>30</sup> 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

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<sup>36</sup> 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](http://www.g8summitsecurity.ca/g8/news/nr-02-04.htm)> (last accessed: 24 June 2002)

<sup>37</sup> This document is no longer available under the section “Information for Visitors” at [www.g8summitsecurity.ca](http://www.g8summitsecurity.ca), but was accessed in June 2002.

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.

## 2. 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 program 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 protesters 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.

## SCENARIO #7

A church collects donations for a young Afghan boy who is undergoing emergency medical treatment in Canada. Some of the funds are wired to family members in Afghanistan who will be caring for the boy when he returns home. One of his relatives in Afghanistan who helps manage the funds that have been received has some link to members of the Taliban.

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 the Anti-terrorism Act.

## b) Consequences of Committing 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, the financing of terrorism is an indictable offence, carrying a maximum sentence of ten years which could apply to the directors of a charity found to be guilty of this offence.<sup>38</sup> 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

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<sup>38</sup> *Criminal Code*, *supra* note 4, ss. 83.02-83.04.

imprisonment for a term of not more than ten years.<sup>39</sup> Facilitating a “terrorist activity” is an indictable offence with a maximum penalty of imprisonment for a term not exceeding fourteen years.<sup>40</sup>

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:

... 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).

The list was last updated April 8, 2006, expanding the list to include 39 organizations.<sup>41</sup> 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

<sup>39</sup> *Ibid.*, s. 83.12(1).

<sup>40</sup> *Ibid.*, s. 83.19(1).

<sup>41</sup> The list is available online at: Solicitor General of Canada <http://www.psepc-sppcc.gc.ca/prg/ns/le/cle-en.asp>.

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 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*.<sup>42</sup> 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.<sup>43</sup> 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 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

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<sup>42</sup> *United Nations Suppression of Terrorism Regulations*, SOR/2001-360.

<sup>43</sup> 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>.

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 D of this paper, “De-Registration Under Part 6 of the Anti-terrorism Act.”

### C. 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 FATF) but, after the events of September 11, it was amended again through Part 4 of the Anti-terrorism Act, which expanded its scope to include terrorist financing. The amended *Act* was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.<sup>44</sup> Regulations were adopted under the amended *Proceeds of Crime Act* and promulgated on May 9th, 2002.<sup>45</sup>

“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.<sup>46</sup> 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.<sup>47</sup> 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

<sup>44</sup> For an in-depth discussion of the Act, see A. Manzer, *A Guide to Canadian Money Laundering Legislation*, (Markham: Butterworths, 2002).

<sup>45</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-781, s. 31(1) [“*Proceeds of Crime Regulations*”].

<sup>46</sup> For a general discussion concerning the methods of money laundering, see Manzer, *supra* note 44, at 5.

<sup>47</sup> 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 44, at 19.

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 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,<sup>48</sup> 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.”<sup>49</sup> 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.<sup>50</sup> 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 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.

The government has repealed the application of the *Proceeds of Crime Act* to the legal profession. This is not to say, however, that lawyers will be ultimately exempt from reporting obligations. Negotiations between the Department of Finance and the legal profession are ongoing to develop a mutually acceptable regime of

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<sup>48</sup> For more on FINTRAC, see part C.2.a), below.

<sup>49</sup> A. Dawson, “Agency flagged \$100 million in illicit cash” *The National Post* (6 November 2002).

<sup>50</sup> *Ibid.* The first reporting requirements came into force on 8 November 2001, and the report covered the period to 31 March 2002.

reporting and due diligence procedures.<sup>51</sup> In May 2005, the matter between the Federation of Law Societies of Canada and the Attorney General of Canada was adjourned *sine die* (without any future date being designated for resumption) and upon a number of conditions by the British Columbia Supreme Court.<sup>52</sup> 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 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"), which is discussed in more detail below.

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<sup>51</sup> The Department of Finance (Canada). *Enhancing Canada's Anti-money Laundering and Anti-terrorist Financing Regime* (June 2005) (6 November 2002) online: Department of Finance: <[http://www.fin.gc.ca/activity/pub5/enhancing\\_e.pdf](http://www.fin.gc.ca/activity/pub5/enhancing_e.pdf) .

<sup>52</sup> *Federation of Law Societies of Canada v. Attorney General of Canada* (British Columbia Supreme Court, Vancouver Registry No. L013117, 13 May 2005). The conditions include the following:

1. That if a new set of regulations affecting legal counsel is enacted pursuant to the *Proceeds of Crime Act* by the Federal Government without the consent of the Federation, that the coming into force of those regulations would be deferred in accordance with the May 2002 Agreement between the Federation and the Attorney General of Canada;
2. That the Attorney General of Canada agree to interlocutory injunctions exempting legal counsel and legal firms from the application of the Act and its Regulations should it become necessary to maintain the status quo at any stage of the proceedings; and
3. That the Federation and the Attorney General have an unrestricted right to re-set the petition for hearing.

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*.<sup>53</sup> 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.<sup>54</sup> 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:

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.<sup>55</sup>

## 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 11, its mandate was expanded through Part 4 of the Anti-terrorism Act to include terrorist financing.

<sup>53</sup> 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](http://www.antiterrorismlaw.ca).

<sup>54</sup> *Special Recommendations on Terrorist Financing*, online: FATF <[http://www1.oecd.org/fatf/SReCS TF\\_en.htm](http://www1.oecd.org/fatf/SReCS TF_en.htm)>

<sup>55</sup> *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](http://www.fintrac.gc.ca/publications/annualreport/2002/AR_e.pdf)> (last modified: 5 November 2002) at 10 [“FINTRAC Report”].

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, 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. 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.<sup>56</sup> 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 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:

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<sup>56</sup> The FINTRAC Report, *ibid.*, 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."

- (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 offence<sup>57</sup>

“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 commission of a money-laundering offence.<sup>58</sup> 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.<sup>59</sup> Under such broad definitions, Canadian charities could become the subject of such reports without being aware 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.”<sup>60</sup> 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.<sup>61</sup> 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, either in cash or by monetary instruments.<sup>62</sup> 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

<sup>57</sup> *Proceeds of Crime Act*, *supra* note 9, s. 7 [emphasis added].

<sup>58</sup> 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](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](http://www1.oecd.org/fatf/pdf/GuidFITF01_en.pdf)> (last accessed: 7 November 2002).

<sup>59</sup> Manzer, *supra* note 44, at 20.

<sup>60</sup> *Proceeds of Crime Act*, *supra* note 9, s. 9(1).

<sup>61</sup> 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.

<sup>62</sup> See for example, *Proceeds of Crime Regulations*, ss. 12-13, 21-22, 24-25, 28-29, and 32-33.

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 0 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 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 from letting the organization that is the subject of the report know, either directly or by implication, that they have made such a report.<sup>63</sup> 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.

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<sup>63</sup> *Proceeds of Crime Act*, *supra* note 9, s. 8; see also Manzer, *supra* note 44, 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.

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.<sup>64</sup>

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 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.

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<sup>64</sup> This process is discussed in greater detail in Part D of this paper.

In this regard, paragraph 35(2)7 of the *Securities Act*<sup>65</sup> states that registration under the *Securities Act* is not required in order to trade in securities that are issued by:

an issuer organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit, where no commission or other remuneration is paid in connection with the sale 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.”<sup>66</sup> These activities could include a charity that is involved in the related business of transferring funds to third party agents

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<sup>65</sup> R.S.O. 1990, c. S.5.

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*,<sup>67</sup> 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]

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."<sup>68</sup> 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.<sup>69</sup>

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

<sup>66</sup> *Proceeds of Crime Regulations*, *supra* note 45, s. 1(2).

<sup>67</sup> R.S.C. 1985 (5<sup>th</sup> 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."

<sup>68</sup> 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](http://www.cra-adrc.gc.ca/tax/charities/consultation_policy-e.html)> (last modified: 5 May 2002) at para. 6 [*Related Business*].

<sup>69</sup> *Ibid.*

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

#### D. 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*.<sup>70</sup> 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 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.

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<sup>70</sup> *Charities Registration (Security Information) Act* (being part VI of the *Anti-terrorism Act*, *supra* note 6).

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 and Refugee Protection Act* that have been in force for many years, which indicate Federal Court judges usually endorse security certificates.<sup>71</sup>

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.<sup>72</sup>

## E. 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

<sup>71</sup> C. Freeze, “Powerful antiterror tool rarely employed by Ottawa” *The Globe and Mail* (30 October 2002) A9.

<sup>72</sup> “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](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: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2002/chylb16.pdf>> (last accessed: 11 November 2002).

all the more serious when considered against the lack of procedural safeguards that are taken for granted in other areas of Canadian law.

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 fulfil 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](http://www.antiterrorismlaw.ca).

4. Negative Impact on Charities from the Anti-terrorism Act

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 11-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.<sup>73</sup> 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, since fines, penalties and *Criminal Code* charges may not be included in normal insurance coverage for directors and officers.

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<sup>73</sup> S. Bell, "Canadian organizations named in U.S. \$1 trillion law suit over September 11" (*The National Post*, 29 August 2002).

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. Pending the result of negotiations between the legal profession and the Department of

Finance, lawyers may well find themselves under a duty to report, as the subject of a report, or responsible for some other mandatory due diligence obligations 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.”<sup>74</sup>

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.

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<sup>74</sup> See *e.g.* Section C above about efforts between the Federation of Law Societies of Canada with respect to the *Proceeds of Crime Act*.

## PART II

### F. INTERNATIONAL ANTI-TERRORISM LEGISLATION

The global reach of Canadian charitable organizations both in terms of charitable activities and potential donors means that such organizations and their advisors must look beyond domestic anti-terror policies and consider the implications of initiatives of foreign jurisdictions. Charities working in foreign countries will have to be in compliance with both domestic and foreign laws. At the same time, those organizations that are soliciting funds from donors in foreign countries through charities in those countries may find themselves subject to increased donor scrutiny in order that the donors may satisfy themselves that they are in compliance with their own country's laws.

A thorough review of foreign anti-terrorism policies is beyond the scope of this paper. However, this paper does examine some of the key pieces of legislation and policy found in the United States, the United Kingdom and Australia. The key documents of FATF are also reviewed.

#### 1. United States

To the outsider, it is not a simple task to determine what measures must be complied with in order to be in complete conformity with U.S. law with respect to anti-terrorism. This is because American anti-terrorism law is a virtual hodgepodge of executive orders, acts, regulations and "best practices" from various agencies that govern an individual's or organization's actions. Failure to comply with all U.S. laws governing an organization may result in severe civil and/or criminal penalties.

##### a) Executive Orders

One starting point for consideration is *Executive Order 12947 – Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process*, signed into force by President William Jefferson Clinton on January 24, 1995.<sup>75</sup> The executive order declared a national emergency in order to deal with the threat of terrorist acts that constituted an "unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."<sup>76</sup> As such, any transaction or dealing by a U.S. person or within the U.S. by any proscribed organization was prohibited, including the making or receiving of any contribution of funds, goods,

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<sup>75</sup> *Federal Register*, Vol. 60, No. 16, 25 January 1995.

<sup>76</sup> *Ibid.* at Preamble.

or services to or for the benefit of such persons. The order named twelve groups, including Hizballah and the Popular Front for the Liberation of Palestine.<sup>77</sup> The Secretary of State is empowered to designate additional foreign persons for the purpose of this executive order, because they are found “to have committed, or pose a significant risk of committing acts of violence that have the purpose or effect of disrupting the Middle East peace process, or to assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence.”<sup>78</sup>

On September 23, 2001, President George W. Bush signed *Executive Order 13224 – Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism*.<sup>79</sup> The order is intended to be a means by which the U.S. government can disrupt the financial support network for terrorists and terrorist organizations by authorizing the U.S. government to designate and block the assets of foreign individuals and entities. Following from this, the preamble to the order provides that “because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists.”<sup>80</sup> The order names twenty-seven individuals or organizations with which transactions or deals are prohibited, including Al Qaida, Usama bin Laden, Muhammad Atif and the Wafa Humanitarian Organization.<sup>81</sup> The Secretary of State is empowered to designate additional individuals or organizations whose property and interests will be blocked because they are determined to have “committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.”<sup>82</sup> Section 6 of the order calls upon the Secretary of State, the Secretary of the Treasury, and other appropriate agencies to make “all relevant efforts to cooperate and coordinate with other countries ... to achieve the objectives of this order.”<sup>83</sup> This includes providing technical assistance or entering into bilateral or multilateral agreements. Civil and criminal penalties may be assessed for those individuals or entities that violate the executive order.

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<sup>77</sup> *Ibid.* at Annex.

<sup>78</sup> *Ibid.* at s. 1.

<sup>79</sup> *Federal Register*, Vol. 66, No. 186, 25 September 2001.

<sup>80</sup> *Ibid.* at Preamble.

