CARTERS.ca™

CARTER & ASSOCIATES
PROFESSIONAL CORPORATION
Barristers, Solicitors & Trade-mark Agents / Avocats et agents de marques de commerce
Affiliated with Fasken Martineau DuMoulin LLP / Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

CHARITY LAW BULLETIN NO.11

DECEMBER 13, 2001

Editor: Terrance S. Carter

AMENDED *ANTI-TERRORISM ACT* - BILL C-36 PROVIDES LITTLE RELIEF TO CHARITIES

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

A. INTRODUCTION

Bill C-36 was introduced in the House of Commons on October 15th, 2001 in response to the September 11th terrorist attacks in the United States and to implement international conventions on anti-terrorism. Amendments to Bill C-36 were submitted to the House of Commons on November 22, 2001. Bill C-36, as amended, received third reading on November 28, 2001, and is expected to be passed into law before the end of the year. Although Bill C-36 was extensively amended, very little relief was provided for charities. For a detailed discussion concerning Bill C-36 and its impact on Canadian charities, reference should be made to Charity Law Bulletin No. 10 dated October 25, 2001, an article entitled *"Pro-active Protection of Charitable Assets – A Selective Discussion on Liability Risks and Pro-active Responses"* dated November 20, 2001, and a Power Point presentation dated December 4th, 2001 entitled *"The Effect of Anti-terrorism Act (Bill C-36) Upon Charities"*, all available at www.charitylaw.ca.

This *Charity Law Bulletin* is intended to supplement and update *Charity Law Bulletin No. 10* by explaining the effects of the amended Bill C-36 as it impacts Canadian charities. All references in this Bulletin concerning Bill C-36 are of a summary nature only and are not intended to provide a detailed discussion of Bill C-36. Readers are encouraged to refer to the specific wording of Bill C-36 that can be found at www.parl.gc.ca.

B. SELECTED DISCUSSIONS ON AMENDMENTS

1. Definition of "Facilitation"

Bill C–36 enacts comprehensive Criminal Code provisions prohibiting funding and facilitating of "terrorist activities" and "terrorist groups". The recent amendments to Bill C-36 moved the definition of "facilitation" from Section 83.01, the general definition section, to Section 83.19 that sets out the offence of "facilitation of terrorist activities." The stated reason for the move by the government was to ensure that "facilitation" requires knowledge and intent as a specific mens rea criminal offence.

Section 83.19(1) 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.*

Section 83.19(2) defines "facilitation" as follows:

For purpose of this Part, a terrorist activity is facilitated whether or not

i) the facilitator knows that a particular terrorist activity is facilitated;
ii) any particular terrorist activity was foreseen or planned at the time it was facilitated; or
iii) any terrorist activity was actually carried out. (emphasis added)

The definition of "facilitation" set out in Section 83.19(2) is not in keeping with the common law rule requiring the *mens rea* component to be commensurate with the nature of the punishment. The combined wording of s. 83.19(1) and (2) means that it is only necessary to show that an accused, in essence, knowingly did not know that a particular terrorist activity is facilitated or may be facilitated. This is much less of a knowledge and intent factor than s. 83.19(1) would suggest and the punishment of such offences would seemingly require.

Further, the definition of "facilitate" under Section 83.19(2), in failing to make any reference to Section 83.19(1), continues to apply to the entire "Part" of the *Criminal Code* instead of to a particular "Section" requiring knowledge and intent. The broad definition of "facilitation" therefore applies to all *Criminal Code* offences involving "facilitation" of terrorism without being moderated by the

requirement for knowledge or intent under Section 83.19(1). As a result, to "facilitate" a "terrorist activity" requires in fact only a limited *mens rea*, or guilty mind, where there is a specific requirement for knowledge and intent for an offence, and even less so where there is no specific requirement for knowledge and intent, i.e. "using and possessing property for facilitating or carrying out a terrorist activity" under Section 83.04(a). As a result, charities may unwittingly become involved in violating the *Criminal Code* by "facilitating" a "terrorist activity" without fully knowing or understanding their actions.

For instance, a Canadian charity which funds an agent in the Middle East that operates a hospital which on occasion may treat or give medicine to a member of a "terrorist group" would be contravening the *Criminal Code*. Under Bill C-36, a charity in the above situation could be found to be:

a) a "terrorist group" by meeting the definition of a "listed entity"; and/or
b) a "terrorist group" for facilitating a "terrorist activity".

