

# ICJ EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS

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### Canadian Charities: The Forgotten Victims Of Canada's Anti-Terrorism Legislation\*

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#### A. INTRODUCTION

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

The co-ordinated attack on terrorist financing and activities has revealed that in many cases, charitable activities that were previously thought to be commonplace and uneventful may now lead to a charity becoming susceptible to criminal charges for having facilitated “terrorist activities” or for supporting “terrorist groups.” This, in turn, may result in a charity losing its charitable status and its directors being exposed to personal liability. In addition, financial transactions involving charities may lead to allegations of terrorist financing or to the surveillance and monitoring of a charity’s financial activities. It has become increasingly evident that charities, both in Canada and worldwide, have become one of the silent victims of the global

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\* This submission is a condensed version of a paper by the author, entitled “The What, Where and When of Canadian Anti-Terrorism Legislation for Charities in the International Context,” last revised May 11, 2006, available at [www.antiterrorism.ca](http://www.antiterrorism.ca).

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

anti-terrorism initiatives that have been carried out during the past five years. Charities face the uncertainty of whether overbroad legislation will be applied to their activities, a literally impossible task of ensuring strict compliance, and uncertainty as to whether they will be able to effectively continue their operations in the face of mounting restrictions.

In many instances, the enforcement of the law *per se* may not be the key issue. The concern may not be what the authorities *will do* in enforcing anti-terrorism legislation, but rather that they *may* enforce such legislation. As a result, part of the impact of Canada's anti-terrorism legislation may have as much to do with coping with a fear of the law as it will with coping with the law itself. This "shadow of the law" effect has already created and will continue to create a chill upon charitable activities in Canada, as charities hesitate to undertake programs that might expose them to violation of anti-terrorism legislation, and with it the possible loss of their charitable status. This effect is coupled with a fundamental tension within Canada's anti-terrorism legislative regime with respect to charities: while charities are the specific focus of a substantial portion of the anti-terrorism legislation, there has historically been little recognition by Parliament or sector regulators that the legislation poses any ongoing impediment to the operations of charities. In order for charities to move out from the "shadow of the law," existing laws and regulations require substantial change to provide a clear and attainable benchmark of operations and due diligence standards for charities.

## **B. ANTI-TERRORISM LEGISLATION IN CANADA**

Canada's anti-terrorism legislation has not been enacted in a legal vacuum. Most conceivable acts of terrorism have for some time been subject to prosecution in one way or another as criminal offences under the provisions of Canada's *Criminal Code*.<sup>2</sup> Many other statutes, such as the *Immigration and Refugee Protection Act*,<sup>3</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

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<sup>2</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>3</sup> S.C. 2001, c. 27.

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

The four 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>4</sup> Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act* (“Bill C-35” or “Foreign Missions Act”);<sup>5</sup> 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>6</sup> and, Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act* (“Bill C-25”).<sup>7</sup> While other statutes deal with issues related to terrorism, for the purposes of this submission, the above four pieces of legislation are collectively referred to as Canada’s anti-terrorism legislation.

### **C. CANADA’S ANTI-TERRORISM ACT**

The changes brought about by the Anti-terrorism Act are without precedent in Canadian legal history, and demonstrate a disturbing disregard for the principle of due process and natural justice. The amendments implemented by the Anti-terrorism Act arguably amount to the creation of a “Super *Criminal Code*” within Canada’s existing *Criminal Code*. From a practical standpoint, charities could very well become involved unwittingly in violating the *Criminal Code* by “facilitating” a “terrorist activity” without actually intending to directly or indirectly support any terrorist activity whatsoever and without knowing or even imagining the ramifications of their actions. This concern is particularly relevant in the wake of recent natural disasters, such as the devastating tsunami that hit Southeast Asia in December 2004,<sup>8</sup> and the

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<sup>4</sup> S.C. 2001, c. 41. 41[“Bill C-36” or “Anti-terrorism Act”].

<sup>5</sup> S.C. 2002, c. 12 [“Bill C-35” or “Foreign Missions Act”].

<sup>6</sup> S.C. 2004, c. 15 [“Bill C-7” or “Public Safety Act”].

<sup>7</sup> S.C. 2006, c. 12 [“Bill C-25”].