<sup>81</sup> *Ibid.* at Annex.

<sup>82</sup> *Ibid.* at s. 1.

<sup>83</sup> *Ibid.* at s. 6.

b) Existing Anti-terrorism Legislation

As one observer has suggested, most of the existing anti-terrorism legislation in the U.S. were themselves a response to other highly publicized and tragic terrorist attacks.<sup>84</sup> Of limited interest is the *Omnibus Diplomatic Security and Antiterrorism Act of 1986*,<sup>85</sup> which extended U.S. federal court jurisdiction over those individuals or organizations committing terrorist acts against American citizens anywhere in the world. This was a response to the Palestine Liberation Organization (“PLO”) hijacking of the Achille Lauro cruise ship, which resulted in the death of Leon Klinghoffer. This act was followed by the *Anti-Terrorism Act of 1987*,<sup>86</sup> which barred fundraising for the PLO in the U.S. and sought to shut down their offices. One provision in the *Federal Courts Administration Act of 1992*<sup>87</sup> is seen as an important development in U.S. anti-terrorism law as it defined international terrorism as acts intended to intimidate a civilian population or coerce a government.<sup>88</sup>

The *International Emergency Economic Powers Act* (“IEEPA”),<sup>89</sup> enhances the presidential authority when there is an “unusual and extraordinary threat” to the national security, foreign policy, or economy of the U.S. with its source in whole or substantially outside the U.S., if the president declares a national emergency with respect to the threat. As section 1701(b) states, the authorities granted under the IEEPA may only be exercised to deal with an unusual and extraordinary threat and for no other purpose.<sup>90</sup> Section 1702 sets out the presidential authorities granted by the IEEPA, which are along the lines of authority exercised under Executive Orders 12947 and 13224, as discussed above. However, section 1702( b) limits the presidential authority, explicitly denying any authority to regulate or prohibit, directly or indirectly, such things as donations of articles intended to be used to relieve human suffering, except to the extent that the president determines that such donations would seriously impair his ability to deal with any national emergency, or would endanger Armed Forces of the U.S. which are engaged in hostilities.<sup>91</sup>

<sup>84</sup> David Jenkins, “In Support of Canada’s Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law” (2003) 66 Sask. L. Rev. 419.

<sup>85</sup> Public Law 99-399.

<sup>86</sup> Public Law 100-204.

<sup>87</sup> Public Law 102-572.

<sup>88</sup> Jenkins, *supra* note 84.

<sup>89</sup> 50 U.S.C.S. Ch. 35, Sec. 1701-06.

<sup>90</sup> *Ibid.* at sec. 1701(b).

<sup>91</sup> *Ibid.* at sec. 1702(b).

Another piece of legislation to consider is the *Antiterrorism and Effective Death Penalty Act* (“AEDPA”),<sup>92</sup> whose purpose is to provide the federal government with the ability to prevent persons within the U.S., or subject to the jurisdiction of the U.S., from providing material support or resources to foreign organizations that engage in terrorist activities. This statute came out of the first terrorist attack on the World Trade Centre and the Oklahoma City Bombing. Section 1189 sets out the requirements for designating an organization as a “foreign terrorist organization,” and the freezing of such organizations’ assets located in the U.S.<sup>93</sup> Criminal law statutes should also be consulted, as there are severe penalties for engaging in a financial transaction with the government of a country that supports international terrorism, or for providing material support or resources to designated foreign terrorist organizations.

c) USA PATRIOT Act

Although it gets substantial press, the (*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*) (the “USA PATRIOT Act” or “Patriot Act”)<sup>94</sup> merely builds upon existing anti-terrorism legislation in a “piecemeal fashion” and as some have observed, the Patriot Act “is not a comprehensive restructuring of the American anti-terrorism framework.”<sup>95</sup> Still, it is important to consider its impact on the counterterrorism measures currently in place in the U.S. Both the manner in which it was enacted and its broad measures are significant. It was just 45 days after the September 11 attacks when, with virtually no debate, Congress passed the 342-page piece of legislation with a vote of 280-138. The Patriot Act was signed into law on October 26, 2001 by President George W. Bush, and its renewal was signed on March 9, 2006.<sup>96</sup> An ACLU report provides an interesting commentary on the timeline of the Patriot Act.<sup>97</sup> Some noteworthy entries include the following:

- Two days following the September 11 attacks, the Senate Judiciary Committee proposed a floor amendment to a routine spending bill that would have expanded the government’s

<sup>92</sup> 8 U.S.C.S. Ch. 12.

<sup>93</sup> Ibid. at sec. 1189.

<sup>94</sup> Public Law 107-56. Given the brief time between the September 11 attacks and the introduction of the Patriot Act, the elaborate acronym is impressive. The American Civil Liberties Union, however, calls the Act’s name “extravagant” and “calculated to intimidate”: ACLU, *Insatiable Appetite: The Government’s Demand for New and Unnecessary Powers After September 11* (New York: ACLU, 2002), available at [www.aclu.org](http://www.aclu.org).

<sup>95</sup> Jenkins, *supra* note 84.

<sup>96</sup> A limited number of provisions of the Patriot Act had a sunset clause for which renewal was required. Most of the Act, however, has no expiry.

<sup>97</sup> See ACLU, *ibid.*

authority to intercept oral and electronic communications. The amendment passed quickly;

- One week after the attack, Attorney General John Ashcroft transmitted to Congress an omnibus anti-terrorism proposal, which included expanded wiretap authority, authority to detain suspicious immigrants indefinitely and without charge, new powers for government agents to obtain financial and other records without probable cause, and lower barriers to the involvement of intelligence agencies in domestic law enforcement. Ashcroft wanted the proposal enacted in three days;
- Although the Judiciary Committees in the House and the Senate convened a hearing on the proposal, the bill moved directly to the Senate floor without a committee vote. All amendments proposed by Senator Russell Feingold (D-WI) were tabled with few votes of support. In the House, the Republican-led Judiciary Committee debated the proposal and amended it to incorporate additional civil liberties protections. The amended bill was unanimously adopted, but the Administration persuaded the House Leadership to rewrite the bill in the middle of the night before the floor debate in order to conform the text more closely to Ashcroft's specifications;
- Instead of a conference committee meeting of Senators and Representatives to reconcile the two versions of the bill, a small group of members and Administration officials met behind closed doors to negotiate the package;
- Final passage of the bill occurred just as the anthrax scare paralyzed Congress, meaning that most members of Congress did not have an opportunity to read the bill or any critiques of the bill supplied by various groups, including the ACLU.<sup>98</sup>

A four-year sunset clause was included in the bill, but only applies to a handful of provisions, including provisions dealing with the controversial issue of law enforcement electronic surveillance authority. As noted above, President Bush signed the renewal into law in 2006. A thorough analysis of the Patriot Act is outside the scope of this paper, but there are a number of its features that are noteworthy, particularly with respect to its impact on charitable organizations.

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<sup>98</sup> *Ibid.* at 3-4.

With the passage of the Patriot Act, federal law enforcement authorities were given expanded powers that had been rejected prior to September 11. Presidential powers were also enlarged, civil and criminal law statutes were strengthened and the Secretary of the Treasury's power to adopt regulations and due diligence guidelines for fighting money laundering were enhanced. Among the statutes amended was the IEEPA. Section 1702(a)(1) of the IEEPA was amended to empower the President and his delegates to:

- assist the U.S. government in identifying, investigating, disrupting, and dismantling non-traditional structures, such as tax exempt organizations, being used by terrorist organizations to raise and distribute funds;
- broaden the government's authority to regulate and freeze any property or interest in property subject to U.S. jurisdiction; and
- confiscate and dispose of any property or interest in property within U.S. jurisdiction that belongs to any foreign individual, entity or country determined to have planned, authorized, aided, or engaged in an attack on the U.S.<sup>99</sup>

The definition of "material support or resources" in criminal law powers with respect to the direct or indirect provision of financial or other material support or resources by any person "knowing or intending" their use for terrorist activities were also expanded in order to now contemplate "grants, microfinance assistance, and many types of technical assistance."<sup>100</sup>

The Patriot Act has ten titles, covering such issues as enhanced surveillance procedures, money laundering, border protection, enhanced investigatory powers, enhanced criminal law powers, aid to victims of terrorism and improved intelligence. Most of these powers have proved to be contentious, with some opponents referring to the act as representative of the government's "insatiable appetite" for "new and unnecessary" powers following the September 11 attacks.<sup>101</sup>

Indeed the Patriot Act contains a number of concerning provisions:

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<sup>99</sup> Nina J. Crimm, "Post-September 11 Fortified Anti-Terrorism Measures Compel Heightened Due Diligence" (Paper presented at the Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy Symposium, Pace University School of Law, 3 December 2004).

<sup>100</sup> *Ibid.*

<sup>101</sup> See *e.g.* ACLU, *Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11* (New York: ACLU, 2002), available at [www.aclu.org](http://www.aclu.org)).

- Under Title IV – Protecting the Border, section 412, the Attorney General is enabled to indefinitely detain aliens on the belief that the individual poses a danger to national security. Once detained, the Attorney General must place the alien in removal proceedings or level criminal charges within seven days of commencement of detention. Where deportation within the reasonably foreseeable future is unlikely, the alien may be detained for additional periods of up to six months if their release will threaten the national security of the U.S. or the safety of the community or any other person. This certification must be reviewed by the Attorney General every six months. The ACLU has suggested that this provision may be used to detain persons who are engaging in speech protected by the First Amendment;<sup>102</sup>
- Under Title IV, section 411, organizations can be placed on the Terrorism Exclusion List (“TEL”). Aliens providing support to or associated with TEL organizations may be found to be “inadmissible” to the U.S. and therefore may be prevented from entering or may be deported;
- Under Title II – Enhanced Surveillance Procedures, section 213, law enforcement authorities are able to perform what is colloquially known as “sneak and peek” or “black bag” secret searches, by delaying notice of the execution of a search warrant; and
- Under Title VIII – Strengthening the Criminal Laws Against Terrorism, section 802, there is a very broad definition of “domestic terrorism,” which includes such phrases as “acts dangerous to human life” that are intended to “intimidate or coerce a civilian population.” There is a fear that with such a vague definition, the government could designate lawful advocacy groups as terrorists and subject them to invasive surveillance, leading to criminal penalization for what had previously been constitutionally protected political advocacy.<sup>103</sup>

How these measures will be used against charitable organizations and their members remains to be seen. However, there are strong indications that Muslim charities are bearing the “lion’s share of the burden of increased scrutiny, suspicion, and pre-emptive action,”<sup>104</sup> in relation to the U.S.

<sup>102</sup> *Ibid.* at 4. It should be noted, however, that the First Amendment does not protect free speech where the speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions: *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>103</sup> *Ibid.*

<sup>104</sup> OMB Watch, *Muslim Charities and the War on Terror: Top Ten Concerns and Status Update* (Washington: OMB Watch, February 2006), available at [www.ombwatch.org](http://www.ombwatch.org).

government's war on terror financing. For example, four of the largest U.S. Muslim charities have been effectively destroyed by the U.S. government in the days following the September 11 attacks, yet the government has not obtained a single terrorist conviction of any of the principals of the organizations, nor has the government conclusively proven that any of the funds were used to finance terrorist activities.<sup>105</sup> The 911 Commission's comments in relation to this bear repeating:

Although effective in shutting down its targets, this aggressive approach raises potential civil liberties concerns, as the charities' supporters insist that they were unfairly targeted, denied due process, and closed without any evidence they actually funded al Qaeda or any terrorist groups. The BIF and GRF investigations highlight fundamental issues that span all aspects of the government efforts to combat al Qaeda financing: the difference between seeing links to terrorists and proving funding of terrorists, and the problem of defining the threshold of information necessary to take disruptive action.<sup>106</sup>

There are also allegations of unequal enforcement of the anti-terrorist financing laws. Whereas charitable organizations have had their assets seized at the outset, the infamous Halliburton corporation, which has ties to the White House through Vice President Dick Cheney, has been under investigation since 2001 for doing business with Iran, yet law enforcement authorities have not sought to seize or freeze the corporation's assets pending the investigation.<sup>107</sup> In a similar vein, in December 2003, the U.S. Senate Finance Committee requested IRS records on more than two dozen Muslim charities in order to probe possible links between the charities and terrorist groups.<sup>108</sup> However, two years later the probe was wrapped up with the committee saying "it discovered nothing alarming enough to warrant new laws or other measures."<sup>109</sup> Similar broad fishing expeditions of non-Muslim organizations have not been initiated.

