THE PROPOSED ANTI-TERRORISM LEGISLATION (BILL C-36)

- ITS IMPACT ON CHARITIES

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A. BACKGROUND INFORMATION

The earlier Bill C-16, known as the *Charities Registration (Security Information) Act*, sought to disallow organizations that directly or indirectly provide support to terrorist activities from attaining or keeping charitable status under the *Income Tax Act*. In response to the September 11th terrorist attack in the United States, Bill C-36 was introduced in the House of Commons by the Federal Government on October 15th, 2001 as part of the Government Anti-Terrorism Plan. The stated objective of this new legislation is to take aim at terrorist activities and organizations by strengthening measures to identify, prosecute, convict and punish terrorist groups, and by providing new investigative tools to law enforcement and national security agencies. To this end, Bill C-36 amends and incorporates various statutes, including the *Criminal Code*, *Income Tax Act*, *Evidence Act*, *Canadian Human Rights Act, Immigration Act, Proceeds of Crime (Money Laundering) Act, Access to Information Act, Privacy Act,* and *Charities Registration (Security Information) Act*, in an effort to create a comprehensive scheme to penalize those who engage in or support terrorist activities.

In Part 1, the new legislation, extensively revises the federal *Criminal Code,* which reflects the intention of Parliament to criminalize terrorist activities to the fullest possible extent. In Part 4, the Bill amends the *Proceeds of Crime (Money Laundering) Act*, which becomes the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* with the intention of preventing or deterring the financing of terrorist activities and inter-country money laundering. In Part 6, the Bill enacts the *Charities Registration (Security Information) Act* by incorporating most of the content of Bill C-16. It is without doubt that given its comprehensive scope, Bill C-36, if passed, will have an extreme impact upon Canadian charities and their charitable activities carried out both domestically and internationally.

B. *CRIMINAL CODE* PROVISIONS

1. General Comments

Bill C-16 had received criticism from the charities sector for its lack of any definition of "terrorist activities" and "terrorist group," which was feared would lead to an overly broad application to legitimate Canadian charities and their charitable activities. Bill C-36 amends the federal *Criminal Code* to include a definition of "terrorist activities" and "terrorist group", and to outline what constitutes a terrorist offence under the new legislation. The purpose of including such definitions and creating new offences is, according to Parliament, to implement international conventions related to terrorism, and to stop criminal offences related to terrorism, including the financing of terrorism and the participation, facilitation and carrying out of terrorist activities. The serious impact of the revised *Criminal Code* provisions on Canadian charities is a result of: 1, the broad and vague definition of "terrorist activities," "terrorist group," as well as 2, the criminalization of activities of "facilitating" and financing terrorist activity. In light of serious criminal and civil consequences to Canadian charities under the Bill, the ramifications of overly broad or vague definitions must not be taken.

2. The Legislation

(1) Definition of "Terrorist Activities" and "Terrorist Group"

To summarize, Bill C-36, in subsection 83.01, defines "terrorist activity" as follows:

a. an act or omission committed or threatened in or outside Canada;

b. if the act or omission is committed outside of Canada, the terrorist activity includes an act or omission committed for political, religious purpose with the intent to cause substantial property damages, cause serious interference with or serious disruption of an essential service, facility or system;

c. conspiracy, attempt or threat to commit such act or omission; or

d. being an accessory after the fact or counseling in relation to such act or omission.

In the same subsections, the definition of "terrorist group" includes:

a. an entity which has intent or activities facilitating or carrying on terrorist activity; or

b. a listed entity.

(2) Definition of “Facilitate” Terrorist Activity

Under Bill C-36, a terrorist activity is deemed to be “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.

(3) Facilitation and Financing of Terrorism

Under Bill C-36, it is a criminal offence to:

a. directly or indirectly provide or collect property that is intended to be used or knowing that it will be used in whole or in part in a terrorist activity (s. 83.02);

b. directly or indirectly collect property, provide property, or invite a person to provide property, financial or other “related services” that facilitates or carries out a terrorist activity (s. 83.03);

c. deal with property owned or controlled by or on behalf of a terrorist group, facilitate, directly or indirectly, any transaction with respect thereof, or provide any financial or other “related services” in respect thereof (s. 83.08);

d. directly or indirectly participate or contribute to any activity that enhances the ability of any terrorist group to facilitate or carry out a terrorist activity (s. 83.18); or

e. directly or indirectly instruct any person to carry out a terrorist activity (s. 83.22).