<sup>8</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.

destructive earthquake in Pakistan in October 2005,<sup>9</sup> both of which have prompted an outpouring of international humanitarian support.

A charity that is found to be in violation of the *Criminal Code* provisions applicable to terrorism could face consequences on many fronts. Not only might the charity be subject to the relevant penalties under the *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.

### *“Facilitation” and the ramifications of Khawaja*

The creation of the offence of “facilitation” in subsection 83.19(2) of the *Criminal Code* by the Anti-terrorism Act is perhaps one of the most concerning developments for charities. 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. 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. The stated purpose of subsection 83.19(2) is to capture circumstances in which the person is prepared to assist a terrorist group without knowing the specific objective,<sup>10</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.”

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

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<sup>9</sup> The 7.6 magnitude earthquake resulted in an estimated 87,351 dead: National Earthquake Information Center, U.S. Geological Survey.

<sup>10</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 was the Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada, and was appointed Justice of the Federal Court of Canada and *ex officio*, member of the Federal Court of Appeal, November 4, 2003, and appointed as a Judge of the Court Martial Appeal Court of Canada on March 23, 2004.

anti-terrorism legislation on the other is itself problematic. Resolution 1373 of the U.N. Security Council declares in paragraph 1(b) that all countries must:

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

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

In *R. v. Khawaja*, [2006] O.J. No. 4245 (Sup. C.J.),<sup>11</sup> Mr. Justice Rutherford of the Ontario Superior Court of Justice struck down a portion of a definition of “terrorist activity” in the *Criminal Code* that dealt with purpose and motive. The particularly troubling part of the decision for charities was the court’s decision to uphold the law in terms of its breadth and the *mens rea* requirement concerning the definition of “facilitation.” In this regard, there are significant risks that a charity involved in conducting aid or humanitarian programs in a conflict area could unwittingly be found to have facilitated a terrorist activity. Justice Rutherford recognized that there would be situations “in the periphery” that would inadvertently be caught by the sweeping net of the definition, such as a doctor administering emergency aid to a patient involved in a “terrorist activity” or a waitress serving food to members of a “terrorist group.” However, even though the decision recognizes that some humanitarian activities could be caught by the applicable definitions under the *Criminal Code*, the law as a whole was upheld because it purportedly would be counterbalanced by a “judicial determination.”

Yet, even if a trial judge adopted the same interpretation of the *Criminal Code* as Justice Rutherford, the detrimental effect on a charity and its operations would have already occurred

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<sup>11</sup> The Supreme Court of Canada denied leave to appeal this decision on 5 April 2007.

once charges had been laid. A charity charged with facilitation could undergo the freezing of its charitable assets, and the charges would likely jumpstart the deregistration process under the *Charities Registration (Security Information) Act*. The fact that these types of charges were being laid in Canada against a charity would likely create a domino effect throughout a charity's worldwide operations. In addition, these charges would have a disastrous effect on donor confidence and public trust.

#### **D. PROCEEDS OF CRIME (MONEY LAUNDERING) ACT**

The *Proceeds of Crime (Money Laundering) Act* was originally enacted in 1991 and overhauled in 2000. It was originally enacted to combat organized crime in furtherance of Canada's international obligations (particularly its commitments to the Financial Action Task Force on Money Laundering ("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* ("Proceeds of Crime Act").<sup>12</sup> Under the new provisions, charities may be subject to the prescribed record keeping and reporting duties outlined in the Proceeds of Crime Act and its Regulations. These duties have been referred to as a new compliance regime for financial entities, the definition of which may well include charities. However, even if charities do not fall within the definition of a reporting entity, charities could still be subject to reporting by other reporting entities, such as a bank, an accountant or a life insurance company, without the charity's knowledge.

The expansion of the federal government's power to share and collect information with respect to terrorist financing compliance issues may have an indirect but significant impact upon charities. The information collected by the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") and shared with various government and law enforcement agencies could lead to any of the consequences affecting a charity including investigation, criminal charges, listing, de-registration, as well as the freezing and seizing of assets. Whether any of these consequences materialize or not, the knowledge that the authorities are monitoring the

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<sup>12</sup> S.C. 2000, c. 17 ["Proceeds of Crime Act"]. For an in-depth discussion of the Act, see Terence D. Hall and Alison Manzer, *A Guide to Canadian Money Laundering Legislation*, (Markham: Butterworths, 2006).