<sup>105</sup> This is a reference to the actions taken in respect to the Benevolence International Foundation ("BIF"), the Global Relief Foundation ("GRF"), the Islamic American Relief Agency ("IARA") and the Holy Land Foundation for Relief and Development ("HLF"). Both GRF and HLF have been under FBI scrutiny for years because of alleged ties to terrorist organizations. See *e.g.* Laila Al-Marayati, "American Muslim Charities: Easy Targets in the War on Terror" (Paper presented at the Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy Symposium, Pace University School of Law, 3 December 2004); Matthew J. Piers, "Malevolent Destruction of a Muslim Charity: A Commentary on the Prosecution of Benevolence International Foundation" (Paper presented at the Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy Symposium, Pace University School of Law, 3 December 2004); and Victoria B. Bjorklund, "Terrorism and Money Laundering: Illegal Purposes and Activities" (Paper presented at the Diversions of Charitable Assets: Crimes and Punishment Conference, New York University School of Law, National Center on Philanthropy and the Law, October 2004).

<sup>106</sup> National Commission on Terrorist Attacks Upon the United States (911 Commission), *Terrorist Financing Staff Monograph, Executive Summary* [undated] at 11.

<sup>107</sup> OMB Watch, *supra* note 104 at 7.

<sup>108</sup> See "Senators Request Tax Information on Muslim Charities for Probe" at <http://usinfo.state.gov/ei/Archive/2004/Jan/15-147062.html>.

<sup>109</sup> Mary Beth Sheridan, "U.S. Muslim Groups Cleared: Senate Panel Finds Nothing 'Alarming' in Financial Data" (Washington Post, 19 November 2005, A12).

d) Suppression of the Financing of Terrorism Convention Implementation Act

The *Suppression of Financing of Terrorism Convention Implementation Act* (“SFTCIA”)<sup>110</sup> implements a U.N. Convention signed by the U.S. in 2000, adding 18 U.S.C. 2339C. The SFTCIA targets domestically formed entities, including tax exempt 501(c)(3) organizations and those who manage or control the entities, creating a number of offences. Subsection 2339C(a) makes it an offence to:

... by any means, directly or indirectly, unlawfully and wilfully provide[] or collect[] funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out [a terrorist act].<sup>111</sup>

The House Judiciary Committee has indicated that the term “wilfully” means “voluntary or intentional.”<sup>112</sup> Paragraph 2339C(a)(2) goes on to state that “for an act to constitute an offence set forth in this subsection, it shall not be necessary that the funds were actually used to carry out a predicate act.”<sup>113</sup> Thus, there is not a requirement that the funds be used to carry out a terrorist act in order for there to be a violation of the section. Penalty for violation of this subsection is a fine, imprisonment for twenty years, or both.

Subsection (c) establishes another offence of “concealment.” Individuals or entities, including registered tax exempt organizations, who “knowingly conceals or disguises the nature, location, source, ownership, or control of any material support, resources, or funds” intended to support terrorism, may be subject to a fine, imprisonment for ten years, or both.

e) Voluntary Best Practices for U.S. Based Charities

The effort to quell terrorist financing and money laundering has been identified by the U.S. as the second phase in its “war on terrorism.”<sup>114</sup> The U.S. Treasury Department, which spearheads a significant portion of anti-terrorist financing and money laundering initiatives, first issued its *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (“Guidelines”)

<sup>110</sup> Public Law 107-197

<sup>111</sup> *Ibid.*

<sup>112</sup> 107 H.R. 307.

<sup>113</sup> SFTCIA, *supra* note 110.

<sup>114</sup> Kenneth W. Dam, Deputy Secretary of the Treasury, “The Financial Front of the War on Terrorism: The Next Phase” (Presentation to the Council on Foreign Relations, New York, 8 June 2002), available at <http://www.treas.gov/press/releases/po3163.htm>.

in 2002, and recently revised those guidelines based on review and comments from stakeholders.<sup>115</sup> When first released, the Guidelines called for changes to how charities manage their operations, including rigorous, self-imposed financial oversight; high levels of disclosure and transparency, especially in relation to those charities that operate internationally. Additionally, they advocated significant new due diligence practices for charities, i.e. recommending that charities obtain the name, nationality, place of birth, and other personal data of all key staff from potential grantee organizations.

Although they are termed “voluntary,” and the Treasury Department states that the “Guidelines are intended to assist charities in developing a risk-based approach to guard against the threat of diversion of charitable funds for use by terrorists and their support networks,”<sup>116</sup> the reality is that they are viewed as mandatory by a vast majority of U.S. charitable organizations. As they are issued by the Treasury Department there is the appearance that they have the force of law and that any charitable organization that fails to comply with the Guidelines will face increased scrutiny from authorities and may lose their tax exempt status. Further, the use of some mandatory language in the Guidelines belies the voluntary nature of the Guidelines

The Guidelines set out fundamental principles of good charitable practice, which include the necessity for fiscal responsibility, for fiduciaries of the charity to exercise due care and for charitable organizations to comply with U.S. laws. Another fundamental principle is for charitable organizations to adopt practices in addition to those required by law in order to provide additional assurances that all assets are used exclusively for charitable or other legitimate purposes.

Under the heading “Governance,” the Guidelines set out requirements that are well-established norms in charitable corporations, namely that “charitable organizations should operate in accordance with governing instruments, *e.g.*, charter, articles of incorporation, bylaws, etc.,” and that they should be governed by a board of directors “consisting of at least three (3) members.”<sup>117</sup> Under the “Financial Practice/Accountability” heading, there are once again well-established norms. The Guidelines suggest that the charity should adopt a budget on an annual basis, and an individual

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<sup>115</sup> *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (December 2005), available at [http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines\\_charities.pdf](http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf).

<sup>116</sup> *Ibid.* at 2.

<sup>117</sup> *Ibid.* at 3-4.

should be appointed to oversee the charity's assets. As well, the charity should account for all funds received and disbursed in accordance with generally accepted accounting principles. This would include ensuring disbursements record the name of the recipient, the amount disbursed, and the date of the disbursement. The Guidelines also call for funds received to be promptly deposited into a financial institution and for disbursements to be made by check or wire transfer rather than in cash.

The Guidelines call for disclosure/transparency in a charity's governance and finances, which includes publicly identifying the members of the board of directors or trustees, as well as key employees. Disclosure should also be made of how resources and services are distributed and the charity's fundraising goals.

The final section of the Guidelines deals with Anti-Terrorist Financing Best Practices. The Guidelines call for substantial due diligence in this regard. Recipients of resources or services should be clearly identified. A list of nine different factors is provided as suggestions on the "basic information" about recipients that the charity should obtain, including the following:

- the recipient's name in English, in the language of origin, and any acronym or other names used to identify the recipient;
- the jurisdictions in which a recipient maintains a physical presence;
- any reasonably available historical information about the recipient that assures the charity of the recipient's identity and integrity;
- the address and phone number of each place of business of a recipient;
- a statement of the principal purpose of the recipient, including a detailed report of the recipient's projects and goals;
- the names and addresses of individuals, entities, or organizations to which the recipient currently provides or proposes to provide funding, services, or material support, to the extent reasonably discoverable;
- the names and addresses of any subcontracting organizations utilized by the recipient;

- copies of any public filings or releases made by the recipient, including the most recent official registry documents, annual reports, and annual filings with the pertinent government, as applicable; and
- the recipient's sources of income, such as official grants, private endowments, and commercial activities.<sup>118</sup>

The Guidelines also suggest that the charity conduct a “reasonable search” of public information. Included in this search would be a review of the Terrorist Exclusion List, and compliance with all Office of Foreign Assets Control administered sanctions programs. Reviews of the financial and programmatic operations of the recipient would also be required. In addition to vetting recipients, the Guidelines also require vetting of the charity's own key employees.

Despite the best intentions of the Treasury Department in issuing the Guidelines and their 2005 revision, comments from the philanthropic sector have focused on two issues. First, a comprehensive set of laws, regulations, and IRS rulings already effectively prevented the diversion of charitable funds for illegal purposes. Second, the Guidelines are excessively burdensome and impractical. As an executive with a large foundation opined, “[the Guidelines are] unlikely to achieve their goal of reducing the flow of funds to terrorist organizations, but very likely to discourage international charitable activities by U.S.-based organizations.”<sup>119</sup>

A major complaint continues to be the fact that the Guidelines are silent on the issue of whether or not there is a threshold with respect to the due diligence requirements. In other words, the burdensome due diligence requirements appear to apply to a \$100 disbursement as well as the \$1-million disbursement. Many charitable organizations are also concerned that the extensive vetting procedures have the appearance of turning them into “surrogate police,” even though most staff may not be capable of properly analyzing the data received.<sup>120</sup> There are also concerns about whether all the information required is publicly available in developing nations to the same extent as in the U.S. In other words, the due diligence requirements in the Guidelines may not be possible to comply with.

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<sup>118</sup> *Ibid.* at 7-8.

<sup>119</sup> Barnett F. Baron, “The Treasury Guidelines Have Had Little Impact Overall on U.S. International Philanthropy, But They Have Had a Chilling Impact on US-Based Muslim Charities” (Presentation to the Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy Symposium, Pace University School of Law, 3 December 2004).

<sup>120</sup> *Ibid.*

Members of the American Bar Association Section of Taxation<sup>121</sup> have recently called on the Department of Treasury to withdraw the revised Guidelines and endorse the *Principles of International Charity*,<sup>122</sup> developed by a working group of the Council of Foundations, a membership organization of more than 2,000 grant-making foundations and giving programs. In comments to the Treasury Department, members of the Section of Taxation expressed three principal concerns:

- the revised Guidelines contain provisions suggesting that charitable organizations are agents of the government, which they suggest could compromise the safety of humanitarian workers;
- the revised Guidelines suggest the collection of more information on more individuals and organizations than did the initial Guidelines. They are unduly burdensome and beyond the capacity of most charitable organizations; and
- the revised Guidelines do much more than address their stated purpose, that is, to offer guidance to charities that might be helpful in achieving compliance with sanctions administered by the Office of Foreign Assets Control.<sup>123</sup>

However, recognizing that the Treasury Department may not follow the principle recommendation to withdraw the Guidelines, the Taxation Section provided a number of comments on specific aspects of the Guidelines that continue to be cause for concern, from the title to the anti-terrorist financing best practices.

For example, the terms “voluntary” and “best practices” are both seen as a misnomer. As discussed above, the Guidelines are seen as de facto legal authority, with even government programs and departments, like the IRS, treating them as mandatory. The Taxation Section also notes that with the diversity of charitable organizations, it is impossible to suggest that one set of practices can apply to organizations.<sup>124</sup> The broad, sweeping statements relating charitable organizations to terrorist financing are said to be misrepresenting the prevalence of terrorist abuse of U.S.

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<sup>121</sup> The comments provided to the U.S. Department of the Treasury were submitted on behalf of the American Bar Association Section of Taxation and Criminal Justice Section, but were not approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

<sup>122</sup> Available at [http://www.cof.org/Files/Documents/International\\_Programs/2005Publications/Principles\\_Final.pdf](http://www.cof.org/Files/Documents/International_Programs/2005Publications/Principles_Final.pdf).

<sup>123</sup> American Bar Association Section of Taxation, *Comments on U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* (8 March 2006).

organizations. As such, the Taxation Section suggested that providing concrete data on listed entities and frozen assets would prevent undermining donor confidence and educate charitable organizations about the true threat.<sup>125</sup> Additionally, the Taxation Section suggests that “Governance section generally fails to take into account the complexity of its various recommendations because these deceptively complicated issues fall outside the core experience and expertise of Treasury.”<sup>126</sup> Although recognizing that the present “Anti-Terrorist Financing Best Practices” section is a significant improvement over the initial Guidelines, additional changes to the section have “increase[d] the burden on organizations to collect information that they are ill-equipped to pursue or analyze, hinder legitimate and needed service delivery, and inadvertently expose humanitarian workers to greater security risks.”<sup>127</sup> As such, it was recommended that the section be withdrawn in its entirety and be replaced with the *Principles of International Charity*.<sup>128</sup> Alternatively, the Treasury Department was urged to provide more balance.

## 2. United Kingdom

On March 30, 2006, Royal Assent was given to the United Kingdom’s (“U.K.”) fourth major addition to the anti-terrorism arsenal since the turn of the millennium. In a country where there are already over two hundred separate counterterrorism laws,<sup>129</sup> the *Terrorism Act 2006* (c. 11) was met with surprisingly little fanfare outside of its borders, despite the fact that certain contentious provisions in the bill led to the Blair government’s first defeat in the House of Commons.<sup>130</sup>

Draft legislation for the *Terrorism Act 2006* was introduced on October 12, 2005, as part of the Blair government’s promise to crack down on Islamic extremism following the London terror attacks of July 2005. The controversial anti-terror measures, which build upon various measures put in place since September 11, came at a critical juncture in the development of measures to counter the worldwide threat of terrorism. The legislation also came on the heels of a resolution of the U.N. Security Council,

<sup>124</sup> *Ibid.* at 3.

<sup>125</sup> *Ibid.* at 3-4.

<sup>126</sup> *Ibid.* at 5.

<sup>127</sup> *Ibid.* at 7.