3. Comments on The Impact of The Legislation Upon Canadian Charities

(1) Breadth and Vagueness of the Definitions

The broad and vague definitions of “terrorist activities” and “facilitate” will have an adverse impact on any legitimate Canadian charity which carries on charitable activities in another country. A Canadian charity may be caught under the

revised *Criminal Code* by providing funds to a legitimate agent in another country, which in turn unwittingly provides monies, property or other resources to an organization which is involved in “terrorist activities” as defined under the definition of the new legislation. The broad definition of “terrorist group” in its current form may also include environmental, political or economic protesters, various unions, and groups opposed to dictatorial regimes.

The broad definitions also fail to distinguish a dictatorial regime from a democratic regime. Under the new legislation, people in a repressive country who are fighting for freedom may become “terrorist groups,” and Canadian charities which provide medicine, foods, and other assistance to such groups may be considered to commit criminal offences as “facilitating” and financing such “terrorist groups.” The questions the current form of the legislation raises are the following: would a group fighting for democracy and freedom in a dictatorial country be classified as a “terrorist group?” and would the support or aid given by Canadians or Canadian government to support such democratic movements in a dictatorial country constitute an act facilitating or financing such “terrorist activity.” If the answer to these questions is “yes” or “may be”, the definitions would be too broad or too vague. Such broad and vague definitions in the absence of judicial interpretations may result in a disastrous effect upon our support of freedom and democracy through the world.

(2) Facilitating and Financing of Terrorism

The broad scope of section 83.02, 83.03, and 83.04 of the Bill will have a serious and unwelcome impact on legitimate charitable fundraising in Canada. This is because the new legislation indiscriminately penalizes both those which facilitate and finance terrorism activities and those which provide donations to groups which are fighting for democracy and freedom within a repressive regime. The ramification of these overly broad definitions is heightened by the lack of mens rea requirement for committing a “facilitation” criminal offence under the definition of “facilitate” in subsection 83.01(2). By broadly defining “terrorist activity,” and eliminating the mans rea component for a criminal offence with serious punishment, the Bill is at odds with our long established rule of law. If the Bill is passed in its present form, many legitimate Canadian charities carrying on international operations may be caught under the *Criminal Code*.

C. AMENDMENTS TO BILL C-16 – *CHARITIES REGISTRATION (SECURITY INFORMATION) ACT*

1. The Legislation

Under Bill C-16, the Solicitor General of Canada and the Minister of National Revenue ("Ministers") have the authority to issue a certificate to any charity or charity applicant if the Ministers have reasonable grounds to believe that such organizations are

involved in supporting terrorist activity. In reaching the decision, the Ministers may rely on security or criminal intelligent reports and information obtained in confidence from foreign governments, institutions and agency. Such information is not accessible to the charity or charity applicant and its legal counsel. The Minister will refer the certificate to the federal court for judicial review, and the determination of the federal court is conclusive, and not subject to appeal to any other courts. If the certificate is determined to be reasonable, the certificate will be valid for three years. The charity or charity applicant cannot keep or apply for the charitable status in this period unless they can show to the Solicitor General of Canada that there exists a material change in the circumstances.

In Part 6, Bill C-36 enacts the *Charities Registration (Security Information) Act* by incorporating in most of the content of Bill C-16 with some amendments to such and the *Income Tax Ac*t respectively. The amendments were made as a result of the recent terrorist attack in the United States, and the commitment of the Canadian government in fighting terrorism domestically and abroad. However, the broad definition of what constitute "terrorism activities," what are "terrorism groups," what activities constitute terrorism offences in the revised *Criminal Code*, and the procedures concerning the issuance of a certificate will have a serious impact on Canadian charities.

The major amendments to Bill C-16 are as follows:

(1) Bill C-36 incorporates new definitions of "terrorism," "terrorism activities," and "terrorism entities" to be found in the revised *Criminal Code.*

The effect of these overly broad definitions have been discussed in the prior section.

(2) Bill C-36 expands the conditions for issuing a security certificate to charities from "made" to "has made, make, or will make".

In section 4. (1), Bill C-36 expands the grounds permitting the Ministers to sign a certificate if there are reasonable grounds to believe that the registered charity or charity applicant has made, make or will make available any resources, directly or indirectly, to a listed entity as defined in subsection 83.01(1) of the revised *Criminal Code*.

(3) Bill C-36 extends the valid period of a security certificate issued under Bill C-36 from three (3) years to seven (7) years.

