

The Potential Effects on Charities of Proposed Anti-Terrorism Legislation (Bill C-16)

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INTRODUCTION

On March 15, 2001, a new piece of legislation, Bill C-16, received its first reading in Parliament. If passed, Bill C-16, known as the *Charities Registration (Security Information) Act* ("The Act"), would provide an added layer of scrutiny for registered charities and organizations seeking registered charity status. The Act seeks to disallow organizations that directly or indirectly provide support to terrorist activities from attaining or keeping charitable status. The unique feature of the Act is that it allows the Solicitor General and the Minister of National Revenue ("Ministers") to rely upon security or criminal intelligence reports as well as information obtained from foreign sources in considering whether an organization is providing support of terrorist activities. The following is an examination of the Act including a discussion of some of the potential effects that it could have upon charities in Canada.

HOW THE ACT WORKS

Certificate Signed By Ministers:

Under the Act, the Ministers can sign a certificate stating that in their opinion there are reasonable grounds to believe that a registered charity or an organization applying for registered charity status is involved in supporting terrorist activity. The Ministers may rely on security or criminal intelligence reports ("Intelligence Reports"), as well as information obtained in confidence from a foreign based government, institution or agency; or from an institution or agency of an international organization of states ("Foreign Information"). Supporting a terrorist activity could include having directly or indirectly made available resources to an organization or person that was at the time, and continues to be, involved in terrorism or activities in support of terrorism. Such involvement also could include an organization that is making, or that will make, available resources to an organization or person that engages, or will engage in terrorism or activities in support of terrorism.

Certificate Submitted To Federal Court:

Once the Ministers have signed a certificate in respect of an organization, the certificate must be served upon the organization and submitted to the Federal Court. If the Federal Court determines that the certificate is reasonable, the organization named in the certificate will be ineligible to receive charitable status or, if it is a registered charity, will have its charitable status revoked. A certificate deemed by the Federal Court to be reasonable must be published in the *Canada Gazette*. Once a

certificate is adopted, it will be effective for a period of three years from the date it is determined to be reasonable.

Evidence Considered By Federal Court:

In considering a certificate, the Federal Court may examine the Intelligence Reports on which the Ministers based their opinion, and any other relevant information regardless of whether that information would be admissible in a court of law. Upon an application by the Ministers, the court may also consider Foreign Information if the judge determines it to be relevant. The judge may not disclose any Foreign Information to the organization which is the subject of the certificate, or its counsel, in order to protect national security and the safety of persons.

Reasonable Opportunity To Respond:

The organization which is the subject of a certificate is to be given a reasonable opportunity to be heard by the Federal Court. Prior to that opportunity, the judge is to provide the organization with a summary of the information available to be considered by the judge, except for any Foreign Information, and except for any other information the disclosure of which the judge deems would injure national security or the safety of persons.

Material Change in Circumstances:

An organization which is the subject of a certificate found to have been reasonable may apply to the Solicitor General of Canada for a review of the certificate by the Ministers based on a claim that there has been a material change in circumstances regarding the organization since the certificate was adopted. If the Ministers determine that there has been a material change in circumstances, they may decide either to continue or to cancel the certificate, with that decision being appealable to the Federal Court. However, the decision of the Federal Court on an appeal of the Ministers' decision in this regard is not subject to further appeal or judicial review. If a certificate that has been found to be reasonable is subsequently cancelled by virtue of a material change in circumstances, notice of that cancellation must be published in the *Canada Gazette*.

COMMENTARY

The following comments regarding the potential effect of the Act may be useful to be considered by charities and organizations wishing to attain charitable status.

Potential Effect Upon Donors:

The version of the Act presented for the first reading in the House of Commons contains the following statement of the purpose of the legislation:

The purpose of this Act is to show Canada's commitment to participate in concerted international efforts to deny support to those who engage in terrorism, to protect the integrity of the registration system for charities under the Income Tax Act and to maintain that the confidence of Canadian taxpayers that the benefits of charitable

registration are made available only to organizations that operate exclusively for charitable purposes

The Act is driven by a policy to curb the support of terrorist activities by registered charities. It could be argued that this type of policy could have a positive effect on the public perception of charities. However, the legislation will more likely create an unnecessary and exaggerated sense of alarm in the public which could result in a “chill effect” on donations to any organization that according to the public’s perception, and social stereotypes, might be involved in terrorist activities.