<sup>128</sup> *Principles, supra* note 122.

<sup>129</sup> Iain MacWhirter, “It’s time for zero tolerance of Labour” (*The Sunday Herald*, 16 October 2005, p. 23).

<sup>130</sup> The U.K.’s Labour government suffered its first House of Commons defeat under the leadership of Tony Blair when Members of Parliament voted 322 to 291 (with 49 Labour MPs, including 12 former ministers, rebelling on this whipped vote) against a provision in the Act that would have enabled police to detain terror suspects for up to 90 days without charge, rather than the existing 14 days. MPs voted instead to extend the time limit to 28 days. The defeat of the government on this matter did not mean that Blair had to resign as Labour leader, but it was seen to weaken his authority. In a separate vote on another contentious provision in the Act, the inclusion of an offence of “glorification of terrorism” saw the government’s majority reduced to 25. “Blair defeated over terror laws” (*BBC News*, 9 November 2005), available online at [bbc.co.uk](http://bbc.co.uk).

sponsored by the U.K., calling on all governments to adopt laws that prohibit people from “inciting” others to commit terrorist acts, and to deny safe haven to anyone seriously considered guilty of such conduct. It also called on all countries to counter violent extremist ideologies, including steps to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters.

a) Terrorism Act 2000

The *Terrorism Act 2006* became the fourth major piece of counterterrorism legislation introduced in the U.K. since 2000.<sup>131</sup> The *Terrorism Act 2000* (“TACT”)<sup>132</sup> is the primary piece of counterterrorism legislation and contains what the Home Office describes as the most vital counterterrorism measures. This includes making terrorist groups illegal, enhanced police powers and new criminal offences. TACT made it illegal for certain terrorist groups to operate in the U.K. and extended proscription to include international terrorist groups, like Al Qaida. Under Part II of the Act, the Secretary of State is enabled to proscribe any organization that he believes “is concerned in terrorism.” An organization that commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, etc. in the U.K. or in other countries will be considered to be “concerned in terrorism.” Under TACT, police were given greater powers to help prevent and investigate terrorism, including wider stop and search powers and the power to detain suspects after arrest for up to seven days. The Act also introduced a number of new offences allowing police to arrest individuals suspected of inciting terrorist acts, seeking or providing training for terrorist purposes at home or overseas, and providing instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons. Providing or receiving money or other property intended to be used for the purposes of terrorism (fundraising) and making money or property available for such a purpose, and money laundering for terrorist organizations were also made offences under TACT.

With the broad definition of terrorism, enhanced police powers and ability to proscribe organizations without having to prove a case against the organization, TACT has been criticized as a serious assault on civil liberties. “Terrorism” is defined in section 1 of TACT to have a three-

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<sup>131</sup> For further discussion on U.K. anti-terrorism legislation, please see Sean S. Carter and Johanna Blom, “The Perception and Interpretation Burden: The Charity Commission of England and Wales Policy on Charities and Their Alleged Links to Terrorism” in *Antiterrorism and Charity Law Alert No. 2* (30 April 2003), available at [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca).

<sup>132</sup> For the full text of TACT, see <http://www.opsi.gov.uk/ACTS/acts2000/20000011.htm>.

pronged requirement. First, the use or threat of action must (a) involve serious violence against a person; (b) involve serious damage to property; (c) endanger a person's life, other than that of the person committing the action; (d) create a serious risk to the health or safety of the public or a section of the public; or (e) be designed seriously to interfere with or seriously to disrupt an electronic system. Second, the use or threat of action must be designed to "influence the government" or "intimidate the public." Finally, the use or threat must be made for the purpose of advancing a political, religious or ideological cause. TACT makes it clear that the use of firearms or explosives will make the act under the first prong be terrorism whether or not the second prong of the test is met. TACT has a significant extraterritorial provision, stating that acts committed outside of the United Kingdom and directed to persons or governments outside of the United Kingdom will be subject to the provisions TACT.

Home Office statistics indicate that in the period from September 11, 2001 to September 30, 2005, 895 people were arrested under TACT.<sup>133</sup> Of these 895 people, 496 were eventually released without charge, while only 23 were convicted of offences under TACT. In a move that embarrassed the Labour government, TACT provisions were used to forcibly eject a peace activist from the annual Labour Party Conference in September 2005. The Labour Party's hierarchy, including Prime Minister Blair eventually apologized to the 82-year-old activist.<sup>134</sup>

b) Anti-terrorism, Crime and Security Act 2001

In 2001, the *Anti-terrorism, Crime and Security Act 2001* ("ACSA") was introduced in order to "provide stronger powers to allow the police to investigate and prevent terrorist activity and other serious crime,"<sup>135</sup> and had been described as "emergency legislation" put together in the wake of the September 11 attacks. The strong measures in the legislation included provisions to cut off terrorist funding; ensure the government departments and agencies could collect and share information required for countering the terrorist threat; streamline relevant immigration procedures; ensure the security of the nuclear and aviation industries; improve the security of dangerous substances that

<sup>133</sup> See <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/>.

<sup>134</sup> See "Labour issues apology to heckler" (BBC, 28 September 2005), available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4291388.stm](http://news.bbc.co.uk/1/hi/uk_politics/4291388.stm). Walter Wolfgang, described as an 82-year-old Jewish escapee from the Nazis, was forcibly ejected from the Labour Party Conference and prevented from returning after he yelled "nonsense" at the foreign secretary. Section 44 of TACT, which authorizes the police to stop and search "if the person giving [the authorization] considers it expedient for the prevention of acts of terrorism." Prime Minister Blair eventually conceded that TACT should have been used under the circumstances.

<sup>135</sup> Home Office commentary on the *Anti-terrorism, Crime and Security Act 2001*, <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/anti-terrorism-crime-security-act/>. For the full text of the Act, see <http://www.opsi.gov.uk/acts/acts2001/20010024.htm>.

may be targeted/used by terrorists; and extend police powers. Part 4 of ACSA proved to be especially controversial, enabling the Secretary of State to issue certificates in respect of persons he suspected to be a terrorist and whose presence in the country posed a risk to national security. Persons so named in a certificate were subject to deportation or detention. These detention powers were said to be in direct contravention of the U.K.'s obligations under the *European Convention on Human Rights*, which sets out very specific circumstances in which a state may deprive persons of their liberty and which was confirmed in the Chahal decision discussed below. Rather, the detention powers under ACSA were essentially a form of indefinite detention to be exercised exclusively in relation to foreign persons.

c) Chahal decision

As is evident from above, the U.K.'s path to the vast collection of counterterrorism laws has been long and winding. A significant bump on the road was the 1996 decision of the European Court of Human Rights in *Chahal v. U.K.*<sup>136</sup> Chahal, a Sikh separatist and an Indian citizen who had been granted indefinite leave to remain in the U.K., was targeted for deportation by the Home Secretary of the day because his continued presence was considered non-conducive to the public good for reasons of a political nature, primarily the international fight against terrorism. He resisted deportation on the ground that, if returned to India, he faced a real risk of death, or of torture in custody contrary to article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ("Convention"), which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>137</sup> In proceedings before the European Court, the U.K. contended that the effect of article 3 should be qualified in a case where a state sought to deport a non-national on grounds of national security. The Court rejected this argument, stating in unqualified terms:

... the convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the convention ... [article] 3 makes no provision for exceptions and no derogation from it is permissible under art 15 even in the event of a public emergency threatening the life of the nation.<sup>138</sup>

<sup>136</sup> (1996) 1 BHRC 405 [*Chahal* decision].

<sup>137</sup> 213 U.N.T.S. 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>138</sup> *Chahal* decision, *supra* note 136 at 422.

This prohibition was extrapolated to cases of expulsion. The Court placed the onus upon the contracting state to safeguard individuals against such treatment, saying that “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”<sup>139</sup>

In considering *Chahal*’s detention, the Court concluded that any deprivation of liberty under article 5(1)(f) of the Convention will only be justified for as long as deportation proceedings are in progress. In cases where deportation is precluded, article 5(1)(f) of the Convention would not sanction detention even if the individual were judged to be a threat to national security.

The U.K. government is hoping to persuade the European Court of Human Rights to overturn this ruling, as it intervenes in a case brought against the Netherlands by an Algerian accused of involvement in Islamic terrorism. The man, who is seeking asylum, claims he would face political persecution if he were sent back to Algeria.<sup>140</sup> In seeking the reversal of the *Chahal* decision, Home Secretary Charles Clarke said, “the right to be protected from the death and destruction caused by indiscriminate terrorism is at least as important as the right of the terrorist to be protected from torture and ill-treatment.”<sup>141</sup>

The *Chahal* decision played a pivotal role in the measures that led up to the litigation at issue in the House of Lords decision in late 2004.

<sup>139</sup> *Ibid.*

<sup>140</sup> In *Ramzy v. Netherlands* (application no. 25424/05 before the European Court of Human Rights), the applicant, Mohammed Ramzy, submits under Article 3 (prohibition of torture or inhuman or degrading treatment) of the Convention that, if removed to Algeria, he will be exposed to a real risk of torture or ill-treatment at the hands of the Algerian authorities. Leave to intervene as a third party in the Court’s proceedings has also been granted to: the Governments of Italy, Lithuania, Portugal, Slovakia and the United Kingdom; and the non-governmental organisations the AIRE Centre, Interights (also on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, The International Commission of Jurists, Open Society Justice Initiative and Redress), Justice and Liberty. The applicant, an Algerian national, was arrested in the Netherlands in 2002 on suspicion of involvement in an Islamic extremist network active in the Netherlands, linked to the Algerian Salafist Group for Preaching and Combat (Groupe Salafiste pour la Prédication et le Combat; “GSPC”). The network’s main activities are considered to be: aiding and abetting people who have actively participated in the holy war (“jihad”), forgery of identity papers, the recruitment and preparation of young men in the Netherlands for active participation in the holy war, and drugs trafficking for the purposes of financing its activities. The applicant was acquitted on charges relating to this arrest in 2003. Upon release, the applicant was apprehended by the aliens’ police and placed in aliens’ detention for expulsion purposes. Ramzy applied for asylum, claiming that he risked being subjected to torture and/or ill-treatment in Algeria. His asylum request was eventually rejected in a final decision taken by the Administrative Jurisdiction Division of the Council of State on 6 July 2005. On 15 September 2005, Ramzy was released from aliens’ detention, under a ruling from the Regional Court of The Hague, who found the applicant’s continued placement in aliens’ detention to be unlawful, in that there were no prospects for his removal from the Netherlands within a reasonable time. (Registrar, European Court of Human Rights, 20 October 2005).

<sup>141</sup> Joshua Rozenberg, “Terror suspects may face expulsion” (Telegraph.co.uk, 3 October 2005).

d) House of Lords (“Belmarsh”) decision

In late December 2004, the House of Lords, the U.K.’s highest judicial authority and final court on points of law for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases,<sup>142</sup> came out with its decision in *A. v. Secretary of State for the Home Department*.<sup>143</sup> In an eight to one majority (Lord Hoffmann dissenting), the Law Lords ruled that the indefinite detention of foreign suspects without charge or trial in Belmarsh prison breached their human rights.

The case involved the U.K.’s *Human Rights Act 1998 (Designated Derogation) Order 2001* (“Order”), which was implemented following the attacks in the United States on September 11, 2001. The Order derogated from the right to liberty as is provided by article 5(1)(f) of the Convention, and ratified in the *Human Rights Act 1998*. Article 5(1)(f) of the Convention guarantees that “everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... (f) the lawful arrest or detention of ... a person against whom action is being taken with a view to deportation.” Derogation from the Convention is permitted by article 15 where there is a “public emergency threatening the life of the nation.”

Accordingly, the *Human Rights Act 1998 (Designated Derogation) Order 2001* was made, and the ACSA was enacted, which provided that a suspected international terrorist could be detained under specified provisions of the *Immigration Act 1971*, despite the fact that his removal or departure from the U.K. was prevented, whether temporarily or indefinitely, by a point of law which wholly or partly related to an international agreement, or a practical consideration. In simple terms, ACSA enabled the U.K. government to detain any foreign national suspected of links to terrorism who did not opt to be deported. But those detained could not be deported if it would mean persecution in their homeland.

<sup>142</sup> Although the Law Lords are part of a legislative body of the U.K. Parliament, an unusual situation in a democracy, this is an historical role for the House of Lords, dating back 600 years. Today, only “highly qualified judges” who are appointed to be professional law lords take part in the judicial function of the House. In October 2008, the judicial function of the House of Lords will be transferred to a new U.K. Supreme Court, which will be constitutionally and physically separate from Parliament.

<sup>143</sup> [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169 [Belmarsh decision].

The appellants were all non-U.K. nationals who faced the prospect of torture or inhuman treatment if returned to their own countries, could not be deported to any third countries, and were not charged with any crime. Thus, without the derogation order, they could not be detained. All were certified by the Secretary of State as “suspected international terrorists” and detained under ACSA.

