

Canadian Council for International Co-operation  
**An Overview of the Impact of the  
Anti-terrorism Act (Bill C-36) on Charities:  
Toward Developing a Due Diligence Response**

For Background Materials see Article “Pro-Active Protection of Charitable Assets”  
and “Charity Law Bulletin #10, #11 and #12 at [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

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## **Overview of Topics**

- Preliminary Comments
- Overview of Bill C-36
- Criminal Code Definitions Under Bill C-36 That Impact Charities
- Specific Criminal Code Offences That Impact Charities
- The Charities Registration (Security Information) Act Part 6 (Previously Bill C-16)
- Proceeds of Crime (Money Laundering) Act (Part 4)
- The Risk to Charities From Bill C-36
- Developing a Due Diligence Response to Bill C-36

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## **1. Preliminary Comments**

- **Bill C-36 Is an Extremely Complicated Piece of Legislation That Involves Co-ordinating the Provisions of Many Federal Acts**
- **Bill C-36 Needs to Be Read in Conjunction With Bill C-35 and Bill C-42**
- **The Full Impact of Bill C-36 May Not Be Fully Understood for Years**
- **Charities Will Need to Become Familiar With the Many Provisions of Bill C-36 and Guard Against Becoming Unwittingly Caught by the Legislation**
- **All Charities Will Need to Ensure Compliance With Bill C-36, Not Just International NGO's**
- **Charities Will Need to Become Proactive in**
  - **Understanding the Law**
  - **Striving Toward Due Diligence in Ensuring Compliance With the Law**

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## **2. Overview of Bill C-36**

- **Part 6 of Bill C-36 Dealing With Deregistration of Charities and Refusal to Grant Charitable Status Was Introduced in March 2001 As Bill C-16 but Was Withdrawn Because of Opposition**
- **Bill C-16 Has Now Been Incorporated Into Bill C-36 but Made More Stringent**
- **Bill C-36 Also Enacts Comprehensive Criminal Code Provisions Prohibiting Funding and Facilitating of Terrorist Activities and Terrorist Groups**

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- **Charities and Their Legal Counsel May Also Be Caught by the Proceeds of Crime (Money Laundering) Legislation As Amended by Bill C-36**
- **Charities and Their Directors Face Exposure to Liability Through Criminal Code Provisions That May Also Lead to Loss of Charitable Status**
- **Therefore, Charities Need to Become Familiar With Criminal Code Provisions of Bill C-36**
- **An Understanding of Criminal Code and Other Provisions of Bill C-36 Requires a Careful Review of the Details of the Legislation**

### **3. Criminal Code Definitions Under Bill C-36 That Impact Charities**

#### **“Terrorist Activities” Definition**

- **Bill C-36 Includes a Very Broad Definition of “Terrorist Activities” (S. 83.01)**

#### **“Terrorist Group” Definition**

- **Bill C-36 Also Includes a Very Broad Definition of “Terrorist Group” (S.83.01)**
- **Definition Covers Situations That May Impact Charities, Which Amongst Others Include (S. 83.05):**
  - **A “Listed Entity”**
  - **An Entity That Has As One of Its Purposes or Activities Facilitating or Carrying on of Terrorist Activities**
  - **An “Entity” Includes Trusts, Unincorporated Associations and Organizations**
  - **Also Includes an Association of Such Entities**

## **“Facilitation” Definition**

- **A Terrorist Activity Is Defined to Be “Facilitated” Whether or Not**
  - **The Facilitator Knows That a Particular Terrorist Activity Is Facilitated;**
  - **Any Particular Terrorist Activity Was Foreseen or Planned at the Time It Was Facilitated; Or**
  - **Any Terrorist Activity Was Actually Carried Out**

## **Impact of Definitions on Charities**

- **FACT SITUATION #1 - A Charity Funds an Agent in the Middle East That Operates a Hospital Which May Treat or Give Medicine to a Member of a Terrorist Group**
- **FACT SITUATION #2 – A Hospital Provides Medical Care or a Church Provides Sleeping Facilities to Student Protestors at an Anti-globalization Protest Who Erect a Road Block Leading to an International Economic Summit**

- **In Either Situation, the Charity Could Be Found to Be:**
  - **A Terrorist Group for Facilitating a Terrorist Activity**
  - **A Terrorist Group by Meeting the Definition of a “Listed Entity”**
- **The Charity Could Also Be Committing a Separate Criminal Offence of Facilitating a Terrorist Activity**
- **The Charity Could Also Lose Its Charitable Status Under the Deregistration Provisions of Part 6 of Bill C-36**

