
THE IMPACT OF BILL C-51 ON CHARITIES AND NOT FOR PROFITS

*By Terrance S. Carter, Nancy E. Claridge, and Sean S. Carter**

A. INTRODUCTION

Purporting to provide Canadian law enforcement and national security agencies with additional tools and flexibility to keep pace with evolving threats and better protect Canadians here at home, the federal government unveiled its wide-sweeping new anti-terrorism legislation on January 30, 2015, to much debate. In addition to introducing two new pieces of legislation, Bill C-51, short-titled the *Anti-Terrorism Act, 2015* (the “Bill” or “AT Act 2015”)¹, enhances the powers given to the Canadian Security Intelligence Service (“CSIS”) “to address threats to the security of Canada,” provides law enforcement agencies with enhanced ability to disrupt terrorism offences and terrorist activity, makes it easier for law enforcement agencies to detain suspected terrorists “before they can harm Canadians,” creates new terrorism-related offences, and expands the sharing of information between government institutions. A complete analysis of the Bill is beyond the scope of this *Anti-Terrorism and Charity Law Bulletin* (“Bulletin”), so the following commentary is restricted to concerns related to the Bill’s impact on charities and not for profits and the individuals who are on their boards of directors, officers, or serve as employees or volunteers of such organizations.

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¹ Available online: <<http://www.parl.gc.ca/legisinfo/BillDetails.aspx?billId=6842344&Language=E&Mode=1>>.

A casual review of the AT Act 2015 suggests that little will change from the perspective of charities and not-for-profits and their respective boards of directors. As we have frequently commented² in the past, the interplay between Canada's existing anti-terrorism laws and the broad audit and sanction capabilities of Canada Revenue Agency ("CRA") have posed significant concerns for charities carrying out activities in conflict zones and their ability to demonstrate effective control over charitable assets and programs in order to avoid placing the organizations, their directors, officers, employees, and volunteers at risk. In that regard, the sector has seen instances of a mere suspicion of ties to terrorist organizations or activities escalating beyond allegations to proven fact, without the ability for organizations to properly defend against the allegations. Such claims have serious consequences not only for the organization, but also for its board of directors, officers, employees, volunteers, as well as even their members and families, both in terms of maintaining a capacity to carry out charitable activities and maintaining personal security.

However, the new AT Act 2015, if it remains in its current form, will raise additional concerns for charities and not for profits and their ability to operate free of concerns of unfounded claims of ties to terrorism. The following is a brief review of some of those concerns.

B. THE NEW SECURITY OF CANADA INFORMATION SHARING ACT

The AT Act 2015 intends to create the *Security of Canada Information Sharing Act* (the "Information Sharing Act"), which will authorize government institutions to disclose information to other government institutions that "have jurisdiction or responsibilities in respect of activities that undermine the security of Canada." The preamble to the Information Sharing Act indicates that "protecting Canada and its people from activities that undermine the security of Canada often transcends the mandate and capability of any one Government of Canada institution," suggesting that there are currently barriers to the effective sharing of information between government institutions. The sharing of information must be consistent with the *Canadian Charter of Rights and Freedoms* ("Charter"), and the protection of individual privacy. However, notwithstanding such guarantees, there are a numerous concerns with the proposed legislation.

A preliminary concern is the breadth of the definition of an "activity that undermines the security of Canada," which includes "any activity [...] if it undermines the sovereignty, security or territorial integrity of

² Terrance S. Carter, "Charities and the Anti-terrorism Financing/ Money Laundering Regime" (Toronto: Osgoode Hall Law School CLE Program, Legal Risk Management for Charities and Not-for-Profit Organizations), online: <www.carters.ca/pub/article/charity/2011/tsc1006.pdf>.