The men initially took their cases to the Special Immigration Appeals Commission (“SIAC”), which ruled in 2002 that the anti-terror act unjustifiably discriminated against foreign nationals since British nationals, who were equally dangerous, could not be held in the same way. However, this ruling was later overturned by the Court of Appeal, which said that there was a state of emergency threatening the life of the nation.

Although the House of Lords held that “great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question [of whether there is a public emergency threatening the life of the nation], because they were called on to exercise a pre-eminently political judgment,”<sup>144</sup> it did not mean that the courts could never intervene. As Baroness Hale of Richmond stated, “[u]nwarranted declarations of emergency are a familiar tool of tyranny.”<sup>145</sup> Although acknowledging that the events of September 11, 2001, justified the conclusion that there was a public emergency threatening the life of the nation, the court concluded that “what is then done to meet the emergency must be no more than is strictly required by the exigencies of the situation.”<sup>146</sup> Baroness Hale of Richmond wrote:

The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation.<sup>147</sup>

The Law Lords ultimately held that the measures were incompatible with other obligations under international law, from which there had been no derogation. Accordingly, the derogation order was quashed and a declaration was made that section 23 of ACSA was incompatible with articles 5 and 14 of the Convention.

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<sup>144</sup> *Ibid.* at para. 29.

<sup>145</sup> *Ibid.* at para. 226.

<sup>146</sup> *Ibid.* at para. 227.

<sup>147</sup> *Ibid.* at para. 231.

In his judgment, Lord Nicholls of Birkenhead stated:

... indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.<sup>148</sup>

In more damning terms, Lord Hoffman wrote, “[t]he real threat to the life of the nation ... comes not from terrorism but from laws such as these.”<sup>149</sup>

Of note, however, was the fact that despite the decision, the House of Lords did not have the power to order that the detainees be released.<sup>150</sup> As such, Home Secretary Charles Clarke said the men would remain in prison, and the measures would remain in force until the law was reviewed, likely in the New Year.<sup>151</sup>

e) Prevention of Terrorism Act 2005

That review came in the form of the *Prevention of Terrorism Act 2005* (“PTA 2005”), which repealed the impugned powers under ACSA and replaced them with a system of control orders. Control orders can be made against any suspected terrorist, whether a U.K. national or not, and whether the terrorist activity is international or domestic. They enable the authorities to impose conditions upon individuals ranging from prohibitions on access to specific items or services, and restrictions on association with named individuals, to the imposition of restrictions on movement or curfews. As one commentator described the provisions, they “[allow] the Home Secretary to impose ‘gag and tag’ restrictions on all suspected terrorists.”<sup>152</sup> Control orders must be renewed every twelve months, and a breach of any of the obligations without reasonable excuse is a criminal offence punishable with a prison sentence of up to five years and/or an unlimited fine.

Although the Belmarsh decision was heralded as a blow to the government’s anti-terror measures and commentators suggested that the government would find it hard to avoid giving effect to the

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<sup>148</sup> *Ibid.* at para. 74.

<sup>149</sup> *Ibid.* at para. 97.

<sup>150</sup> *Ibid.* at para. 220.

<sup>151</sup> The men were detained in Belmarsh until March of 2005 when they were released with restrictions placed on their communications and movements. However, they were abruptly detained again in August, with the government intending to expel them from the U.K.

<sup>152</sup> Joshua Rozenberg, “Dilemma puts law lords on the rack: Ruling sought on using terrorism evidence if torture suspected” (*The Daily Telegraph* (London), 13 October 2005, pg. 17).

ruling,<sup>153</sup> the July 2005 terrorist attacks on London's transit system effectively renewed the social consensus, giving new life to the government's push to increase security measures: "July 7 was a news event to which Labour felt they had to respond aggressively."<sup>154</sup>

f) Terrorism Act 2006

On October 12, 2005, Home Secretary Charles Clarke followed through on the promises outlined by Tony Blair in early August 2005, with the introduction of the *Terrorism Act 2006*. The measures proposed in the *Terrorism Act 2006* include, among other things:

- Creating an offence of encouragement of terrorism;<sup>155</sup>
- Creating offences relating to the sale and other dissemination of books or other publications, including internet material, that encourage people to engage in terrorism, or provide information that could be useful to terrorists;<sup>156</sup>
- Creating an offence of the preparation of terrorist acts, which adds to the common law of conspiracy to carry out terrorist acts and attempting to carry out terrorist acts;<sup>157</sup>
- Implementing article 7 of the Council of Europe Convention for the Prevention of Terrorism, which requires parties to create an offence of training for terrorism;<sup>158</sup>
- Creating an offence of attending a place used for terrorist training;<sup>159</sup>
- Creating extra-territorial jurisdiction for the U.K. courts for the new offences in Part 1 of the Act and two offences in TACT, which means that an individual who commits one of the designated offences in a foreign country would be liable under U.K. law in the same way as if they had committed the offence in the U.K.;<sup>160</sup>
- Attaching liability for offences committed by corporate bodies to the company directors whether the offences be committed by their consent or connivance;<sup>161</sup>
- Giving the Secretary of State the power to add an organization to the list of proscribed organizations if he believes that the organization is concerned in terrorism, which definition includes the promotion or encouragement of terrorism;<sup>162</sup> and

<sup>153</sup> George Jones & Joshua Rozenberg, "Anti-terror laws rejected on Clarke's first day" (Telegraph.co.uk, 17 December 2004).

<sup>154</sup> *Supra* note 1.

<sup>155</sup> *Terrorism Act 2006*, 2006 c. 11, cl. 1.

<sup>156</sup> *Ibid.*, cl. 2 and 3.

<sup>157</sup> *Ibid.*, c. 5.

<sup>158</sup> *Ibid.*, c. 6.

<sup>159</sup> *Ibid.*, cl. 8.

<sup>160</sup> *Ibid.*, cl. 17.

<sup>161</sup> *Ibid.*, cl. 18.

<sup>162</sup> *Ibid.*, cl. 21.

- Extending the period of detention by judicial authority prior to charging those arrested under section 41 of TACT from fourteen days to up to 28 days.<sup>163</sup>

Despite the social consensus that developed in the wake of the July 2005 terrorist attacks, the new terrorism legislation met with significant criticism, from both inside and outside the Labour Party. Community groups and civil rights advocates condemned the measures as “draconian,”<sup>164</sup> and Blair has acknowledged that the bill split the Labour Party, especially with respect to the original 90-day detention and making “encouraging” or “glorifying” terrorism a crime.<sup>165</sup> For example, the Law Society argued that increasing detention powers from fourteen days to three months would be “tantamount to internment.”<sup>166</sup> Blair also failed to get the backing of Lord Carlile of Berriew, the independent watchdog he appointed to oversee anti-terror legislation.<sup>167</sup> In his report on the Terrorism Bill, Lord Carlile expressed regret at seeing district judges preside over applications to extend detention periods beyond the current fourteen days.

Inevitably the material they see is likely to be one-sided, and they have only modest opportunity for in-depth scrutiny. Though they can ask questions and do seek further information, they have no role in the inquiry under way and they have no independent advice or counsel before them. The procedure before district judges in my view has characteristics suited to short interference with liberty. ... A more searching system is required to reflect the seriousness of the State holding someone in high-security custody without charge for as long as three months.<sup>168</sup>

In commenting on the proposals, Human Rights Watch has called them an “outright breach of the U.K.’s human rights obligations,” suggesting they are so ill-defined and overly broad that “they risk criminalizing valid forms of dissent and undermining freedom of religion.”<sup>169</sup> The group takes particular aim at the offence of encouraging terrorism, repeating a paradox raised by a Member of Parliament during the debate in the House of Commons:

... on the one hand, it appears that it is proper for Governments to wage war to procure regime change in Iraq, whereas on the other, if we recommended the citizens of Iraq should

<sup>163</sup> *Ibid.*, cl. 23. This clause initially called for a detention period up to three months/90 days. The government was defeated on this clause and the result was the compromise position of 28 days detention.

<sup>164</sup> Sandro Contenta, “U.K. groups decry terror bill” (*Toronto Star*, 13 October 2005, pg. A10).

<sup>165</sup> *Ibid.*

<sup>166</sup> Simon Freeman, “Terror watchdog savages new Bill as ‘too extensive’” (*Times Online*, 12 October 2005).

<sup>167</sup> *Ibid.*

<sup>168</sup> Lord Carlile of Berriew, “Proposals by Her Majesty’s Government for Changes to the Laws Against Terrorism: Report by the Independent Reviewer Lord Carlile of Berriew Q.C.” (13 October 2005) available at <http://www.timesonline.co.uk/article/0,,22989-1822736,00.html>.

<sup>169</sup> Human Rights Watch, “U.K.: Proposed Anti-Terrorism Measures Threaten Fundamental Rights,” available at [http://hrw.org/english/docs/2005/08/10/uk11620\\_txt.htm](http://hrw.org/english/docs/2005/08/10/uk11620_txt.htm).

have risen up to destroy Saddam Hussein, we could be prosecuted in this country for doing that.<sup>170</sup>

The group further suggests that the overly broad definition of terrorism is “likely to prove inconsistent with international standards guaranteeing free expression,”<sup>171</sup> and that there are existing criminal offences that are sufficient to meet the threat posed by those who would glorify or encourage terrorism.<sup>172</sup> Despite these concerns, the *Terrorism Act 2006* was made law on March 30, 2006.

g) Anti-terrorism Legislation and the Charity Commission

The U.K. Charity Commission acknowledges that connections between registered charities in England and Wales and terrorist organizations are rare.<sup>173</sup> In fact, on September 11, 2001, the Commission had inquiries open into the activities of five charities, and were evaluating concerns into two others. Subsequent to that point in time, the Commission has evaluated concerns about ten other charities and opened formal inquiries into five of them. Still, out of the approximately 185,000 registered charities in the U.K., only two have been closed down and another has had its assets frozen.<sup>174</sup> Despite these statistics, the Commission claims that “terrorists and other criminal groups use charities in many ways to further their own ends.”<sup>175</sup> And, as it described in a policy statement in 2002, the Commission will essentially hold charities and their trustees, under threat of serious consequences, responsible not only for the charity’s actual activities, but also for the public’s *perception* of the charity’s activities.<sup>176</sup> Some of the ways in which the Commission indicates a terrorist organization may use a charity:

<sup>170</sup> Douglas Hogg, House of Commons, *Hansard*, 2 November 2005, col. 853.

<sup>171</sup> Human Rights Watch, “Briefing on the Terrorism Bill 2005: Second Reading in the House of Lords” (November 2005) at 2.

<sup>172</sup> *Ibid.* at 7. The same comment has been said about Canada’s anti-terrorism legislation. In 2005, then federal Justice Minister Irwin Cotler told the Canadian Bar Association that he would not rule out adopting U.K.-style legislation to combat terror: Steve Mertyl, “Cotler says law review may eye British steps” (*The Globe and Mail*, 16 August 2005). However, amendments to Canada’s *Criminal Code* made by the *Anti-terrorism Act* already provides Canada with provisions broad enough to cover the “encouraging” and “disseminating” provisions of the U.K. Act. Of particular note are sections 83.18, 83.21 and 83.22, as discussed on page 19. 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. Whether intended or not, the amendments potentially place innocent individuals and organizations in Canada in peril of being branded terrorists and suffering the concomitant consequences.

<sup>173</sup> Charity Commission, *Charity Commission policy on charities and their alleged links to terrorism*, 4 October 2004 online: <http://www.charity-commission.gov.uk/tcc/terrorism.asp>.

<sup>174</sup> *Ibid.*

<sup>175</sup> Charity Commission, *Operational Guidance: Charities and Terrorism* (OG 96 – 28 January 2003) <http://www.charity-commission.gov.uk/supportingcharities/ogs/g096.asp>.

<sup>176</sup> Charity Commission, *supra* note 173

- using money raised by charities to fund terrorist organizations;
- using charities to smuggle people into countries illegally;
- using residential schools as military recruitment and training centres;
- using charities set up for providing facilities for young people for organization and recruitment;
- using charities as a base to spread propaganda; or
- using charities for money laundering purposes.<sup>177</sup>

In its policy on charities and terrorism, the Commission articulates three principles, which it says were in place prior to September 11. First, an organization that had as one of its objects the implicit or explicit support of terrorism would not be registered by the Commission. Second, it is not the proper use of charitable assets to support terrorist activity. Finally, real or alleged links between a charity and terrorism corrode public confidence in the integrity of charity.<sup>178</sup> In accordance with this position, the Commission cautions charities and their trustees that any allegation of links to terrorism will be investigated as an “immediate priority,” and that the Commission will “liaise closely” with relevant intelligence, security and law enforcement agencies to facilitate a thorough investigation. As such, should allegations or suspicions arise as a result of the Commission’s work, relevant law enforcement authorities will be informed, which could lead to serious criminal charges for directors of an organization.