#### **4. Specific Criminal Code Offences That May Impact Charities**

**(S. 83.03) Directly or Indirectly Providing or Inviting the Provision of Property, Financial or Other Related Services That Facilitates or Carries Out a Terrorist Activity or Benefits a Terrorist Group**

**(S. 83.04) Directly or Indirectly Using or Possessing Property to Facilitate a Terrorist Activity**

**(S. 83.08) Dealing With Property, Facilitating Transactions or Financial or Related Services for the Benefit or at Direction of a Terrorist Group**

**(S. 83.11) Financial Institutions (Which May Include Charities) Are Obligated to Determine If They Possess Property of a “Listed Entity”**

**(S. 83.18) Directly or Indirectly Participating or Contributing to Any Actions That Enhances the Facilitation of a Terrorist Activity**

**(S. 83.21) Directly or Indirectly Instructing a Person to Carry Out Activities for the Benefit of a Terrorist Group**

**(S. 83.22) Directly or Indirectly Instructing a Person to Carry Out a Terrorist Activity**

**(S. 83.14) The Attorney General May Apply for an Order of Forfeiture of Property of a Terrorist Group**

### **Impact of Criminal Code Offences on Charities**

- **FACT SITUATION #1 – A Charity Through a Fundraiser Requests the Provision of Medical Supplies to Fund an Agent in the Middle East and Gives Instructions to the Agent to Use the Supplies at a Hospital That Might Treat or Give Medicine to a Member of a Terrorist Group**
- **FACT SITUATION #2 – A Charity Through a Fundraiser Solicits Funds for a Programme to Conduct Aerial Drops of Food Packages in Afghanistan Where Some Remaining Members of the Taliban Might Receive a Few of the Food Packages**

- **FACT SITUATION #3 – A Hospital Foundation Raises Funds for the General Operations of a Hospital That Provides Medical Care to Student Protestors at an Anti-globalization Protest Who Erect a Road Block Leading to an International Economic Summit**
- **FACT SITUATION #4 – A Religious Denomination Provides Funding to a Local Church That Assists Student Protestors by Providing Sleeping Facilities in its Church Basement in Fact Situation #3 Above**

## **5. *The Charities Registration (Security Information) Act Part 6 (Previously Bill C-16)***

### **When In Effect**

- **Part 6 Dealing With the Designation of Charities and the Refusal to Grant Charitable Status Comes Into Effect Upon Order in Council**

### **Practical Impact**

- **Even If a Charity Is Not Charged With a Criminal Code Offence, a Possible Violation of a Criminal Code Offence May Result in a Charity Losing Its Charitable Status Without the Protection of Due Process of Law**

### **Certificate Issued**

- **Solicitor General and Minister of National Revenue May Sign a Certificate That, Based Upon Security or Criminal Intelligence Reports, There Are Reasonable Grounds to Believe That a Registered Charity or an Applicant for Registered Charity Status:**
  - **Has Made, Makes or Will Make Available Any Resources, Directly or Indirectly to a Listed Entity**
  - **Made Available Any Resources, Directly or Indirectly, to an Entity (*Not a Listed Entity*) That Was and Continues to Be Engaged in Terrorist Activities or Activities in Support of Them**
  - **Makes or Will Make Available Any Resources, Directly or Indirectly, to an Entity (*Not a Listed Entity*) That Engages in or Will Engage in Terrorist Activities or Activities in Support of Them**

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- **Concerns Involving the Issuance of a Certificate**
  - **No Knowledge or Intent Is Required**
  - **Past, Present and Future Actions Can Be Considered**
  - **No Due Diligence Defence**
  - **No Definition of What “Indirectly” Means**
  - **No Definition of “In Support of” Given**
  - **No Warning Given or Opportunity to Change the Practices of a Charity**
  - **Low Standard of “Reasonable Belief” Utilized**
  - **No Explanation Required for the Issuance of a Certificate**

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## **Referral to Federal Court**

- **The Certificate Must Be Served Upon the Charity or the Applicant and Referred to the Federal Court for Judicial Consideration**
- **A Federal Court Judge Will Then Determine If the Certificate Is Reasonable and If So, Then the Charity Will Lose Its Charitable Registration or the Applicant Will Be Ineligible to Become a Charity**
- **The Federal Court Determination Is Not Subject to Appeal and the Certificate Is Final and is Not Subject to Review By a Court**