Canada or the lives or the security of the people of Canada.” The definition also includes specific examples, including the following:

- (a) interference with the capability of the Government of Canada in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations, or the economic or financial stability of Canada;
- (b) changing or unduly influencing a government in Canada by force or unlawful means;
- (c) espionage, sabotage or covert foreign-influenced activities;
- (d) terrorism;
- (e) proliferation of nuclear, chemical, radiological or biological weapons;
- (f) interference with critical infrastructure;
- (g) interference with the global information infrastructure, as defined in section 273.61 of the National Defence Act;
- (h) an activity that causes serious harm to a person or their property because of that person’s association with Canada; and
- (i) an activity that takes place in Canada and undermines the security of another state. [*emphasis added*]

The government is quick to establish that an activity that undermines the security of Canada does not include lawful advocacy, protest, dissent and artistic expression.

Notwithstanding such assurances, the sheer breadth of the definition of an activity that undermines the security of Canada and the lack of details concerning how the definition and its examples will be interpreted is a cause for great concern for charities and not for profits. For example, the example under paragraph (i) leaves significant room for interpretation for both what will be an “activity” and what will undermine the security of another state, especially in consideration of the constantly changing landscape of international conflicts and the unstable nature of many states. As well, there would be nothing to stop a government from using the breadth of the definition of an “activity” to target groups that pursue positions that oppose government policies, as has already been evident by statements made by cabinet ministers in recent years about environmental organizations, particularly those that are suspected of being funded by foreign groups opposed to government policies. As the Bill is only at the First Reading stage, it will be important to

consider restricting this provision's language or providing more clarification in the proposed language so as to understand the government's intention in this regard. Without some potential reworking of this section, it could unduly restrict the ability of charities and not for profits to know what sort of activities or programmes may put them in violation of the AT Act 2015.

What is more concerning, though, is the fact that the test for determining whether information is to be shared is not whether the information falls within the definition of "an activity that undermines the security of Canada," but instead, it is if the sharing government institution determines that the "information is relevant to the recipient institution's jurisdiction or responsibilities." This suggests that there will need to be a case by case examination in order to determine whether information is validly being shared, especially in light of the fact that there is no test for relevance. Canada's Privacy Commissioner, Daniel Therrien expressed concern with the breadth of the new authorities to be conferred by the Information Sharing Act. Commissioner Therrien commented,

This Act would seemingly allow departments and agencies to share the personal information of all individuals, including ordinary Canadians who may not be suspected of terrorist activities, for the purpose of detecting and identifying new security threats. It is not clear that this would be a proportional measure that respects the privacy rights of Canadians. [...]

I am also concerned that the proposed changes to information sharing authorities are not accompanied by measures to fill gaps in the national security oversight regime. Three national security agencies in Canada are subject to dedicated independent oversight of all of their activities. However, most of the organizations that would receive and use more personal information under the legislation introduced today are not.

It is also concerning to see that the sharing of information may be initiated by a government institution's own initiative, or by the request of the recipient institution. The Information Sharing Act then permits the recipient institution to use the information or further disclose it to any person, for any purpose. As such, once the information is shared, any controls that previously existed under the rules governing the government institution that collected the information in the first instance will no longer be in place. No civil proceedings can be commenced against any person for their disclosure in good faith of information under the Act. This will obviously be of concern to employees and volunteers of charities and not for profits working within the international context and, in particular, in conflict zones.

As well, it is important to note that the list of government institutions between which information can be shared is lengthy, including the more than 140 institutions listed under the *Privacy Act*, though for the purpose of this Bulletin, the primary concern would be information sharing between CRA, the RCMP, CSIS, Canada Border Services Agency, and the Department of Public Safety and Emergency Preparedness. Consequential amendments to the *Income Tax Act (Canada)* (“ITA”) confirm that CRA can share publicly accessible charity information and arguably broaden what other types of taxpayer information can be shared and with whom. In particular, the amendments will allow CRA to share information that falls under the broadly defined category of taxpayer information, as opposed to the more narrowly defined designated taxpayer information that it can currently share with CSIS, the RCMP, and the Financial Transactions and Reports Analysis Centre of Canada under the ITA.