Some Evidence May Not Be Disclosed:

The Act provides that organizations which are the subject of a certificate must be given a reasonable opportunity to be heard. The Act also provides that the organization is to receive a summary of the information available to the Federal Court judge. However, the Act allows the judge to omit from that summary any information the disclosure of which would threaten national security or the safety of persons. The result of this provision is that the organization may not have an opportunity to respond to and challenge the credibility of all of the information relied upon by the judge.

Certain organizations have raised concerns over this limitation, especially in light of the fact that the Act permits the judge to consider Foreign Information. The fear of some organizations is that those foreign entities that provide information considered by the judge may wish to stifle the efforts of certain charitable organizations for political reasons and therefore may manipulate the information they provide in order to achieve this end. Therefore, some organizations maintain that in order to achieve due process of law it is essential that the Act provide the ability to challenge the credibility of all information relied upon by the judge, including Foreign Information.

Limited Appeal Provisions:

Under the Act, the decision of the Federal Court regarding the reasonableness of a certificate is not subject to appeal or judicial review. The only means for an organization to challenge a certificate that has been adopted is by bringing an application to the Solicitor General to have the certificate reviewed by the Ministers based on a claim that there has been a material change in the circumstances of the organization. The Ministers' decision in this instance is appealable to the Federal Court whose decision is not subsequently appealable. Charities should therefore be aware that absent a material change in circumstances, there is no means by which an organization can appeal a certificate once it has been adopted.

Terrorism Not Defined:

In its current form, the Act does not provide a definition of "terrorism" or "terrorist activities." If the Act is passed without including a definition of these terms, then charities and organizations wishing to apply for charitable status will have to ensure that they are not directly or

indirectly supporting any activity that could fall within an undefined and arbitrary definition of terrorism or terrorist activities. In this regard, these organizations will have to guard against the potential of an unnecessarily broad definition of these terms being adopted by the Ministers and the Federal Court in scrutinizing the activities of such organizations.

Public Disclosure:

The Act requires that a certificate found to be reasonable must be published in the *Canada Gazette*, and that if a certificate is subsequently quashed because of a change in material circumstances, notice thereof must also be published in the *Canada Gazette*. However, there is no provision in the Act which ensures that the names of organizations in respect of which certificates are being considered remain confidential. Therefore, the risk would exist for an organization's public image to be affected by virtue of it being the considered subject of a certificate, whether or not the certificate is eventually adopted and the organization is barred from having charitable status.

Potential Effect of Social Stereotypes:

One potential concern regarding the Act is that some organizations may be disproportionately targeted for scrutiny under it. The concern is that stereotypes may exist in society which link certain cultural, religious or ethnic organizations with terrorism more than other groups. Therefore, the fear is that those organizations may be targeted for scrutiny based more so upon those stereotypes rather than being based solely on the availability of greater evidence to implicate them. This, in turn, could unfairly affect the overall public image of those organizations if they are disproportionately the subject of scrutiny.

Potential Complications Re: Dual-Nature Foreign Organizations:

Another concern which has been raised by some organizations is that the Act may have the practical effect of stifling the only channels through which humanitarian aid can be provided to certain countries. The concern is that in some countries the only organizations that administer the provision of humanitarian aid, and through which Canadian organizations can channel support for humanitarian aid, may also be involved in terrorism or the support of terrorist activities. Even if the Canadian organizations were to specify that their support was only to be used for humanitarian aid, and even if the local organizations only used it for such, the fact that the local organizations were involved in terrorist activities could result in the Canadian organizations being denied charitable status. The Act does not appear to consider how Canadian organizations intend, or direct funds to be used by foreign organizations in this type of scenario. Consequently, this could result in the stifling of humanitarian aid being reached by those countries. Again, it is not the purpose of this current discussion to comment upon whether or not this concern is justified.

CONCLUSION

If passed in its present form, the proposed anti-terrorism legislation could have a considerable negative impact on the ability of organizations to obtain and keep status as a registered charity. According to some, this effect could be disproportionately felt by certain organizations more than others. All of the observations brought forth by numerous organizations regarding Bill C-16 should be considered closely by Parliament to ensure that the proposed legislation, if passed, will achieve its

purpose of discouraging the support of terrorism fairly, effectively, and in a way that will be least disruptive to organizations that provide legitimate charitable purposes.

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