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.

Bill C-25, which received Royal Assent on December 14, 2006, represents a poignant and recent example of the concerted effort to increase the monitoring and oversight of the charitable sector and has a significantly negative impact on charities that transfer funds internationally. With Bill C-25's expansion of reporting entities, virtually any means of transmitting funds (i.e. banks, money order businesses, securities dealers) used by a charity may result in reports being made to FINTRAC. The Proceeds of Crime Act refers to this information, which is retained for up to five years, as "designated information," which may potentially be disclosed to both foreign and domestic government agencies. Most pertinent to charities that transfer funds domestically and internationally is Bill C-25's expansion of designated information to include "the name, address, electronic mail address and telephone number of each partner, director or officer" of the charity and "any other similar identifying information." As such, a charity's directors and officers are now explicitly central to the anti-terrorism vetting that is being carried out by private sector financial service providers and government agencies.

In addition, under section 65(1) of the Proceeds of Crime Act, as amended by Bill C-25, FINTRAC is specifically authorized to enter into agreements with foreign governments in order that FINTRAC may send and receive designated information between foreign agencies. The reports detailing "suspicious" transactions that are sent to FINTRAC and passed on to various government agencies could have potentially disastrous consequences for a charity. These reports could be the basis for "facilitation" of terrorism charges under section 83.19 of the *Criminal Code*; potentially initiate the de-registration process under the *Charities Registration (Security Information) Act*; or even result in personal liability for the directors and officers of a charity. Even an initiation of an investigation under anti-terrorism provisions could lead to seizure or freezing of charitable property and immeasurable damage to public perception and donor confidence.

What raises the spectre of being investigated under suspicions of contravening anti-terrorism legislation is not only the expansion of the information being collected and retained by FINTRAC, but the burgeoning domestic and foreign sources to which this information is being

disclosed. For example, the grounds to disclose information to Canada Revenue Agency (“CRA”) have become very broad under the Bill C-25 amendments. Under section 55 of the *Proceeds of Crime Act*, the “designated information” would be disclosed to CRA if there were grounds to even “suspect” that the information is relevant to maintaining its charitable status. Under the Bill C-25 amendments, the expanded designated information could also be disclosed to the Canada Border Services Agency, the Canadian Security Intelligence Service (“CSIS”) and Communications Security Establishment.

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

Part 6 of the Anti-terrorism Act enacted the *Charities Registration (Security Information) Act*.<sup>13</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.

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

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<sup>13</sup> *Charities Registration (Security Information) Act* (being part VI of the *Anti-terrorism Act*, *supra* note 4).

1. House Subcommittee Report

A final report of the House of Commons Subcommittee on the Review of the Anti-terrorism Act (“House Subcommittee”), pursuant to Section 145 of the Anti-Terrorism Act recommended changes to the *Charities Registration (Security Information) Act* that mirror those proposed by the Canadian Bar Association Anti-terrorism Committee in submissions to government made in 2001 and 2005.<sup>14</sup> One of the recommended changes that addresses the concerns raised is that the *Charities Registration (Security Information) Act* be amended to establish a defence for charities that are able to demonstrate that it exercised due diligence to avoid the improper use of its resources under section 4(1)(a), (b), and (c). The House Subcommittee also recognized a charities’ due diligence best efforts “may be inadequate ... and not suffice,” particularly in situations where charities are operating in international disaster areas that necessitate rapid aid and assistance efforts.

One of the other important recommendations that the House Subcommittee had agreed was important to institute was the establishment of a clear *mens rea* requirement by adding the words “the applicant or registered charity knew or ought to have known that” be added into paragraphs (4)(1)(b) and (c) of the *Charities Registration (Security Information) Act*. The House Subcommittee noted that it believes that it is “unfair to penalize an organization when it had no reason to believe that its resources were assisting an entity engaged in terrorism.” The House Subcommittee recognized that the certificate process, as it currently exists under the *Charities Registration (Security Information) Act*, is “parallel” to the deeply controversial security certificate process under the *Immigration and Refugee Protection Act* (“IRPA”), and that the recommended changes are needed to begin to remedy the certificate process. The certificate process under the *Charities Registration (Security Information) Act* is in need of a complete overhaul to institute, among many other things, basic rights of appeal, the ability to test evidence brought against a charity, and a clear *mens rea* requirement.

