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CHARITY LAW BULLETIN NO.14

JUNE 25, 2002

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UPDATE ON THE COMING INTO FORCE OF BILL C-35, THE INTRODUCTION OF BILL C-55, AND REGULATIONS UNDER *THE PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT*

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A. INTRODUCTION

As discussed in previous *Charity Law Bulletins*, it is becoming increasingly important for charities, particularly those that operate internationally, to be aware of the developing plethora and complexity of anti-terrorism legislation in Canada that impacts the charitable sector. In this regard, Bill C-36, now Chapter 41 of the *Statutes of Canada 2001* (referred to hereafter for ease of reference as Bill C-36), as well as Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act*, have been briefly commented upon in Charity Law Bulletins No. 10, 11, 12 and various PowerPoint presentations that are available at www.charitylaw.ca and www.antiterrorismlaw.ca.

The legislation that will be discussed in this Bulletin is Bill C-35 and the implications of its recent coming into force, the introduction of Bill C-55, *The Public Safety Act*, as well as the issuing of regulations under *The Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

Bill C-35, An *Act to Amend the Foreign Missions and International Organization Act*, passed by the House

of Commons on December 12, 2001 as a part of its legislative anti-terrorist initiative, has been proclaimed in force as of April 30, 2002.

Bill C-42, *An Act to Amend Certain Acts of Canada and to Enact Measures for Implementing the Biological and Toxin Weapons Conventions in order to Enhance Public Safety*, was withdrawn on April 24, 2002 amidst a deluge of criticism that the breadth and ambiguity of its measures could pose a serious threat to the liberty and freedom of Canadians. A modified version of Bill C-42 was then introduced into the House of Commons on April 29, 2002 as Bill C-55, the *Public Safety Act 2002*. Despite some improvements to Bill C-55 over that of Bill C-42, a number of concerns remain that may impact charities. However, it should be noted that Bill C-55, as of the date of this Bulletin, has not yet been passed into law.

Within the text of Bill C-36, specifically Part 4 that amended the predecessor to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, are numerous references to regulations that were to elaborate on the definitions of specific entities within that *Act* and provide guidelines for reporting obligations prescribed within it. These regulations were issued on May 9, 2002.

B. THE COMING INTO FORCE OF BILL C-35, AN ACT TO AMEND THE FOREIGN MISSIONS AND INTERNATIONAL ORGANIZATION ACT

The ramifications for charities as a result of the recent coming into force of Bill C-35 is evident when viewed in the light of the amendments to the *Criminal Code by Bill C-36*, specifically the definition of "terrorist activities". Under section 83.01(1)(a) of the *Criminal Code*, as amended by Bill C-36, the definition of "terrorist activities" includes actions taken against "internationally protected persons". Bill C-35 amends the *Foreign Missions and International Organization Act* and expands several important definitions including "international organization" and "internationally protected persons". Bill C-35 extends the "internationally protected persons" status to foreign representatives including diplomats and other officials. In addition, the definition of "international organization" is expanded to include an "inter-governmental conference" such as a meeting of the WTO or the G-8.

The means of transportation for and the areas in which the "internationally protected persons" are to meet are also protected under Bill C-35. Any threatening or commission of acts against such "internationally protected

persons", "official premises", or "means of transport" that will likely endanger the lives or liberty of such persons would meet the definition of a "terrorist activity" under Bill C-36. As such, protestors blocking a road to a WTO Conference or a G8 Summit now run the risk of committing a "terrorist activity".

As well as expanding the definitions of "internationally protected persons" and "international organizations", section 10.1 of Bill C-35 provides the RCMP with power to ensure the "proper functioning" of an "inter-governmental conference" and protection of "internationally protected persons". Citing this legislation as authority, the RCMP, in a news release dated June 21, 2002, advised that they have established an "access control area" in downtown Calgary, nearly 100 km from the G-8 Summit in Kananaskis. This "access control area" was established by the RCMP in anticipation of protests surrounding the G-8 Summit but stated that it was not meant to affect "legitimate business in the area". In a further elaboration, the RCMP, in a news release entitled "Information for Protesters", advised that in order to ensure the "proper functioning" of the conference and the "protection of internationally protected persons", the RCMP would retain the authority to limit the *Charter* guaranteed rights and freedoms of protestors when deemed necessary.

