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## **SENATE COMMITTEE’S INTERIM REPORT ON “COUNTERING THE TERRORIST THREAT”**

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

### **A. INTRODUCTION**

Responding to a mandate to study and report on security threats facing Canada, the Conservative majority of the Standing Senate Committee on National Security and Defence (the “Committee”) released its interim report, [\*Countering the Terrorist Threat in Canada\*](#) (the “Report”)<sup>1</sup> on July 8, 2015. The Report, which comes on the heels of the passage of [\*Bill C-51\*](#),<sup>2</sup> Canada’s latest anti-terror legislation, examines terrorist recruitment, operations, financing, prosecutions and other aspects of the security threats Canadians face as a result of the radicalization, extremist agitation and terrorist threats and violence in Canada and around the world and resulted in twenty-five recommendations (the “Recommendations”). While it is unlikely that the Recommendations will be acted upon in the near future, in part due to the Report’s interim nature, the dissent of one third of the Committee’s members and the election call, it remains important to assess the Recommendations and their impact on charities carrying out programs in conflict zones and donors to such organizations. The following *Anti-terrorism and Charity Law Alert* discusses the Recommendations from the Report that specifically relate to charities and highlights some

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<sup>1</sup> Report of the Standing Senate Committee on National Security and Defense, “Countering the Terrorist Threat in Canada: An Interim Report” (8 July 2015) 41<sup>st</sup> Parliament, 2<sup>nd</sup> Session, online: <<http://www.parl.gc.ca/Content/SEN/Committee/412/secd/rep/rep18jul15-e.pdf>>.

<sup>2</sup> *Anti-terrorism Act, 2015*, available online:

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

of the ways that the rushed nature of the Recommendations have resulted in the Report's failure to provide a thorough, balanced response to the very complicated issue of security threats facing Canada.

## **B. KEY RECOMMENDATIONS AFFECTING CHARITIES**

The following points highlight five of the Committee's Recommendations that should be of particular interest to charities. Although a number of other recommendations in the Report, such as recommendations 7 and 14, which both call for the establishment of publicly accessible lists of individuals considered to be a threat, contain questionable rationales and should be examined further, they do not directly relate to individuals and organizations in the charitable and not-for-profit sectors as the Recommendations discussed below do.

### 1. Recommendation 1

*The Government make it a criminal offence to be a member of a terrorist group in Canada.*

The Committee's response to the threat of violent extremism – recommending the Government make it a criminal offence to be a member of a terrorist group in Canada – is a somewhat impractical response to the threat described, in that it is not clear how the Government would determine what defines a “member” of a terrorist group. While many legitimate charitable and not-for-profit organizations struggle to identify what constitutes their membership in a corporate context on an ongoing and consistent basis, it is difficult to conceive that terrorist organizations would maintain reliable records of who might be considered to be a “member” of that organization, e.g., a formal member with voting rights, a non-voting member, a honorary member, an adherent, a volunteer, a supporter, a donor, etc., and given the serious nature of being a member of such organization, whether written consents from such “member” would be required. As well, when would such “membership” commence or terminate and what would be the consequences of a person resigning from membership or disputing that they were ever a “member” in the first place? The possibilities are endless. Further, would such a law have a retroactive perspective, criminalizing one's “membership” with organizations even during earlier periods when the organization had not borne the label of a terrorist group?

## 2. Recommendation 10

***The Government establish a publicly accessible database of those organizations which have had their charitable status removed on the basis of links to terrorism.***

The Committee heard from Cathy Hawara, the Director General of the Charities Directorate of the Canada Revenue Agency (“CRA”), that since 2008, CRA had found that “eight organizations have been a risk for terrorist financing and we ultimately decided to revoke the organizations’ charitable status.”<sup>3</sup> Notwithstanding that the Director General advised the Committee that the information concerning the revocation of charities and the reasons for revocation are publicly accessible information, the Report recommends that the “Government publish a publicly accessible database of those organizations which have had their charitable status removed on the basis of links to terrorism.”

This Recommendation raises a number of concerns. It raises the question of whether the Report’s authors carefully listened to the testimony of the Director General and her colleague, Mr. Alastair Bland, Director of the Review and Analysis Division at the Charities Directorate. The Recommendation leaves the impression that CRA has a criminal law mandate and that the eight organizations mentioned by the Director General lost their charitable status on a finding of fact to a criminal law standard, and not to non-terror related regulatory compliance matters that happened to be coupled with allegations of terrorism.