Of additional concern for charities, is the dictum from the Commission that trustees should be “vigilant to ensure that a charity’s premises, assets, volunteers or other goods cannot be used for activities that may, *or appear to*, support or condone terrorist activities.”<sup>179</sup> In this respect, charities should be aware that the Commission does not refer solely to the list of proscribed organizations under TACT. Instead, the Commission suggests there is a “broader context” to terrorism, and there “may be organizations which are not listed in [TACT], or by the Home Secretary, but which nonetheless, we might regard as terrorist organizations.”<sup>180</sup> As such, the Commission will refer to the list of persons and organizations named by the United Nations, the European Union and U.K.

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<sup>177</sup> Charity Commission, *supra* note 175.

<sup>178</sup> Charity Commission, *supra* note 173.

<sup>179</sup> *Ibid.* [emphasis added].

<sup>180</sup> Charity Commission, *supra* note 175.

Orders and Statutory Instruments to having possible links to terrorist organizations, or to be involved in terrorist organizations, which is found on the Bank of England website. Thus, the requirements for additional vigilance on the part of charities and their directors is a necessity in order to ensure they are not associated with organizations or persons who are identified by the U.K. government, the United Nations and the European Union, else the organization may lose their charitable status, and the directors may face severe criminal sanctions.<sup>181</sup>

A number of cases have demonstrated the Commission's resolve to take affirmative and aggressive action against a charity before all concrete facts are necessarily assembled or allegations are properly substantiated. For example:

- In a statement announcing the takeover of the Tamils Rehabilitation Organization as a result of an investigation into allegations of terrorist links in May 2002, David Rich, the Commission's Head of Investigations spoke of the necessity of taking a "tough line" approach. Although the inquiry failed to produce evidence of links between the charity and terrorist activity, the Commission appointed a receiver and manager to take over administration and management of the charity because of a lack of adequate financial controls and transparency uncovered during the investigation.<sup>182</sup>
- In the case of the International Development Foundation, the charity was shut down for seven months for suspicion of links with terrorism because it had been mentioned in a report to the French Parliament for alleged links to terrorist activities and Osama bin Laden. According to a Commission press release, the Commission "used a range of powers to obtain full financial records and documentation for the charity and to freeze the charity's bank accounts" during the investigation from January to July of 2002. At the end of the investigation, the Commission cleared the charity of "links to terrorism,"

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<sup>181</sup> Canada is also in the lead in respect of director's liability for the conduct of the corporation. The U.K.'s Act purports to attach liability for offences committed by corporate organizations to the corporate directors whether the offences are committed by their consent or through negligence. Amendments to Canada's *Criminal Code* in 2003 through Bill C-45 attaches criminal liability on organizations, and their directors, if the criminal conduct or act was committed by a senior officer of the corporation, or if there is an act of negligence on the part of any representative of the organization. The bill expanded the traditional class of representatives who could subject the corporation to liability to all persons who act on behalf of the organization.

<sup>182</sup> "Charity Commission takes over control of Tamil charity over terror allegations" (M2 Presswire, 28 May 2002).

finding that, while there was evidence of unsatisfactory financial controls, the allegations and suspicions about links to terrorism were unsubstantiated.<sup>183</sup>

- In another case, the Society of the Revival of Islamic Heritage had its assets frozen as a “temporary and protective measure” in January of 2002, because the U.S. Treasury Department placed a charity of a similar name on its list of designated terrorist organizations.<sup>184</sup> After a seven-month investigation during which the charity was essentially non-operational, the Commission determined that there was no evidence linking the charity with the charity or individuals named by the Treasury Department.<sup>185</sup>

The consequences of an allegation against a charity of being involved in terrorist activity are extremely serious. Nevertheless, allegations can stem from a variety of internal and external sources and circumstances over which a charity and its directors may have little or no control. This policy statement signals a new paradigm of responsibility for charities in England and Wales, one that reverses the fundamental burden of proof and imposes a near impossible standard of not only compliance in fact, but compliance in perception.

### 3. Australia

Before the September 11 attacks on the U.S., there were no federal, state or territorial laws on terrorism in Australia.<sup>186</sup> To complicate matters, the Australian Constitution does not provide the Australian Government with the explicit power to make laws with respect to terrorism. As such, the states had to refer their legislative powers to the federal Parliament in order to support counterterrorism measures at the national level. Part of the reference of power agreement, the Australian Government is required to consult with the states and territories on amendments to the terrorism offences.<sup>187</sup> Since 2002, the Australian government has introduced a number of terrorism laws, making it an offence to commit a terrorist act, be a member of a terrorist organization, provide or receive training connected with terrorist acts, associate with a terrorist organizations, support or plan a terrorist act, and receive

<sup>183</sup> “Development charity cleared of terrorist links” (M2 Presswire, 23 July 2002).

<sup>184</sup> “US terrorism allegations prompt inquiry” (M2 Presswire, 10 January 2002).

<sup>185</sup> “Trustees have no link with terrorism” (M2 Presswire, 5 November 2002).

<sup>186</sup> George Williams, “The dangers in anti-terror laws” (*The Age*, 30 April 2004); George Williams, “Law on terror erodes freedoms” (*Courier Mail* (Queensland), 30 April 2004, p. 17).

<sup>187</sup> Commonwealth of Australia, *Protecting Australia Against Terrorism: Australia’s National Counter-Terrorism Policy and Arrangements* (Canberra: Department of the Prime Minister and Cabinet, 2004) at 18.

funds from or make funds available to a terrorist organization. All offences attract substantial penalties, some of them up to life imprisonment. Like other nations, it is necessary to consult a number of legislative initiatives in order to determine the scope of the Australian anti-terrorism initiative. In fact, the Australian National Security website lists at least twenty-nine separate acts that are part of the “legislative regime around counter-terrorism, national security and other cross-jurisdictional offences.”<sup>188</sup>

a) Criminal Code Act 1995

The *Criminal Code Act 1995* (the “Criminal Code”), as amended by the *Security Legislation Amendment (Terrorism) Act 2002*, defines a terrorist act as an action or threat of action that causes serious physical harm or death to a person, or endangers a person’s life or involves serious risk to public health or safety, serious damage to property or serious interference with essential electronic systems, and the action is done or the threat is made with the intention of advancing a political, religious or ideological cause and to coerce or influence by intimidation an Australian or foreign government or intimidate the public or a section of the public.<sup>189</sup> Acts of terrorism are subject to a penalty of life imprisonment,<sup>190</sup> while providing or receiving training in relation to a terrorist act is subject to a penalty of twenty-five years imprisonment.<sup>191</sup> Similarly lengthy penalties are given to individuals who possess “things” connected with preparation for, the engagement of a person in, or assistance in a terrorist act. Doing so knowingly will subject the individual to a fifteen-year term of imprisonment, while if the individual is reckless as to the existence of the connection, they will receive a ten-year term of imprisonment.<sup>192</sup>

b) Australian Security Intelligence Organization Act 1979

The *Australian Security Intelligence Organization Act 1979*<sup>193</sup> gives the Australian Security Intelligence Organization (“ASIO”) the power to seek a warrant to question, and in limited circumstances detain, an individual who may have information relating to a terrorism offence. Individuals may be questioned by ASIO for up to a total of twenty-four hours (forty-eight hours if

<sup>188</sup> See <http://www.nationalsecurity.gov.au>.

<sup>189</sup> *Criminal Code Act 1995*, Sched., s. 100.1.

<sup>190</sup> *Ibid.* at s. 101.2(1).

<sup>191</sup> *Ibid.* at s. 101.2(2).

<sup>192</sup> *Ibid.* at s. 101.4.

<sup>193</sup> *Australian Security Intelligence Act 1979*.

an interpreter is used)<sup>194</sup> and, if permitted by the warrant, the individual may be detained for up to seven days or 168 hours.<sup>195</sup> Individuals being questioned by ASIO are afforded certain procedural rights, including the right to have a lawyer present, and the right to make a complaint to the Inspector General of Intelligence and Security in order to seek a remedy in a federal court at any time. However, section 34TA provides that the prescribed authority may limit contact with the individual's lawyer of choice should the prescribed authority be satisfied that contact with the lawyer may alert a person involved in terrorism that the offence is being investigated or if records may be destroyed. This does not prevent the individual from contacting a different lawyer.

c) Anti-terrorism Act 2004

The *Anti-terrorism Act 2004* was introduced in order to strengthen Australia's counter-terrorism laws in a number of respects, reflecting an urgency created by the terrorist train bombings in Madrid, Spain, in March 2004. One focus of the Act was to ensure a national approach to the treatment of terrorism offences, resolving differences in the separate bail regimes of the states and territories in the Australian Commonwealth, as well as differences in treatment between those suspected of murder and those suspected of terrorist offences. As such, the Act provides that terror suspects can only get bail under "exceptional circumstances." Amendments were also made to the *Crimes Act 1914* in order to permit the fixed investigation period applying to the investigation of federal terrorism offences to be extended to twenty-four hours, up from the previous four hours. Perhaps more controversial, the amendment enabled law enforcement authorities to "stop the clock" when making overseas inquiries, which would count as "dead time." The increase in pre-charge detention time was said to address the "uncertainty" created by an Australian High Court decision in which it was held that law enforcement agencies lacked the power to detain and question suspects, or to continue other investigations into a suspect's alleged involvement in criminal activity, prior to bringing an arrested person before a magistrate.<sup>196</sup> As controversial as this aspect of the bill proved to be, some commentators have pointed out that even with this amendment; Australia is far behind other nations in terms of holding suspects without charge.<sup>197</sup>

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<sup>194</sup> *Ibid.* at s. 34HB.

<sup>195</sup> *Ibid.* at s. 34HC.

<sup>196</sup> See *Williams v. R.*, [1987] H.C.A. 36,

<sup>197</sup> *Williams*, *supra* note 186.

In another measure to ensure terrorism offences are “treated with the utmost seriousness,”<sup>198</sup> the Act provides that convicted terrorists would be required to serve three quarters of their sentences before being granted parole; a life sentence would require that the convicted person serve thirty years before parole. The extension of the non-parole period was in part a response to the outrage following a number of cases in which convicted persons would be released on parole in a short period of time, including the sentencing of a Perth terrorist, Jack Roche, who could “walk free” after three years after confessing to a plot to bomb the Israeli embassy in Canberra, and the release of terrorist suspect Bilal Khazal because the law in New South Wales contained a presumption in favour of bail in criminal cases.<sup>199</sup>

Two other anti-terrorism bills were introduced in 2004, which bring in strict new measures that have been criticized as an unacceptable infringement on rights. The *Anti-Terrorism Act (No. 2) 2004* makes it an offence to intentionally associate with a person who is a member of a listed terrorist organization. Various exceptions are provided, i.e. associating with close family members. The *Anti-Terrorism Act (No. 3) 2004* amends various acts in order to improve Australia’s counter-terrorism legal framework. Amongst the changes are amendments to the *Passports Act 1938* to ensure those suspected of terrorist activities are not able to obtain travel documents.

d) Anti-Terrorism Act 2005

The *Anti-Terrorism Act 2005* received Royal Assent on November 3, 2005. The Act requires that if a report is made in relation to the review and provided to the Attorney General, the report must be laid before each House of Parliament. The *Anti-Terrorism Act 2005* makes five interpretative amendments to the *Criminal Code Act 1995*, clarifying that, in the prosecution of a terrorism offence, it is not necessary to identify a particular terrorist act. Instead it will be enough for the prosecution to prove that the particular conduct was related to “a” terrorist act.

e) Anti-Terrorism Act (No. 2) 2005

The *Anti-Terrorism Act (No. 2) 2005* (“ATA2”) is the larger of the two anti-terrorism measures passed by the Australian government in 2005, and sparked an intense debate over community safety and the defence of long-standing rights. ATA2, which received Royal Assent on December 14,

<sup>198</sup> Philip Ruddock MP, “Media Release” 094/1994 (16 June 2004).

<sup>199</sup> Kate Gauntlett, “Anti-terror bail heat from Labor” (*The West Australian (Perth)*, 17 June 2004, p. 10); “Australian government plans to toughen anti-terrorism laws” (*Xinhua General News Service*, 16 June 2004).

2005, covers a number of issues including: control orders, preventative detention, use of lethal force by law enforcement authorities, “advocating” and financing terrorism, and supporting insurgency abroad.

ATA2 amended a number of existing laws, introducing new tools to combat the threat of terrorism. One such amendment was to Australia’s sedition laws, modernizing them in order to address individuals in the Australian community who directly urge others to use force or violence, including terrorist acts.