Within less than 60 days of its coming into force, it is now evident that Bill C-35 and its amendments to the *Foreign Missions and International Organizations Act* are being utilized in relation to controlling protestors at the G-8 Summit at the discretion of the RCMP. As a result, since it is now possible that protestors who disrupt or threaten the "means of transport" of "internationally protected persons" may be committing "terrorist activities", any charitable organization considering providing humanitarian aid to these individuals needs to be aware that they could be "facilitating a terrorist activity", contrary to the *Criminal Code* as amended by Bill C-36.

C. RELEVANT AMENDMENTS TO THE NATIONAL DEFENCE ACT IN BILL C-55

Bill C-42, the predecessor to Bill C-55, proposed to amend the *National Defence Act* by giving the power to the Minister of Defence to proclaim a broad "military security zone" without the assurance of adequate safeguards. Among other things, many feared that Bill C-42 could be used to subdue legitimate democratic dissent, a right that is guaranteed in the *Canadian Charter of Rights and Freedoms*. This concern remains with regards to Bill C-55 notwithstanding some improvements in the legislation over that of Bill C-42. As the legislative guidelines for security and safety are redrawn in Bill C-55, charitable organizations may find that

they will be affected to the extent that they become active in situations in which citizens choose to exercise their rights of political dissent.

In this regard, Part 11 of Bill C-55 replaces "military security zones" with "controlled access military zones". While the change of terminology is not itself crucial, Bill C-55 limits the use of "controlled access military zones" to the protection of: (a) a defence establishment; (b) Canada Forces' property outside a defence establishment; or (c) property of visiting forces. The designation of a "controlled access military zone" is now subject to judicial review as a result of changes introduced in Bill C-55. This safeguard is now more meaningful since Bill-55 establishes an objective test of being "reasonably necessary" in ensuring the safety and security of Canadian or visiting forces property, rather than the previous subjective test in Bill C-42 of "in the opinion of the Minister."

What is missing in Bill C-55, however, are legislative safeguards that will restrict the use of the "controlled access military zones" so that such a designation is not used, among other things, to quell legitimate political dissent. A "controlled access military zone" could be created around moveable military property with no other limitations on how the resulting martial law could be used other than the proviso that it "may not be greater than is reasonably necessary" for ensuring the safety or security of the Canadian Forces or visiting forces property. Therefore, the possibility remains that Canadian Forces Property, such as armoured personnel carriers, could be placed around the proximity of a G-8 Summit or placed at an anticipated site of protests and thereby be justified in "forcibly" removing any person or thing that enters into that zone.

Charities, such as hospitals, that might provide medical assistance, or churches that might offer accommodation or other forms of help to protestors who infringe on a "controlled access military zone" will need to be aware of the consequences that could result from aiding or facilitating protestors in these situations. In addition, Canadian charities that are involved in humanitarian or civil libertarian issues and decide to hold public rallies or demonstrations at a government sponsored summit may become subject to martial law imposed on those who are caught within a "controlled access military zone". The creation and enforcement of "controlled access military zones" set out in Bill C-55 may therefore pose a real threat to the members and volunteers of charitable organizations who operate and provide assistance within these potential theatres of confrontations or conflict.

D. RELEVANT AMENDMENTS TO THE *PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT* IN BILL C-55 AND RELATED REGULATIONS

Bill C-55 also contains amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act.* The original act, the *Proceeds of Crime (Money Laundering) Act,* received Royal Assent on June 29, 2000. It was originally created to combat organized crime and establish the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), an independent government agency with a mandate to collect, analyze, assess and disclose information in order to assist in the detection, prevention and deterrence of money laundering. However, after the events of September 11th, its mandate was expanded by Part 4 of Bill C-36 to include terrorist financing. In this regard, Part 4 of Bill C-36 renamed the said act the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act ("Proceeds of Crime Act").*

Part 4 of Bill C-36, containing the amendments to the *Proceeds of Crime Act,* includes a number of reporting obligations on specified persons or entities that are to be phased in during 2002. The first reporting obligation, i.e. the reporting of suspicious transactions, took effect on November 8, 2001. Reporting entities, including financial entities, securities dealers, legal counsel, accountants and real estate brokers, must now report all transactions to FINTRAC where there is "reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence."

What Bill C-55 does in amending the *Proceeds of Crime Act* is to strengthen the ability of FINTRAC and other government agencies to collect and share compliance related information with various agencies that regulate and supervise banks, trust companies, securities dealers, lawyers, and accountants, as well as to expand FINTRAC's power to collect information from federal and provincial government agents for purposes related to law enforcement or national security. Bill C-55 also contains a corresponding amendment to the *Office of the Superintendent of Financial Institutions Act* which will permit the Superintendent to disclose FINTRAC information related to compliance by a financial institution. This means that FINTRAC is permitted to collect information from government databases related to national security just as it may from other law enforcement databases.