To that point, Mr. Bland was careful to advise the Committee that,

[CRA is] not out to prove terrorist financing, which is a criminal offence. We will focus on the rules in place and articulate to the organization how they are or are not compliant with those rules. Often we raise concerns about connections to terrorism, but our administrative role in this is to look at the rules under the *Income Tax Act*. If there is egregious non-compliance with those rules, then revocation is one of the tools we have at hand. Because we don’t have to go to *mens rea*, it’s not possible for us to know whether an organization is doing this on purpose with full intent and understanding or they are simply being abused, whether it’s wilful blindness or naiveté on their part. To be effective and to stop the unacceptable behaviour, we have an administrative role to play. With the organizations that we look at and audit, we identify an unacceptable risk and go in and do our audit functions. However, at

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<sup>3</sup> Standing Senate Committee on National Security and Defence, [Evidence](#) (Hawara), 41st Parliament, 2nd Session, 1 June 2015.

the end of the day *it's not necessarily fair to identify those organizations as being involved in a criminal act of terrorist financing.*<sup>4</sup> [emphasis added]

3. Recommendation 11

***When the Government removes charitable status on the basis of terrorism, it holds individuals responsible for being party to, or providing material support, for terrorist activity.***

The Report indicated that the Committee was “concerned there appears to be no liability for the directors and staff of these charities who have been linked to terrorism,” leading to the Recommendation that “when the Government removes charitable status on the basis of terrorism, it holds individuals responsible for being party to, or providing material support, for terrorist activity.”

As suggested above, this Recommendation demonstrates a lack of understanding of the CRA’s legislated role in auditing charities, the ultimate findings of the CRA in circumstances where charities have had their status revoked, and the rule of law exercised in the audit process. The *Criminal Code* already contains serious penalties for those found guilty of being party to or providing material support for terrorist activity.<sup>5</sup> However, if one is charged under the *Criminal Code*, there is a high evidentiary standard in place before one can be convicted, which is not in place when the CRA completes an audit of a charity.

If the Government were to implement such a recommendation, directors, officers, employees and even volunteers could be left to face some vague notion of liability (which is not defined in Recommendation 11) without the government ever having to meet the standard criminal burden of proof to tie the individuals to actual terrorism offences.

4. Recommendation 21

***The Muslim Brotherhood and entities closely associated with it, be reviewed by CSIS as a priority, with the intent of determining whether it should be designated a terrorist entity.***

The Committee suggested that “pre-engagement analysis should extend well beyond criminal record checks and include assessments of whether individuals and groups have facilitated divisive or

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<sup>4</sup> Standing Senate Committee on National Security and Defence, [Evidence](#) (Bland), 41st Parliament, 2nd Session, 1 June 2015.

<sup>5</sup> See *Criminal Code*, RSC 1985, c C-46, Part II.1.

intolerant messaging,” recommending that the “Muslim Brotherhood and entities closely associated with it, be reviewed by CSIS as a priority, with the intent of determining whether it should be designated a terrorist entity.”

Such a recommendation presupposes that the Muslim Brotherhood is a monolithic terrorist organization with affiliates in various countries acting under some type of common coordinated agenda, but provides no evidence to support that assumption or attempt to define what is meant by reference to the “Muslim Brotherhood.” This would similarly pose a significant problem for the Government to identify “entities closely associated” with the “Muslim Brotherhood,” whatever that organization consists of. The concern is that Recommendation 13 could lead to a reverse onus criminal offence based upon allegations and innuendos that the individual in question would need to disprove.

### C. CONCLUSION

The Report contains a number of other concerning recommendations, including references to “pre-criminal space”, mandatory screening of citizens involved in public outreach and inserting the Government into the training and certification of Muslim religious leaders. This is not overly surprising given the dearth of balanced representation from different interested sectors to the issues, including the charity and not-for-profit sector, concerning those invited to give evidence before the Committee. Unlike the Standing Committee on Finance hearings on terrorist financing in Canada and abroad held earlier this year and reporting in June,<sup>6</sup> this Committee’s Report did not hear from any charities or anyone speaking on behalf of the broader charitable sector. Such representation in the hearings held by the Standing Committee on Finance resulted in what many have considered as more balanced recommendations, including the recommendation that CRA consult with the charitable sector to determine how to develop more practical compliance protocols in dealing with anti-terrorism legislation.<sup>7</sup>

The end result is a set of interim Recommendations by the Senate that were obviously rushed and therefore did not reflect the “sober second thought” that the Senate should be bringing to a serious problem that

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<sup>6</sup> House of Commons, Standing Committee on Finance, *Terrorist Financing in Canada and Abroad: Needed Federal Actions*, (June 2015), (Chair: James Rajotte). online: <<http://www.parl.gc.ca/content/hoc/Committee/412/FINA/Reports/RP8048561/finarp13/finarp13-e.pdf>>. See also Terrance S. Carter, Nancy E. Claridge and Sean S. Carter, “House of Commons Finance Committee Tables Report on Terrorist Financing”, (2015) *Anti-terrorism and Charity Law Bulletin* No 40, online: <<http://www.carters.ca/pub/bulletin/charity/2015/atchylb40.pdf>>.

<sup>7</sup> See Recommendation 3, *supra* note 6.

involves a very difficult and complex area of the law. It is hoped that the Senate Committee will broaden its research, study the Standing Committee on Finance Report on Terrorist Financing, and complete some much needed homework before issuing its final report.



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