In section 13, Bill C-36 states that unless it is cancelled earlier pursuant to the Bill, a security certificate issued is effective for a period of seven years (as compared to three years in Bill C-16) beginning on the day it is first determined to be reasonable by the Federal Court.

2. Comments On The Impact Upon Canadian Charities

Bill C-36, if passed, would not only create an extra layer of scrutiny for registered charities and organizations seeking registered charitable status, but would also create a “chill effect” on Canadian charities and their charitable activities both domestically and internationally. By imposing serious liabilities on charities without according statutory or common law defenses, the new Bill will undoubtedly shackle the operation of Canadian charities.

(1) Lack of Fairness In, Under and Before the Law

a) Lack of Procedural Fairness

i) Limited Access to and Disclosure of Information

Bill-36 limits the disclosure of the information obtained in confidence from a foreign government, institution or agency to the subject charity and its counsel. Charitable organizations are precluded under the Bill from inquiring about what kind of foreign information is being considering, and from cross-examining the credibility of that information. As a result, a hostile foreign government or foreign entities may manipulate the information they provide in order to harm a particular charitable organization, specifically one of a religious nature, thus leaving the Canadian charity defenseless to such intentional and malicious manipulations.

ii) Evidence Law

Bill C-36 provides that in determining whether a certificate submitted by the Ministers is reasonable or not, a Federal Court judge may admit any relevant information even though such information would not be normally admissible in a court of law. Under the new Bill, the judge’s discretion to admit such information is only subject to a few limitations. Accordingly, the judge could admit information which might not be subject to the cross-examination, and could therefore be very prejudicial to the subject charitable organization. As a result, a charitable organization is deprived of its rights to cross-examine the credibility of those providing information during a hearing and to exclude prejudicial evidence - rights which are otherwise available under common law evidence rules.

iii) No Right of Appeal

The new legislation restates the position in Bill C-16 that a certificate determined to be reasonable by the Federal Court judge is conclusive. It is not subject to appeal or review by any court. This strict clause may not be justified or warranted in considering the serious nature of the allegation and the consequences to the subject charity or organization seeking charitable status. The fairness of the law is undermined by such a clause.

b) Limited Defense

i) No Diligence Defense

The new legislation penalizes a registered charity or an applicant for charitable status for directly or indirectly providing funds or services to terrorist entities. Considering the complexity of the social, political, and cultural structure in a foreign country, it is very onerous, if not impossible, for a Canadian charity to ensure that any of its funds distributed to a foreign entity will not be abused and eventually end up in the hands of a terrorist entity. Under Bill C-36, if a foreign entity receives funds from a Canadian charity, and the foreign entity uses those funds directly or indirectly to support terrorist activities, the Canadian charity would be denied charitable status and also face possible law suits by its donors, its members and any victims of the terrorist activities. Bill C-36 does not provide a due diligence defense to a *bona fide* Canadian charity which may inadvertently distribute funds to a foreign entity in good faith, even if the charity and its directors exercise due diligence to prevent its commission. Considering the heightened stigma and severe penalties of the legislation on a bona fide charity and its directors, providing no due diligence defense, requiring no mens rea for a indictable criminal offence, and providing no rights of appeal is itself an attack on both freedom and democracy.

ii) Act Does not Consider Knowledge and Intention

Although the revised *Criminal Code* creates a specific intent crime for providing property to and financing terrorist groups, the *Charities Registration (Security Information) Act* under Bill C-36 did not distinguish charities or applicant organizations who have knowledge of an intention to use charitable assets for terrorism activities from those charities or applicant organizations who, in good faith, distribute charitable assets to foreign entities and could not possibly foresee that the assets so distributed may go to

terrorist groups. In other words, the new legislation punishes equally both criminals and legitimate charities who honestly try to help others in good faith.

(2) The *Charter of Rights* and Discrimination Concern

Discrimination concerns arise from the possible stereotyping of certain charities, which have links to specific cultural, religious or ethnic backgrounds. The new Bill allows for the possibility of a charity losing its charitable status or for an organization to be denied from obtaining charitable status if the Ministers and the Federal Court have reasonable grounds to believe that the charity, or the applicant, will make any of its resources available to an organization or person that will engage in terrorism or activities in support of terrorism. This provision may be triggered for some organizations more than others based on stereotypes, especially in light of the recent attack in the US. Specifically, certain charities may be singled out by the Minister based on culture, race, religion, or national origin. This may amount to an act of discrimination based solely upon those factors, which is prohibited by the Canadian *Charter of Rights and Freedoms*.