In addition, the charity could also be committing a separate *Criminal Code* offence of "facilitating a terrorist activity" contrary to Section 83.19 of the amended Code. The charity could also lose its charitable status under the deregistration provisions of Part 6, *Charities Registration (Security Information) Act*, of Bill C-36.

2. Co-relation with Bill C-35

The broad definition of "terrorist activity" as well as "terrorist group" under Bill C-36 is extended further by its interrelationship with Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act*. There is a real concern that the combined provisions of Bill C-36 and C-35 could be used to lay charges against political protesters, as well as legitimate charities providing charitable services to such protesters.

Section 83.01 of Bill C-36 sets out a definition of "terrorist activity" as follows:

> Acts or omissions committed inside or outside Canada, and if in Canada, includes offences in relation to the implementation of the UN's *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*.

Section 83.01 of Bill C-36 also includes a broad definition of "terrorist group" which is relevant to its correlation to Bill C-35. The definition of "terrorist activity" includes the following:

i) A "listed entity," which means an entity that the Canadian Government has reasonable grounds to believe:

   (1) Has carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
   (2) Is acting on behalf of, at the direction of, or in association with such an entity.

ii) An entity that has as one of its purposes or activities in the facilitation of or carrying out of any terrorist activity.
iii) An entity also includes an association of such entities.
iv) In the same section, the Bill defines "entity" as a person, group, trust, partnership, fund, or an unincorporated association or organization.

Bill C-35 was introduced on October 1, 2001. Third reading was passed by the House of Commons on December 4, 2001. It is expected to come into force shortly along with Bill C-36. The original *Foreign Missions and International Organizations Act* received Royal Assent on December 5, 1991 as part of the Canadian Government's commitment to the implementation of the UN Convention. The said Act granted certain privileges, immunities and benefits to foreign diplomatic missions and consular posts, international organizations, and foreign state subdivisions. The stated object of Bill C-35 is to modernize privileges and immunities regime to comply with Canada's existing commitments under international treaties and to respond to the developments in international law.

Section 1(1) of Bill C-35 expands the definition of "international organization" to now include "an inter-governmental conference in which two or more states participate." As a result, foreign state representatives, including diplomatic and other officers, attending meetings or conferences in Canada will fall within the definition of "Internationally Protected Persons" under the UN Convention, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.*

Bill C-36, in Section 83.01, defines "terrorist activity" as including, among other things, offences against "Internationally Protected Persons" and related property. The means of transportation and the areas in which the internationally protected persons meet at are now protected, and any threat or commission of acts against such "persons", "official premises" or "means of transport" which is likely to endanger the life or liberty of such person now becomes a terrorist activity under the amended Bill C-36.

With the combined wording of Bill C-36 and Bill C-35, students protesters who erect barricades on roads leading into an international economic summit would be participants in a "terrorist activity" and could be considered to be part of a "terrorist group". As a result, a hospital providing medical care to these student protesters might itself be considered to be facilitating a "terrorist group" contrary to the *Criminal Code,* as well as losing its charitable status. This possibility would no doubt come as a surprise to both protesters and the hospital alike.

C. CONCLUSION

The amended Bill C-36 provides little relief for charities. As a result of the combined impact of Bill C-36 and Bill C-35, Canadian charities and their legal advisors will need to carefully review the Bill to ensure compliance with its provisions and guard against becoming unwittingly caught by the legislation. Bill C-36 is an extremely complicated piece of legislation and its future impact on Canadian charities may not be fully understood for years to come.

CARTERS.ca™

CARTER & ASSOCIATES
PROFESSIONAL CORPORATION
Barristers, Solicitors & Trade-mark Agents
Affiliated with Fasken Martineau DuMoulin LLP
Avocats et agents de marques de commerce
Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux
Orangeville (519) 942-0001
Ottawa (613) 235-4774
Toll Free: 1-877-942-0001
www.carters.ca™

By Appointment / Par rendez-vous
Toronto (416) 675-3766
London (519) 937-2333
Vancouver (877) 942-0001
www.charitylaw.ca™

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carter & Associates. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish the solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation. © 2005 Carter & Associates