Federal police powers were also enhanced by ATA2, conferring the power on the Australian Federal Police to stop, question and search in all places occupied by the Australian Federal Government and prescribed security zones within those places. The Act also strengthens the regime relating to ASIO powers, including enhancing various aspects of ASIO’s special powers warrant regime, enhancing its ability to access aircraft and vessel information, and developing an offence for providing false or misleading information under an ASIO questioning warrant.

Much of the debate about the new law was focused on the new regimes for control orders and preventative detention. In an opinion requested by the Chief Minister and Attorney-General, three law professors from the Australian National University indicated that the preventative detention and control order provisions did not meet the guarantees given by the Prime Minister in relation to safeguards, and they would likely breach a number of Australia’s obligations under the *International Covenant on Civil and Political Rights*.<sup>200</sup>

ATA2 creates a new regime for control orders, enabling law enforcement authorities to apply to an issuing court for a control order where there are reasonable grounds that a control order would assist in preventing a terrorist act or that a person has trained with a listed terrorist organisation. The concept is said to have been derived from similar powers in the U.K. The types of controls that can be imposed under a control order include a prohibition or restriction on the person leaving Australia, associating with a specified person, or carrying out a specified activity. The laws provide

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<sup>200</sup> Opinion Letter to Mr. Jon Stanhope, Chief Minister and Attorney-General, from Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, dated 18 October 2005, re: Human rights implications of the *Anti-Terrorism Bill 2005*.

for both an initial “interim” control order that has limited duration, and a “confirmed” control order, which can last for up to 12 months.

The Act also provides for preventative detention orders that allow law enforcement authorities to take a person into custody and detain them for a short period to prevent a terrorist attack occurring, or preserve evidence of a recent terrorist attack. Where a preventative detention order is sought to prevent a terrorist act, the law enforcement authority must establish that detaining the person is reasonably necessary in order to substantially assist in preventing a terrorist act. The maximum period of detention under the preventative detention regime is 48 hours. Both the order and the treatment of the person detained are subject to judicial review, as well as merits review.

f) State and Territory Governments

The State and Territory governments in Australia also maintain their own counter-terrorism and related policies, legislation and plans within their own jurisdictions, as they have primary responsibility to respond to terrorist incidents within their own jurisdiction.<sup>201</sup> The National Counter-Terrorism Plan, which outlines the responsibilities, authorities and mechanisms to prevent and manage acts of terrorism and their consequences in Australia, relies on strong co-operative, coordinated and consultative relationships between the Australian Government and the various state and territorial governments. In the event of the declaration of a National Terrorist Situation, overall responsibility for policy and broad strategy transfers to the Australian Government, which will consult with the affected state or territory.

4. FATF

The Financial Action Task Force on Money Laundering (“FATF”) is an inter-governmental body established by the G7 group in 1989 with the purpose to develop policies to combat the laundering of drug money. This original mandate has been refocused to join the war on terrorism. FATF now breaks its work into three principal areas: (1) setting standards for national anti-money laundering and counter terrorist financing programmes; (2) evaluating the degree to which countries have implemented

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<sup>201</sup> Commonwealth of Australia, *National Counter-Terrorism Plan*, 2<sup>nd</sup> ed. (September 2005) at 2:2, online: <http://www.nationalsecurity.gov.au>.

measures that meet those standards; and (3) identifying and studying money laundering and terrorist financing methods and trends.<sup>202</sup> To qualify for membership in FATF, a country must:

- be strategically important;
- be a full and active member of a relevant FATF-style Regional Body;
- provide a letter from an appropriate Minister making a political commitment to implement the FATF Recommendations within a reasonable time frame and to undergo the mutual evaluation process; and
- effectively criminalize money laundering and terrorist financing; make it mandatory for financial institutions to identify their customers, to keep customer records and to report suspicious transactions; and establish an effective financial investigation unit, so that the country will be assessed fully or largely compliant with Recommendations 1, 5, 10 and 13, and Special Recommendations II and IV.<sup>203</sup>

There are currently 33 members of FATF, including Canada, the United States, the United Kingdom and Australia.

Two documents form the primary policy issued by FATF: *The Forty Recommendations*<sup>204</sup> and the *Nine Special Recommendations on Terrorist Financing*.<sup>205</sup> Together, these two policies set the international standard for combating the financing of terrorism, of which money laundering is considered a key factor. In the words of FATF, the policies “provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing.”<sup>206</sup> The 40 Recommendations focuses on four areas deemed vital to combating money laundering and international terrorist activities. First, recommendations one to three deal with domestic legal systems and the need for countries to criminalize money laundering with respect to the widest range of predicate offences, thereby implementing two U.N. conventions: the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (the “Vienna Convention”) and the *United Nations Convention against Transnational Organized Crime, 2000* (the “Palermo Convention”). These money

<sup>202</sup> FATF website, [www.fatf-gafi.org](http://www.fatf-gafi.org).

<sup>203</sup> *Ibid.*

<sup>204</sup> FATF, *The Forty Recommendations* (France: FATF, 2003) [40 Recommendations].

<sup>205</sup> FATF, *Nine Special Recommendations on Terrorist Financing* (France: FATF, 2004) [Special Recommendations].

<sup>206</sup> 40 Recommendations, *supra* note 204 at 1.

laundering laws should enable authorities to confiscate the proceeds of money laundering. Recommendations four through twenty-five detail the measures to be taken by financial institutions and non-financial businesses and professions, like the legal profession, in order to prevent money laundering and terrorist financing. This would require member countries to ensure that financial institution secrecy laws do not inhibit implementation of the FATF recommendations, and that financial institutions implement customer due diligence and record keeping, ensuring that anonymous accounts and accounts in fictitious names are not kept. These recommendations also require financial institutions, non-financial businesses and professions to report suspicious transactions. Recommendations twenty-six through thirty-four discuss the need for countries to establish a financial intelligence unit to serve as a national centre for receiving, requesting, analyzing and disseminating suspicious transaction reports and other information regarding potential money laundering or terrorist financing. Finally, recommendations thirty-five to forty deal with international co-operation, including mutual legal assistance and extradition.

The first eight Special Recommendations were issued in October 2001, following the September 11 attacks. The ninth Special Recommendation was issued three years later, in October 2004. They broadly extend the application of the 40 Recommendations to terrorist financing, for example requiring ratification and implementation of the *United Nations International Convention for the Suppression of the Financing of Terrorism*, the criminalization of the financing of terrorism and associated money laundering, the freezing and confiscation of terrorist assets and the reporting of suspicious transactions related to terrorism.<sup>207</sup> Special Recommendation VIII focuses on non-profit organizations:

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

- (i) by terrorist organizations 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 organizations.<sup>208</sup>

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<sup>207</sup> Special Recommendations, *supra* note 205, Special Recommendations 1-4.

<sup>208</sup> *Ibid.* at Special Recommendation VIII.

The *Interpretative Note to Special Recommendation VIII* indicates that despite the important role non-profit organizations play in the world economy and social systems, “the ongoing international campaign against terrorist financing has unfortunately demonstrated however that terrorists and terrorist organizations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment and otherwise support terrorist organizations and operations.”<sup>209</sup> The objective of the special recommendation is to ensure that NPOs are not misused by terrorist organizations in order to pose as legitimate entities; exploit legitimate entities as conduits for terrorist financing; or to conceal or obscure the clandestine diversion of funds intended for legitimate purposes.<sup>210</sup> In order to comply with Special Recommendation VIII, countries must have the capacity to obtain “timely information on [the NPO sector’s] activities, size and other relevant features.”<sup>211</sup> It is suggested that an effective approach to identifying, preventing and combating terrorist misuse of NPOs is to have an approach that includes the following elements: (a) outreach to the sector; (b) supervision and monitoring; (c) effective investigation and information gathering; and (d) effective mechanisms for international co-operation.<sup>212</sup> This interpretative note appears to mirror the controversial U.S. Treasury Department’s Anti-terrorist Financing Guidelines: Voluntary Best Practices. Now that the Guidelines have been incorporated into these Special recommendations, there is now an obligation by member countries, such as Canada, to implement them. This is highly ironic considering these unprecedented and unachievable standards have been defended as being only “best practices” or “voluntary,” but will now have the force of law.

Although the FATF has no legislative authority, it is proving to have increasing influence over policy dealing with counterterrorism measures in member nations. As one commentator has observed, “cumulatively, the international arena has created significant pressure for all states to modify frequently introspective and protectionist domestic laws and financial regimes to accommodate [anti-money laundering and countering of the financing of terrorism] obligations.”<sup>213</sup> On a purely policy level, the ability of a non-elected body to have such control over domestic policy is disturbing, especially when it is not plainly evident who may be pulling the strings of the policymakers at FATF. While FATF makes it clear that member countries are free to develop their own methods for complying with the 40

<sup>209</sup> FATF, *Interpretative Note to Special Recommendation VIII: Non-Profit Organizations* (Paris: FATF, 2006).

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid.*

<sup>213</sup> Daniel P. Murphy, “Canada’s AML/CFT Response and the Financial Action Task Force” (Paper presented to the Second Annual Symposium on Money Laundering, Toronto, Osgoode Hall Law School Professional Development Program, 11 February 2006) at 4.

Recommendations and the Special Recommendations, the reality is that there are limited means in order to comply and avoid sanctions.

FATF's treatment of Austria with respect to its anonymous passbook and security deposit schilling accounts is one such example of the group's ability to place financial and political pressure on nations in order to comply with FATF's policies. Austria had a long history of such accounts, the result being that in a country of eight million people there were twenty-five million anonymous accounts, a situation that made the country's financial system ripe for illegal transactions according to FATF.<sup>214</sup> When Austria joined FATF, it committed itself to implementing the Recommendations, including those noted above regarding customer due diligence. Due to Austria's failure to resolve these issues, FATF threatened resort to Recommendation 21 of the 40 Recommendations, which provides as follows:

Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions, from countries which do not or insufficiently apply the FATF Recommendations. Whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should, as far as possible, be examined, the findings established in writing, and be available to help competent authorities. Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.<sup>215</sup>

FATF called on its member governments to persuade the Government of Austria to put an end to anonymous passbook savings accounts by requiring the holders of all such accounts, and persons making large transactions through them, to be identified. FATF also called upon financial institutions to give "special attention" to transactions with bank cheques issued by Austrian banks and denominated in Austrian schillings.<sup>216</sup> By February 2000, FATF indicated Austria would be suspended as a FATF member unless the government committed to eliminating their anonymous passbook system. As one observer noted, "the significant threat of Recommendation 21 and the potential impact it would have on the Austrian economy resulted in a reversal of long standing government policy and a change in Austria's law vis-à-vis anonymous 'passbook' savings accounts."<sup>217</sup> Austria's new banking laws require that new passbook accounts identify the owner, and after June 30, 2002, no deposits or withdrawals can be made from any accounts without identifying the owner. Following this move, the Deputy U.S.

<sup>214</sup> Organization for Economic Cooperation and Development, News Release, 11 February 1999 [OECD].

<sup>215</sup> 40 Recommendations, *supra* note 204, Recommendation 21.

<sup>216</sup> OECD, *supra* note 214.

<sup>217</sup> Murphy, *supra* note 213 at 12-13.

Treasury Secretary stated, “this victory represents a clear demonstration of FATF resolve and credibility.”<sup>218</sup>

FATF has brought its power to bear upon other countries. The tiny principality of Liechtenstein was the only European country among fifteen jurisdictions listed as “non-cooperative” in a report on money laundering released by FATF in 2000. As *TIME Europe* described it, “the world’s richest nations placed the principality on a blacklist of countries.”<sup>219</sup> As banking and related services accounted for 40 percent of Liechtenstein’s economy, the prospect of financial sanctions being imposed by FATF members sent the country’s parliament “scrambling” to introduce appropriate legislation.<sup>220</sup>

Through FATF’s Non-cooperative Countries and Territories (“NCCT”) Initiative, FATF seeks to “reduce the vulnerability of the financial system to money laundering by ensuring that all financial centres adopt and implement measures for the prevention, detection and punishment of money laundering according to internationally recognized standards.”<sup>221</sup> Following a review process, countries that are listed on the NCCT list are subjected to the terms of Recommendation 21. If the NCCT is considered not to have made adequate progress, additional counter-measures will be applied in a “gradual, proportionate and flexible” manner.<sup>222</sup> In addition to enhanced surveillance and reporting of financial transactions involving the NCCT, the NCCT may be subject to the following measures:

- stringent requirements for identifying clients and enhancement of advisories to financial institutions for identification of the beneficial owners before business relationships are established with individuals or companies from these countries;
- enhanced relevant reporting mechanisms or systematic reporting of financial transactions on the basis that financial transactions with such countries are more likely to be suspicious;
- in considering requests for approving the establishment in FATF member countries of subsidiaries or branches or representative offices of banks, taking into account the fact that the relevant bank is from an NCCT; and/or

<sup>218</sup> Charles P. Wallace Vaduz, “Funds in the Sun: Tax havens are coming under increasing pressure to clean up money laundering” (Vol. 156, No. 2 *TIME Europe* 10 July 2000).