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<sup>14</sup> The House Subcommittee report is a marked departure from a Senate Subcommittee report on the Anti-terrorism Act that was released earlier this year. The Senate report, though recognizing many of the same problems with the *Charities Registration Act* as the House Subcommittee, recommended very little change to the substance of the *Charities Registration Act*. The ultimate impact of the House Subcommittee’s recommendations, and whether these recommendations will translate into any legislative or regulatory changes, however, remains to be seen.

## 2. CRA Enforcement

A number of important revelations surfaced during the parliamentary review of the Anti-terrorism Act. Canada Revenue Agency (“CRA”) has given important testimony concerning the role of security certificates, the increasing frequency of investigations and audits of charities and potential applicants, as well as the circumstances around which charities are voluntarily giving up their charitable status or withdrawing their applications. Senior officials from CRA in their testimony provided a vigorous defense of C-36 and the anti-terrorism measures carried out by the agency. There were several instructive revelations, however, that emerged from their testimony before the House Subcommittee on Public Safety and National Security.<sup>15</sup> Though CRA officials stressed the “necessity of the legislation” to the Subcommittee, they testified that controversial provisions, such as the security certificate provisions under the *Charities Registration (Security Information) Act*, constituted “prudent reserve power” as opposed to the powers already available to CRA under the *Income Tax Act*. Senior CRA officials further testified that the powers bestowed upon them before C-36 were sufficient to address situations relating to possible cases of the facilitation of terrorist activities. As CRA Commissioner Michel Dorais acknowledged:

In all fairness, if there was an organization that had some link with terrorist organizations, it would probably be faulting on other grounds, so before we’d get to that point, the process of decertification would already be launched on the grounds of money not flowing for charity purposes or books not being kept properly.

The officials also acknowledged that the CRA has not issued any security certificates to date. When confronted with why the provisions of C-36 were needed, the officials pointed to the deterrence effect of the legislation and suggested that it prevents potential terrorist activity within the charitable sector by inducing the voluntary deregistration of charities. The officials testified that information obtained through CRA audits, investigations and from “shared information from other agencies” was being collected and compiled, and in a number of cases, where CRA sought additional information from

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<sup>15</sup> Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness for Wednesday, May 18, 2005, transcripts available at: <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=117505>.

the charity or applicant, it “prompt[ed] the organizations to withdraw the applications” or to “not question when a revocation action [had] taken place.”

The frequency of these investigations and the availability of staff to carry them out has recently increased, as CRA officials noted they had received “additional resources” and were “creating a new capability for [a] more in-depth analysis.” CRA officials testified that their goal was to double the number of charities audited each year in keeping with the initiative to “strengthen and enhance the monitoring of charities.” Some of the aspects of these audits by CRA that relate to anti-terrorism issues and investigations that officials recognized in their testimony included: the extent to which there was monitoring how donations were being utilized, whether there was proper financial record keeping and reporting in compliance with legislation, the control and direction the charity has over its resources, and where and from whom donations are being collected.

It is interesting to note that, as the CRA officials recognized in their testimony, the security certificate provisions under C-36 are directly drawn from the IRPA’s security certificate process, which the United Nations Working group on Arbitrary Detention expressed “grave concerns” about in June 2005 after spending several weeks in Canada at the federal government’s invitation.<sup>16</sup> In addition, the reference to “prudent reserve power” by CRA officials gives credence to the concern raised by many charities in Canada that they are operating under “the shadow of the law.”

## F. FATF

The Financial Action Task Force on Money Laundering (“FATF”) is an inter-governmental body established by the G7 group in 1989 with the purpose to develop policies to combat the laundering of drug money. This original mandate has been refocused to join the war on terrorism. Two documents form the primary policy issued by FATF: *The Forty Recommendations*<sup>17</sup> and the *Nine Special Recommendations on Terrorist Financing*.<sup>18</sup> Together,

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<sup>16</sup> Press Conference by the Working group on Arbitrary Detention of the United Nations Commission on Human Rights. 15 June 2005. Ottawa, Ontario. Available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/3BF0D474B35B1526C125702200470A2A?opendocument>.