## **Evidence to be Heard**

- **The Federal Court “Shall” Examine in Private the Security or Criminal Intelligence Reports Considered by the Ministers**
- **The Federal Court May Also Examine Other Evidence In the Absence of the Charity If the Disclosure Would Injure National Security or the Safety of Anyone**
- **The Federal Court Can Admit Any Reliable and Relevant Information, Whether or Not the Information Is or Would Be Admissible in a Court of Law**
- **The Federal Court Can Receive In Private Information Obtained in Confidence From a Government, an Institution of a Foreign State, or From an International Organization, and Not Disclose Such Information to the Applicant or the Charity**

## **Effect of Certificate**

- **Once a Certificate Is Determined to Be Relevant by a Federal Court Judge, Then the Registration of That Charity Is Automatically Revoked**
- **This May Result in the Loss of Charitable Property Due to the 100% Tax to the Federal Government Imposed on Revocation of Charitable Status**

## **Time That the Certificate Is In Effect For**

- **A Certificate Is Effective for a Period of Seven Years, But May Be Cancelled Earlier Upon an Application Based Upon a Material Change of Circumstances**

## **6. Proceeds of Crime (Money Laundering) Act (Part 4)**

- ***Proceeds of Crime (Money Laundering) Act* Has Now Been Amended to Include the Financing of Terrorist Activities**
- **Regulations May Be Adopted That Could Include Charities and Those Who Raise Monies on Behalf of Charities**
- **Charities May Be Unwittingly Included in the Definition of Who the Act Applies to Because of the Exemption From Registration Under S.35 (2) 7 of the *Securities Act* for Charities That May be Seen As Authorizing Charities to Carry on the Business of Dealing in Securities**
- **Since Lawyers Fall under the Legislation, Monies Intended for Charities That Are Given Through a Lawyer will Be Under the Jurisdiction of the Legislation**

## **7. The Risk to Charities From Bill C-36**

### **Triple Threat from Bill C-36**

- **Past, Present and Future Acts Can Be Considered in Revoking or Denying Charitable Status**
- **Can Involve Criminal Code Offences, Loss of Charitable Status and Money Laundering Violations**
- **Can Result in Penalties, Imprisonment and Seizure of Charitable Property**

### **Lack of Fairness Before the Law Under Bill C-36**

- **Lack of Procedural Fairness**
  - **Limited Access to and Disclosure of Information**
  - **Normal Rules of Evidence Do Not Apply for Loss of Charitable Status**
  - **No Right of Appeal or Review for Loss of Charitable Status**

### **Limited Defence**

- **No Due Diligence Defence Available For Charities For Either**
  - **Criminal Code Offences**
  - **Loss of Charitable Status**
- **Knowledge And Intent Have Been Curtailed**
  - **Criminal Code Offences Involving Facilitation Involve Lower Threshold Of Knowledge And Intent Than Other Criminal Code Offences**
  - **Knowledge And Intent Is Not A Requirement At All For Loss Of Charitable Status**

## **Discrimination Concerns of Bill C-36**

- **Charities With Political, Religious and Ideological Purposes Will Be Suspect Because They in Part Meet the Definition of “Terrorist Activity”**
- **Religious, Ethnic and Environmental Charities May Be Scrutinized More Than Others**
- **Greater Scrutinization May Result in Discrimination Against Some Charities Because They Have “Religious or Ideological” Purposes**

## **Negative Impact on Charities From Bill C-36**

- **Negative Impact on the General Public’s Perception of Charities Being Associated With Possible Financing of Terrorism**
- **Negative Impact May Result by Creating a “Chill Effect” on Future Charitable Activities For International Religious and Humanitarian Aid Organizations**
- **May Restrict Co-operative Efforts With Charities in Other Countries That May Be Concerned About Exposure to Bill C-36, As Well As Similar Concerns by Canadian Charities About Anti-terrorism Laws in other Countries**

## **Serious Penalties and Liability to Charities and Directors**

- **Directors Could Be Charged With Criminal Code Offences**
- **Agents of Charities Involved in International Operations Could Expose Both the Charity and Directors to Liability**
- **Breach of Fiduciary Duty Arising From a Loss of Charitable Property Could Lead to Personal Liability for Directors**
- **Fines, Penalties and Criminal Code Charges Are Not Normally Included in Insurance Coverage**
- **Gifts by Donors to a Charity That is a Terrorist Group May Put The Donors at Risk in Violating the Criminal Code and Will Therefore Require that Donors Make Appropriate Inquiries of Intended Recipient Charities**