(3) Negative Effect On Public Perception, Charitable Activities And Fundraising

a) Negative Effect on Public Perception on Charities

Bill C-36 may create a negative impact upon the public perception of certain charities linked to particular cultures, regions and ethnic groups. It may in turn have a negative impact of the image of charities as a whole.

b) Negative Effect on Charitable Activities

Bill C-36, if passed, will have a "chill effect" on Canadian charities in carrying on charitable activities internationally. The severity of the liability under Bill C-36 may forestall many Canadian charities from carrying out international operations especially in certain volatile regions.

(4) Severe Liability And Penalty

a) Criminal Offence

Although a *bona fide* charity under Bill C-36 is unlikely to be caught by the *Criminal Code*, its directors, if they intend to, or knowingly make available its resources either directly or indirectly to support terrorism activities, could be found guilty under the *Criminal Code*. Although we do not know the legal implications on the charity and other innocent directors from such a situation, the charity may face possible civil law suits by its donors, members and the victims of terrorism activities on the grounds of breach of trust, breach of fiduciary duty, or negligence.

b) Vicarious Liability In International Operations

Under the *Income Tax Act*, a Canadian charity is not permitted to distribute its charitable assets to foreign entities unless: a) the recipient entities are foreign "qualified donees" as defined in the *Income Tax Act*, or: b) the recipient entities are not "qualified donees", but an agency agreement, a joint venture agreement, or a cooperative agreement has been signed between a recipient foreign entity and a Canadian charity. By entering into an agency, joint venture, or cooperative partnership, the Canadian charity may to differing degrees become liable for the acts committed by foreign recipient entities.

In practice, if a foreign recipient entity as an agent of the Canadian charity engages, or will engage, in terrorist activities, the Canadian charity is liable under the law of agency and under Bill C-36. The liability of the Canadian charity affects not only its charitable status under Part 6 of the new legislation, but also affects civil penalties since the Canadian charity may also be held vicariously liable for the conduct of its agent. *Bona fide* Canadian charities could therefore be found guilty for criminal conduct committed by foreign recipient entities. Bill C-36 will therefore opens the gates to Canadian charities being subject to unexpected criminal law charges and accompanied civil law suits.

c) Breach Of Fiduciary Duty

The recent decision of the Ontario Superior Court of Justice in *The Aids Society of Children (Ontario),* 105 A.C.W.C. (3rd) 1044, has established that a charity and its directors have a fiduciary duty to donors. In light of this case, it can be reasonable presumed that if a charity's assets are found to be directly or indirectly benefiting terrorism activities and its charitable status is revoked under the new Bill, the charity and its directors may be held for the breach of their fiduciary duties owed to donors in relation to their failure to protect and apply charitable assets for the intended purposes. As the result, donors may be able to sue for breach of fiduciary duty and/or breach of trust. The charity and its directors would not have a defense under Bill C-36 since it does not provide for a due diligence defence. This could impact the civil liability of the directors of the charity to its donors.

d) Insurance Concern

The extent to which general liability and/or director and officer liability insurance will cover claims arising from Bill C-36 is not known, although normally fines, penalties and criminal charges are excluded from many insurance policies. Any lack of insurance coverage could result in a reduction in volunteers as directors and officers of a charity.

D. ANTI-MONEY LAUNDERING PROVISIONS

1. General Comments

The *Proceeds of Crime (Money Laundering) Act, S.C. 2000, c.17*, was received Royal Assent on June 29th, 2000, as a part of Canadian government commitment to fight domestic and international organized crimes. Most of the Act will come into force commencing on November 8th, 2001 over the next 12 months.

In Part 4, Bill C-36 amends the *Proceeds of Crime (Money Laundering) Act,* which becomes the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. The amendments were made in reflection of Canadian Government international commitments to fight terrorist activity. Specifically, the revised Act aims to assist various government agencies to detect and deter the financing of terrorist activities, to combat the laundering of proceeds of crime, and to facilitate the investigation and prosecute the terrorist activity financing offences and the money laundering offences.

2. The Legislation

The Act makes it mandatory for various persons and entities to keep and retain records of specific detailed information about certain financial transactions to a newly created government agency, the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"). FINTRAC will then review the information received. In circumstances 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. Based on the provided information, the government agencies may take actions to investigate the subject transactions, to retain and search the subject persons, and to seize and forfeit the property in question if necessary.