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> FATF, *supra* note 202.

<sup>222</sup> *Ibid.*

- warning non-financial sector businesses that transactions with entities within the NCCTs might run the risk of money laundering.<sup>223</sup>

It is only when the appropriate review group is satisfied that the NCCT has taken sufficient steps to ensure continued, effective implementation of the reforms that the review group should recommend to the FATF Plenary for the removal of the country from the NCCT list. FATF statistics indicate that a total of 47 countries or territories have been examined in two rounds of reviews. Of those countries reviewed, a total of 23 were listed as NCCTs. In 2000, the Bahamas, Cayman Islands, Cook Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, St. Kitts and Nevis, and St Vincent and the Grenadines were all listed as NCCTs.<sup>224</sup> In 2001, the list of NCCTs contained the Cook Islands, Dominica, Egypt, Guatemala, Hungary, Indonesia, Israel, Lebanon, Marshall Islands, Myanmar, Nauru, Nigeria, Niue, Philippines, Russia, St. Kitts and Nevis, and St. Vincent and the Grenadines.<sup>225</sup> In subsequent years, the countries of Grenada, Indonesia, Ukraine were added, but as of the 2005 review, only three countries remained on the NCCT list: Myanmar, Nauru and Nigeria.<sup>226</sup> Nauru was finally delisted at the October 2005 FATF Plenary after the country abolished its 400 shell banks.<sup>227</sup>

<sup>223</sup> *Ibid.*

<sup>224</sup> FATF, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (Paris: FATF, 2000) at 12

<sup>225</sup> FATF, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (Paris: FATF, 2001) at 18.

<sup>226</sup> FATF, *Annual and Overall Review of Non-Cooperative Countries or Territories* (Paris: FATF, 2005) at 17.

<sup>227</sup> FATF, News Release, 13 October 2005.

### PART III

#### G. DUE DILIGENCE RESPONSE

##### 1. The Need for Due Diligence

Although due diligence is not a defence for violations of the anti-terrorism laws in Canada and abroad, or against revocation of charitable or tax exempt status under tax laws, effective due diligence is, at the very least, necessary in order to show a desire to comply. Apart from compliance with anti-terrorism laws, maintaining due diligence is also mandatory in accordance with the common law fiduciary duties of directors to protect charitable property. While due diligence is not a defence against anti-terrorism charges, the anti-terrorism laws do not abrogate directors' fiduciary duties to the charity and its donors. As such, it can provide powerful protection for directors against complaints at common law. If a charity's assets are frozen or seized, the charity's directors and officers could be exposed to civil liability for breaching their fiduciary duty to protect the organizations' charitable assets. If they are found to have been negligent, this could be a very significant liability quite apart from any possible criminal sanctions. Directors and officers may be able to protect themselves against a finding of negligence by demonstrating their intent to comply through exercising due diligence.

On a more practical level, however, the greatest benefit from exercising due diligence may be in its preventative 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. Global Standards Required for Charities that Operate Internationally

Due diligence procedures for charities that operate internationally are not only important as a response to Canada's anti-terrorism initiatives, but are the only prudent course of action in the face of emerging global standards concerning NGOs and charities. CRA's publication "Charities in the International Context"<sup>228</sup> stresses the importance of taking into account "Best Practice" guidelines that are promulgated by relevant international policy making institutions, such as the FATF, and by key jurisdictions, such as the United Kingdom and United States.<sup>229</sup> These "Best Practice" guidelines are reflective of an emerging global standard of due diligence procedures that are becoming accepted as the benchmark for international charitable operations.

In addition, it has become apparent that a charity need not have operations in one of the key jurisdictions spearheading the "war on terrorism" for their operations to be subject to monitoring by agencies of these key jurisdictions for compliance with their "Best Practice" standards.<sup>230</sup> This is especially true for charities that operate in areas that may be considered a "conflict zone" by a particular jurisdiction, subjecting the charity to heightened levels of surveillance and monitoring. The consideration of international "Best Practice" guidelines is also important for charities that engage in cross-border funds transfers, work with international partners, or utilize foreign financial institutions, as they may be subject to the same type of scrutiny.

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

<sup>228</sup> Canada Revenue Agency, "Charities in the International Context," online: <http://www.cra-arc.gc.ca/tax/charities/international-e.html> last accessed: 23 August 2005.

<sup>229</sup> For a further discussion of these issues please reference *Anti-terrorism and Charity Law Alert No. 5*, available at <http://www.carters.ca/pub/alert/atcla/atcla05.pdf>.

<sup>230</sup> Department of the Treasury of the United States, "2003 Money Laundering Strategy" online: <http://www.treas.gov/offices/enforcement/publications/ml2003.pdf> [last accessed: 24 August 2005].

diligence guidelines and demonstrating compliance with them by implementing due diligence procedures in the operations of a charity can help minimize such risks associated with operating internationally.

### 3. Recognizing the Risk Factors

In response to an Internal Revenue Service request for comments on how it might clarify the existing requirements, some members of the American Bar Association (“ABA”) Section of Taxation developed a “Continuum of Risk Factors” for grant-making and tax exempt organizations dealing in international activities. Identifying how activities change from “Less Risk” to “Some Risk” to “More Risk,” the chart lists the following factors for organizations to consider when pursuing international activities:

- the organization’s existing relationship with the foreign entity;
- the foreign entity’s ability to provide references from trusted sources;
- the foreign entity’s history of legitimate charitable accomplishments;
- the foreign entity has strong leadership and control mechanisms, including an on-site professional staff and record-keeping systems;
- the organization and the foreign entity create appropriate records on the identities of recipients and timely account for the use of funds;
- the parties have a written grant agreement which states how payments are to be used;
- the grant agreement prohibits fund use for non-charitable purposes, including the promotion of violence or terrorist activities;
- the organization disburses funds in smaller increments as needed for specific projects or expenditures;
- more formal financial systems and registered channels for transferring funds are available and used by the foreign entity, thereby subjecting it to the safeguards of banking regulatory systems consistent with international standards;
- the foreign entity is located in a country that is not now, and has not recently been, identified by the government or other relevant agencies as supporting or housing known terrorist organizations and activities, or maintaining links to terrorist financing;

- the organization determines that the foreign entity does not appear on any government agency list of known or suspected terrorists or terrorist organizations;
- payments are not disbursed to individuals; and
- payments are remitted by wire transfer to a known account in a reputable financial institution.<sup>231</sup>

While this is certainly not an exhaustive list of risk factors, it is a helpful starting point. Risk factors will depend on the domestic organization, the foreign entity, the common activities and the governing law.

#### 4. 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 domestic legislation and international best practice guidelines, 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.

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<sup>231</sup> "Comments in Response to Internal Revenue Service Announcement 2003-29, 2003-20 I.R.B. 928 Regarding International Grant-Making and International Activities by Domestic 501(c)(3) Organizations" in Victoria B. Bjorklund, "Terrorism and Money Laundering: Illegal Purposes and Activities" (Paper presented at the Diversions of Charitable Assets: Crimes and Punishment Conference, New York University School of Law, National Center on Philanthropy and the Law, October 2004) at Exhibit E.

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 Canadian Security Intelligence Service (“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 may 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 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 and Ongoing Assessments of Projects

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 anti-terrorism and related 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 Concerning 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.

5. 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. Third party agents may include foreign financial institutions and recipient or subcontracting organizations.

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.

d) Due Diligence Concerning Publications, Websites, and Public Statements

Charities should exercise vigilance in monitoring the content of their public communications. A charity must assume that the contents of publications, websites and the substance of all public statements are being, or may be in the future, reviewed by governmental agencies in the course of preliminary anti-terrorism investigations. This type of in-house due diligence should also be carried out with respect to third parties with whom the charity is associated. Public communications that may be perceived in any way as constituting the support or tolerance of an entity associated in any way with terrorism could result in serious, detrimental consequences for a charity, even if the communications are only loosely associated with the charity.

6. 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.

As the above suggests, a boilerplate anti-terrorism policy will likely be ineffective. The following provides a skeleton view of the contents of an anti-terrorism policy:

- Preamble: the preamble will generally set out, in brief terms, the nature of the organization, its statement of faith or the objects of the organization, as well as a statement with respect to the incompatibility of the organization's beliefs and/or goals and any acts of terrorism;
- Definitions: although this is self-explanatory, it is important to ensure that certain terms are clearly spelled out, including the definition of terrorism, terrorist group, as well as detailing the persons to whom this policy will apply. With respect to the definition of "terrorism" and "terrorist group," it is best to adhere to statutory definitions in force in the organization's jurisdiction;
- General Policy Guidelines and Principles: under this heading, the organization should set out its commitment to complying with anti-terrorism laws, both domestically and in the foreign countries in which they plan to operate, ensuring compliance with any investigations by law enforcement authorities. The organization will also want to indicate that the organization will promptly review any concerns or allegations of non-compliance with legal counsel and review such advice with the board;

- **Reporting:** this section of the policy will detail the reporting requirements should anyone become aware of any concerns or allegation of non-compliance. The organization will likely want to set out when law enforcement or tax authorities should be consulted and who is responsible for such actions;
- **Program Review:** as was discussed above, program reviews are an essential component of demonstrating due diligence. This section of the policy should set out when such program reviews will be conducted. It is advisable to ensure that programs are reviewed on a regular basis, not just on start-up;
- **Donor Review:** donors, as much as recipients, can compromise the integrity of the organization. As such, the anti-terrorism policy should establish the threshold for investigating the donor, and the information required from donors before the charity is satisfied;
- **Review of Participants:** the policy should set out which participants are to be subject to review, and what information will be required;
- **Review of Associates:** as with the participant review, the policy should set out which associates are to be subject to review, and what information will be required;
- **Financial Governance:** as detailed above, both the domestic legislation and FATF Guidelines have set out strict requirements in relation to financial governance. This section of the policy should confirm compliance with those measures, and set out the due diligence requirements the organization has in place in order to ensure the charity's funds do not fall into the wrong hands;
- **Review and Amendment of Anti-Terrorism Policy:** as is the case with most policies, the organization should commit to reviewing the anti-terrorism policy on a regular basis, and making appropriate amendments to the policy as is required by changing national and international requirements;
- **Schedules:** the Schedules should contain the checklists for the various reviews discussed above, i.e. Program Review Checklist, Donor Review Checklist, etc., as well as a Waiver and Release that will enable the charity to terminate the relationship with a participant, member or client if the individual or entity is compromised by any connection to terrorist activity or groups. This is

also an appropriate place to reproduce the lists of Listed Entities from both the Solicitor General and the United Nations, or other sources, as well as information on how to obtain updated lists in this respect.

b) Evidencing Due Diligence with CRA

Canadian-based charities 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 the charity 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.

## CONCLUSION

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

These countries have each responded to the perceived threat of international terrorism by enhancing police powers, increasing scrutiny of charitable organizations, and dismissing the very fundamental values that they purport to be defending. And despite comprehensive and restrictive laws in place, the pervasive suggestion is that the nations need to do more.

Canada’s response to the threat of international terrorism is reflected in the broad powers contained in a series of legislative measures, including the Anti-terrorism Act’s amendments to Canada’s anti-money laundering laws and the creation of the *Charities Registration (Security Information) Act*. 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, with a “one size fits all” approach to due diligence that is likely to negatively impact the ability of organizations to effectively carry out their objects. And yet, failure to comply with any aspect of the new anti-terrorism legislation could result in the loss of charitable status or the possible issuance of a security certificate, a process devoid of normal legal safeguards and avenues to provide an informed defence. The system, whether by implementation or design, is apt to produce inequitable results, making charities with political, religious or ideological purposes inherently suspect and subject to more scrutiny than other charities. This has generally been the experience of many Muslim charities around the world, which is particularly unfortunate in a time when so many parts of the Muslim world have been hit hard with natural- and man-made disasters, such as the tsunami in Southeast Asia and the war in Iraq and Afghanistan. Critical aid to these areas of the world are being delayed as aid agencies become bogged down in attempts at compliance

with counterterrorism measures, or worse, become the subject of investigations by law enforcement authorities for alleged ties to terrorist organizations or activity.

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

As time passes, however, it is becoming clearer that compliance with domestic counterterrorism measures is not enough. Organizations now have to become mired in the various compliance regimes in order to give and receive donations and services. It is simply no longer an option to only be familiar with the laws of other nations; it is now a necessity to know the what, where and when of both Canadian and international anti-terrorism legislation in order for a charitable organization to operate effectively outside of Canada. And despite the drastic measures that many countries have taken in the months and years following the terrorist attacks on the U.S., many governments remain intent upon obtaining greater powers, always at the expense of the fundamental freedoms which the countries are apparently defending, leading one to reluctantly conclude that what we have seen to date is only a precursor to a harsher and even more impractical international regulatory environment for the charitable sector in the future.