The expansion of the federal government's power to share and collect information with respect to compliance issues may have a significant indirect impact upon charities in at least two contexts. Firstly, a charity that

funds international programs may unwittingly become the subject matter of a reported transaction without being aware of it. For example, a charity's bank, its lawyers or its accountants are now required by law to report to FINTRAC any suspicious transactions or large cash transactions of the charity as specified in the legislation and regulations.

Secondly, under Part 6 of Bill C-36, *Charities Registration (Security Information) Act*, the Solicitor General and the Minister of National Revenue are provided with extremely broad power to revoke or refuse to grant charitable status to a charity based upon information that is collected both domestically and internationally. In this regard, information collected by FINTRAC may be made available to and used by the Solicitor General or the Minister of National Revenue in considering whether to revoke a charity's charitable status or to deny a charitable status application notwithstanding that under Part 6 of Bill C-36 the subject charity may be denied an opportunity to review or cross-examine such information.

The amendments to the *Proceeds of Crime Act* under Bill C-36 and Bill C-55 will also have a direct impact upon charities to the extent that charities are found to be included within the definition of entities that the Act applies to. The first way that this may occur is under section 51(g) in Part 4 of Bill C-36, which states that persons and entities "authorized under provincial legislation to engage in the business of dealing in securities" have a statutory obligation to record and report the financial transactions as defined in that Act. Under the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended, charities are generally exempted from the registration requirements in issuing and trading securities. Specifically, section 35(2)7 of the *Securities Act* states that registration under the *Securities Act* is not required to trade in securities that are issued by an issuer organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not-for-profit, where no commission or other remuneration is paid in connection with the sale. As a result, in Ontario at least, where a charity fulfills the exemption qualifications requirements under subsection 35(2)7 of the *Securities Act*, it is arguable that the charity may, in some situations such as the raising of funds through the issuance of bonds, have become "authorized to engage in the business of dealing in securities." If so, a charity in Ontario, and possibly in other provinces with similar legislation, may be subject to the mandatory recording and reporting obligations imposed under the *Proceeds of Crime Act*.

The second way is where charities are included within the expanded definition of entities that are required to report as described in the regulations under the *Proceeds of Crime Act* released on May 9, 2002. The

regulations now include definitions of "financial entity" and "money services business" which in some instances may include charities. For instance, the definition of "financial entity" includes "a company to which the *Trust and Loan Companies Act* applies". There are circumstances where a charity may be involved in trust activities that could require that a charity be registered under that Act. Also, the definition of "money services business" is in part defined as a "person or entity that is engaged in the business of remitting funds, or transmitting funds by any means, or through any person, entity or electronic funds transfer network." For instance, Canadian charities that transfer funds to a healthcare or relief organization internationally or even domestically, for instance, might fall under this definition and be required to report. If charities do fall within the definitions of entities that are required to report, there will be serious consequences if those charities fail to report as required by the *Proceeds of Crime Act.* Charities will therefore now need to be diligent in monitoring whether they have become involved in circumstances which might unwittingly expose them to a duty to report under the *Proceeds of Crime Act.*

E. CONCLUSION

This bulletin has only been able to identify a few of the circumstances in which the growing body of anti-terrorism legislation may affect charities in Canada. The coming into force of Bill C-35 will now further expose charities to becoming unwittingly included in prohibited "terrorist activities" more so than only under the provisions of Bill C-36. While Bill C-55 is just one part of the overall anti-terrorism legislative agenda, the amendments contained within in it to the *National Defence Act* and the *Proceeds of Crime Act* raise several concerns for charities, particularly where charities and their members are active in participating or providing humanitarian aid during legitimate protest events. In addition, amendments to the *Proceeds of Crime Act* under Bill C-55 and the corresponding regulations in that Act under Bill C-36 will provide government agencies, such as FINTRAC, with broader information collection powers that could be used to deregister a charity.

The consequences of the combined effect of Bill C-35, Bill C-36, Bill C-55 and the regulations under the *Proceeds of Crime Act* underscore the importance of charitable organizations becoming familiar with the increasing body of anti-terrorism legislation in Canada and developing a proactive response. The complexities of the legislation in this regard and the impact upon charities will not likely be fully understood for some time. Meanwhile, suggested guidelines for due diligence in complying with anti-terrorism legislation, particularly

Bill C-36, can be found in Charity Law Bulletin # 12, available at www.charitylaw.ca or www.antiterrorismlaw.ca.

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