## **8. Developing a Due Diligence Response to Bill C-36**

### **The need for Due Diligence**

- **Charities Will Need to Exercise Due Diligence to Determine If There Is Compliance And/Or Risk With Bill C-36**
- **Due Diligence Is Not a Defence for Either**
  - **Criminal Code Offences**
  - **Part 6 Certificates Revoking Charitable Status**
- **Due Diligence, Though, Can Be Effective in**
  - **Avoiding Possible Violations of Bill C-36 Before They Occur**
  - **Evidencing Thoroughness in Operations in Order to Counter Allegations of Facilitating Terrorist Activity**
- **Undertaking Due Diligence Is Mandatory in Accordance With the Common Law Fiduciary Obligations of Directors to Protect Charitable Property**

## **Due Diligence Through Education**

- **All Aspects of Due Diligence Should Be Reflected in an Anti-terrorism Policy Statement**
- **Need to Develop Access to General Resource Materials on Bill C-36 and Other Anti-terrorism Legislation**
- **Need to Compare and Coordinate Educational Materials With Other Charities, Either Directly or Indirectly Through Umbrella Associations**
- **Need to Provide Educational Materials and Presentations to Board Members, Staff, Volunteers, Donors and Agents of the Charity**

## **Due Diligence at the Board Level**

- **CCRA May Conduct CSIS Security Checks of Board Members for New and Existing Charities**
- **Potential Board Members Should Be Advised That a CSIS Security Check May Be Carried Out on Them**
- **Potential Board Members Should Be Required to Complete Disclosure Statements to Determine Compliance With Bill C-36**
- **Consents From Potential Directors Should Be Obtained to Share the Results of the Disclosure Statement With Board Members and With Executive Staff, As Well As Nominating Committee Members, If Applicable**
- **Consents to Be a Director Should Include an Undertaking to Immediately Report Any Material Change in the Disclosure Statements**
- **Directors Should Be Required to Complete Yearly Disclosure Statements to Confirm Compliance With Bill C-36**

### **Due Diligence at Staff and Volunteer Level**

- **Potential Key Staff Persons Should Be Advised That a CSIS Security Check May Be Carried Out on Them**
- **Potential Staff and Volunteers Should Be Required to Complete Disclosure Statements to Determine Compliance With Bill C-36**
- **Consents Should Be Obtained From Staff and Volunteers to Allow the Charity to Share the Results of the Disclosure Statements With Other Executive Staff and Board Members**
- **Consents From Staff and Volunteers Should Include an Undertaking to Immediately Report Any Material Change in the Disclosure Statement**
- **Staff and Key Volunteers Should Be Requested to Complete Yearly Disclosure Statements to Confirm Compliance With Bill C-36**

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### **Due Diligence Checklist of Charitable Programs**

- **A Due Diligence Compliance Checklist Should Be Developed to Determine Whether Charitable Programs Comply With Bill C-36 and the Level of Risk That Might Be Encountered**
- **A Due Diligence Compliance Checklist Should Incorporate All Aspects of the Anti-terrorism Policy That Apply to a Charitable Program**
- **Each Existing and Proposed Charitable Program Should Be Evaluated in Accordance With the Due Diligence Compliance Checklist**
- **The Results of the Due Diligence Checklist Should Be Communicated to the Board of Directors**
- **A Due Diligence Checklist of All Charitable Programs Should Be Repeated on a Regular Basis, i.e. Once a Year**

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## **Due Diligence With Umbrella Associations**

- **Umbrella Associations to Which a Charity Belongs Can Expose the Charity, the Umbrella Association, and Other Members of the Association to Risk of Being Part of a “Terrorist Group”**
- **Members of an Umbrella Association Should Be Required to Complete Disclosure Statements to Determine Compliance With Bill C-36**
- **Consents Should Be Obtained From Members to Share the Results of the Disclosure Statements With the Directors of the Umbrella Association, As Well As With Its Members**

- **Consents From Members Should Include an Undertaking to Immediately Report Any Material Change in the Disclosure Statement**
- **Members of the Umbrella Association Should Be Required to Complete Yearly Disclosure Statements to Confirm Compliance With Bill C-36**
- **Members of the Umbrella Association Should be Required to Adopt Their Own Anti-terrorism Policy Statements**