<sup>17</sup> FATF, *The Forty Recommendations* (France: FATF, 2003) [40 Recommendations].

<sup>18</sup> FATF, *Nine Special Recommendations on Terrorist Financing* (France: FATF, 2004) [Special Recommendations].

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>19</sup>

Although FATF has no legislative authority, it is proving to have increasing influence over policy dealing with counterterrorism measures in member nations. As one commentator has observed, “cumulatively, the international arena has created significant pressure for all states to modify frequently introspective and protectionist domestic laws and financial regimes to accommodate [anti-money laundering and countering of the financing of terrorism] obligations.”<sup>20</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 exercising influence on the policymakers at FATF. While FATF makes it clear that member countries are free to develop their own methods for complying with the 40 Recommendations and the Special Recommendations, the reality is that there are limited means in order to comply and avoid sanctions.

## **G. GLOBAL STANDARDS REQUIRED FOR CHARITIES THAT OPERATE INTERNATIONALLY**

Due diligence procedures for charities that operate internationally are not only important as a response to Canada’s anti-terrorism initiatives, but are the only prudent course of action in the face of emerging global standards concerning NGOs and charities. CRA’s publication “Charities in the International Context”<sup>21</sup> stresses the importance of taking into account “Best Practice” guidelines that are promulgated by relevant international policy making institutions, such as FATF, and by key jurisdictions, such as the United Kingdom and United States.<sup>22</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.

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<sup>19</sup> 40 Recommendations, *supra* note 17 at 1.

<sup>20</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.

<sup>21</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>22</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>.

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>23</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 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.

There is a real need for “made in Canada” guidelines for charities when it comes to anti-terrorism due diligence standards. The House Subcommittee recognized that these types of guidelines are needed because there is “little practical guidance” in Canada that would assist charities in introducing anti-terrorism due diligence procedures. These “made in Canada” guidelines are needed both to publicly acknowledge the reality of the due diligence burden that is necessitated by Canada’s anti-terrorism legislation and to serve as a tangible, domestic benchmark for operations that charities could reference compliance with in defence of inadvertent contravention of the legislation.

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<sup>23</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].

## H. DUE DILIGENCE RESPONSE

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

One of the most significant benefits of exercising due diligence may be in its preventive effect. While it may not provide a defence after the fact, when a violation has already occurred, it is one measure that a charity can use in advance to protect itself from unwittingly committing a violation. Due diligence can help avoid the occurrence of the kind of event or association that might lead to a charity to be implicated under the anti-terrorism laws. By being more knowledgeable about the charity and its operations, officers will have more power to respond appropriately. Through exercising due diligence the charity can identify potentially problematic individuals or organizations before it is too late. Due diligence can highlight programs that need to be restructured or discontinued in order to avoid exposure. It can alert officers to the need to decline donations from questionable donors. While no one can guarantee that due diligence will identify all possible risks, it can certainly help to minimize a charity's exposure by eliminating obvious risks. Some important changes are therefore needed in Canada's anti-terrorism legislation, in conjunction with the creation of "made in Canada" "Best Practice" guidelines, the institution of a due diligence defence to both "facilitation" charges under the *Criminal Code* and, as previously mentioned, for the improper use of a charities' resources under relevant sections of the *Charities Registration (Security Information) Act*.

## I. CONCLUSION

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

The legislative experience has been the same in other common law countries. The singular focus with which governments, such as the United States and the United Kingdom, have implemented new counterterrorism measures means that the international charitable landscape has been irrevocably changed. No longer is it prudent for charities participating in international initiatives or soliciting from international donors to ignore the new international political reality. The ramifications of anti-terrorism legislation for charities in Canada are broad and unprecedented. The legislation necessitates 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. However, Canada’s anti-terrorism legislation, as it now stands, has and will continue to cast its shadow over charities, leaving them susceptible to possible discriminatory and arbitrary enforcement of the law.

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

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