C. SECURE AIR TRAVEL ACT

The AT Act 2015 also intends to introduce the *Secure Air Travel Act* (“Secure Air Travel Act” or “Act”), which will provide a new framework for identifying and responding to persons who may engage in an act that poses a threat to transportation security or who may travel by air for the purpose of committing a terrorism offence. The Secure Air Travel Act authorizes the Minister of Public Safety and Emergency Preparedness to establish a list of such persons and to direct air carriers to take any necessary actions to prevent the commission of such acts. The list would include the name, alias(es), date of birth and gender of any person who the Minister “has reasonable grounds to suspect will (a) engage or attempt to engage in an act that would threaten transportation security; or (b) travel by air for the purpose of committing an act or omission that” is a terrorism offence.

The Act permits the sharing of this information with foreign governments, governmental institutions or international organizations, which may be subject to written arrangements between the governments, institutions or organizations.

Notwithstanding the numerous problems that have developed in both Canada and other jurisdictions as a result of other “no-fly lists,” which would be of worry to employees and volunteers of charities and not for profits working in conflict zones, it is concerning to see that the list will not contain other identifying information that would assist in differentiating individuals who land on the list (e.g. place of birth, citizenship, nationality, residency, passport information, etc.). The fact that the Secure Air Travel Act

includes provisions to mandate the regular review of the list and to provide administrative recourse to an individual who believes he or she is wrongly included on the list is little comfort given the seriousness of being included on such a list.

D. NEW TERRORISM OFFENCE “IN GENERAL”

Part 3 of the AT Act 2015 includes the creation of the new terrorism-related offence of advocating or promoting the commission of terrorism offences in general. The new section 83.221 of the *Criminal Code* is as follows:

Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general – other than an offence under this section – while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

Criminal defence lawyers have already raised a number of concerns related to this new offence, as the scope of the offence is not clear and there are obvious concerns over the criminalization of advocacy and promotion of “terrorism offences in general” considering that terrorism offences are generally already quite broad. This is particularly so with regard to the inclusion of the words “in general” in describing “terrorism offences,” since there is no explanation in the AT Act 2015 concerning what those additional words mean.

This overreaching continues in reference to what will constitute “communication” under the provision. Hate propaganda laws, after which this provision is modelled, defines “communicating” to include communication by telephone, broadcasting or other audible or visible means, and defines “statements” to include words spoken or written or recorded electronically or otherwise, and gestures, signs or other visible representations (see section 319).

Without the benefit of clear definitions as to the application of this new offence, the work of charities and not for profits carrying out activities in conflict zones will need to be carefully reviewed in order to determine whether the risk to the organization and its reputation of becoming unintentionally involved in this offence exists and can be managed on a reasonable basis. At this early stage, it is easy to see problems arising as a result of, for example, a charity’s fundraising activities being a primary source of risk with articles, blogs, tweets, posters, pamphlets, online videos and the like all being subject to scrutiny for possible

interpretation of advocating or promoting the commission of a terrorism offence in general. We have previously written extensively about concerns over facilitation and material support offences.³ The facilitation offence found in section 83.19 of the *Criminal Code* does not require the alleged facilitator to know that a particular terrorist activity is facilitated; the particular terrorist activity to be foreseen or planned at the time of facilitation; or even for any terrorist activity to actually be carried out, yet the alleged facilitator is liable to imprisonment for a term not exceeding 14 years. Section 83.191 of the *Criminal Code* makes it an offence to leave or attempt to leave Canada to facilitate terrorism.

E. CONCLUDING COMMENTS

Although Canadian charities and not for profits have been living under the shadow and “chilling effect” of Canadian anti-terrorism measures for the last 14 years, the provisions introduced through Bill C-51 raise new concerns for organizations operating in conflict zones or otherwise becoming the subject of investigation by law enforcement and other agencies.

In whatever form this legislation is proclaimed, there will be likely serious Charter and other challenges for it to face, including the impact on charities and not for profits which express religious, ideological ideals and pursue them in their activities. Close attention to the development of this legislation will be important and a close pro-active review of the charity activities and due diligence procedures will be important in order to ensure limitation of liability for the organization, its directors, officers, employees and members.