Not every person or entity has the statutory obligations to record and report those transactions as defined in the Act to FINTRAC. In section 5, the Act defines the reporting persons and entities as follows: foreign banks or banks to which the *Bank Act* applies; credit societies, unions, caisses polulaires or associations regulated by a provincial act or *Cooperative Credit Associations Act*; life companies and life insurance companies regulated by a provincial act or *Insurance Companies Act*; companies to which the *Trust and Loan Companies Act* applies; trust companies under provincial legislation; loan companies; persons dealing with securities and investment counseling; casinos, Canadian government departments, and other businesses or professions as defined in the Act.

Not every financial transaction needs to be reported. Only those transactions within the definition the Act will be reported. The reporting persons or entities must record and report the following transactions that occur in the course of their business activities:

(1) Suspicious Transactions

In Part 1, the Act requires the individuals and entities as defined in the Act to report any financial transactions in the prescribed form and manner if there are reasonable grounds to suspect that the transaction may be related to the commission of money laundering offences or terrorist activity financing offence.

(2) Currency and Monetary Instrument Transactions

In Part 2, the Act requires that every person or entity as defined in the Act report and record the importation or exportation of currency or monetary instruments of a value greater than the prescribed amount. The Act gives a very broad power to government agencies to enforce this statutory obligation.

(3) Large Cash Transactions and Cross-Border Currency and Monetary Instruments

According to information sources from the County & District Law Presidents' Association ("CDLPA"), and an article written by Dan Pinnington, published in Presidents' CDLPA Newsletter, Volume 7, Issue 2, further regulations may be passed to require those reporting persons or entities to report and keep records on "prescribed" or "large case transactions" and "cross-border currency and monetary instrument." The "large case transactions" refer to any single transactions involving amounts of $10,000 or more in cash. The later refers to any cross-border import or export of $10,000 or more in cash or monetary instruments.

3. Comments On The Impact Upon Canadian Charities

The Act may have direct impact upon Canadian charities. Under the Act, persons and entities authorized under provincial legislations to engage in the business of dealing in securities have the statutory obligations to record and report the financial transactions as defined in the Act. Under Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended, Canadian charities are exempted from the registration requirements in issuing and trading securities. The *Securities Act*, in subsection 35.(2) 7, states that registration is not required to trade in the securities issued by an issuer organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit, where no commission or other remuneration is paid in connection with the sale. As a result, in Ontario, it can be argued that charities are "authorized to engage in the business of dealing in securities" because they are statutorily exempted from registration under the *Securities Act*. If so, a charity in Ontario, possibly in other provinces, may be subject to the statutory recording and reporting obligations imposed by the Act.

The Act may also have indirect impact upon Canadian charities. In its current form, the Act imposes the recording and reporting obligations on various financial institutions, and it is also interpreted to be applicable to accountants and legal counsels.

The Act may impose the same obligations on more persons, entities or professionals in the future as a result of new regulations that can be passed by the Federal Government to include other "persons" or "entities" to which the Act applies.

In addition, the word, "suspicious," is not defined in the Act, nor details provided as to what constitutes "reasonable grounds." Under such broad definitions, Canadian charities may frequently become a subject of such reports when they carry on international operations and transfer funds to certain foreign jurisdictions without awareness of such reports.

As the Act creates an absolute obligation for specific persons and entities to report "prescribed" transactions, any transactions by Canadian charities involving a substantial amount of cash may also be reported by banks, credit unions, trust companies, and other financial institutes. This provision will also have impact upon charitable fundraising involving any large cash donations, or international donations. It may unduly deter *bona fide* donors from making donations to Canadian charities, or discourage Canadian charities to transfer much needed cash to foreign jurisdictions. A Canadian charity which transfers charitable assets to a foreign charity under an agency or a joint-venture agreement may become a subject of such reports.

By the same token, the mandatory obligations of reporting persons and entities to report currency and monetary instruments may subject Canadian charities to being reported to FINTRAC when the charities carry on international operations. This may have the practical effect of discouraging legitimate cross-border charitable activities.

E. CONCLUSION

The proposed anti-terrorism legislation, if passed, could have a considerable negative impact on Canadian charities and the charitable activities that they are carrying on. Further debate is needed to ensure that the proposed legislation will achieve its purpose of discouraging, punishing real terrorist activities, and protecting freedom and democracy.

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