## **Due Diligence Concerning “Affiliated Charities”**

- **“Affiliated Charities” Means Other Registered Charities Which the Charity Works in Conjunction With, Either Through Informal Cooperation or by Formal Joint Venture or Partnership Agreements**
- **Affiliated Charities That Either Receive Funds From the Charity or Give Funds to the Charity Can Create Risks to the Charity If They Are Not Complying With Bill C-36**
- **Affiliated Charities Should Be Required to Complete Disclosure Statements to Confirm Compliance With Bill C-36**

- **Affiliated Charities Should Undertake to Immediately Report Any Material Change in the Disclosure Statements**
- **Affiliated Charities Should Be Required to Complete Yearly Disclosure Statements to Confirm Compliance With Bill C-36**
- **Affiliated Charities Should Be Required to Provide Releases and Indemnities to the Charity in the Event of Non-compliance With Bill C-36**
- **Affiliated Charities Should Be Required to Adopt Their Own Anti-terrorism Policy Statement**

## **Due Diligence With Regards to Third Party Agents**

- **All Third Party Agents of a Charity Can Expose a Charity to Liability by Directly or Indirectly Being Involved in the Facilitation of a “Terrorist Activity”**
- **Agents That Act on Behalf of a Third Party Agent for a Charity May Also Expose the Charity to Liability**
- **All Direct and Indirect Third Party Agents Should Be Required to Complete Disclosure Statements to Determine Compliance With Bill C-36**
- **Agents Should Undertake to Immediately Report Any Material Change in the Disclosure Statements**

- **Agents Should Be Required to Complete Yearly Disclosure Statements to Confirm Compliance With Bill C-36**
- **Agents Should Be Required to Provide Releases and Indemnities to the Charity in the Event of Non-compliance With Bill C-36**
- **Agents Should Be Required to Adopt Their Own Anti-terrorism Policy Statements**

## **Due Diligence Concerning Donors**

- **Need to Regularly Review List of Donors of a Charity to Check for “Listed Entities” or Organizations That May Be Terrorist Groups**
- **Are Restrictions Imposed by Donors on the Use of Funds That Could Lead to Violations of Bill C-36?**
- **Is a Donor Able to Use a Program of a Charity to Permit the Flow Through of Funds Directly or Indirectly to a Terrorist Activity?**

## **Documenting Due Diligence Through an Anti-terrorism Policy Statement**

- **An Anti-terrorism Policy Statement Should Be Adopted to Document All Aspects of Due Diligence on Bill C-36, Including All Applicable Documents, Such As Statements of Disclosure and Checklists**
- **Board of Directors Should Appoint a Committee and a Key Staff Person to Develop, Implement and Review the Charity’s Anti-terrorism Policy Statement**
- **The Anti-terrorism Policy Statement Should Set Out Reporting Requirements in the Event That There Is an Actual or Potential Violation of Bill C-36**

- **The Anti-terrorism Policy Statement May Be Published on the Charity's Website, With Excerpts Possibly Being Reproduced in Reports and Brochures of the Charity, As Well As Communications to Donors**
- **Donors Should Be Advised That a Full Copy of the Anti-terrorism Policy Is Available**

### **Evidencing Due Diligence With CCRA**

- **Download as Much Evidence of Due Diligence Compliance to CCRA as Possible**
- **A Copy of the Anti-terrorism Policy Statement Should Be Forwarded to CCRA With a Request That CCRA Advise of Any Deficiencies in the Policy Statement**
- **If a New Program of a Charity May Result in Possible Non-compliance With Bill C-36, Then a Letter Requesting Approval in Advance of the Program Should Be Sought From CCRA**
- **Copies of All Agency Agreements Should Be Filed With CCRA With a Request That CCRA Approve the Agreements, Specifically as They Relate to Compliance With Bill C-36**

## **Evidencing Due Diligence With Legal Counsel**

- **Involvement of Legal Counsel Can Provide Tangible Evidence of Due Diligence, As Well As Assisting to Insulate the Charity and the Board From Liability**
- **Legal Counsel Can Be Utilized to Review, Comment and Amend**
  - **Anti-terrorism Policy Statement**
  - **Disclosure Statement**
  - **Compliance Checklist**
  - **Particulars of a Charitable Program**
- **Legal Counsel Can Also Assist in Communicating With CCRA to Evidence Due Diligence Compliance**