

2002 Church and The Law Seminar – November 5, 2002

The Chill Effect of Anti-terrorism Laws on Churches & Religious Charities: What to Do in Response

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

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**2002 CHURCH & THE LAW
SEMINAR**

**The Chill Effect of Anti-terrorism Laws
on Churches & Religious Charities:
What to Do in Response**

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

For Background Materials See Article by Same Name
And "Charity Law Bulletins #10, #11, #12, #14 and #16"
at www.charitylaw.ca and www.antiterrorismlaw.ca
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**1. Background and General Comments About
Anti-terrorism Legislation**

- Bill C-36 Is an Extremely Complicated Piece of Legislation That Involves Coordinating the Provisions of Many Federal Acts
- Bill C-36 Needs to Be Read in Conjunction With Bill C-35 *An Act to Amend the Foreign Missions and International Organizations Act* (Proclaimed in Force as of April 30, 2002) and Bill C-17 *Public Safety Act* Introduced October 31, 2002 (Formerly Bill C-55 and Bill C-42) and Subsequent Regulations.
- The Full Impact of Anti-terrorism Legislation May Not Be Fully Understood for Years
- 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 Deals With Deregistration of Charities and Refusal to Grant Charitable Status
- Bill C-36 Also Enacts Super Criminal Code Provisions Prohibiting Funding and Facilitating of Terrorist Activities and Terrorist Groups
- Charities and Their Legal Counsel May Also Be Encompassed by the Proceeds of Crime (Money Laundering) Legislation As Amended by Bill C-36 and Regulations Issued under it
- Charities and Their Directors Face Exposure to Liability Through Criminal Code Provisions That May Also Lead to Loss of Charitable Status
- An Understanding of Criminal Code and Other Provisions of Bill C-36 Requires a Careful Review of the Details of the Legislation

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**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)
- Definition Covers Situations That May Impact Charities, Which Amongst Others Includes:
 - Acts or Omissions,
 - Both in and Outside of Canada,
 - Committed in Whole or in Part for Political, Religious or Ideological Purposes, Objectives or Causes,

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- With the Intention of Intimidating the Public With Regard to Its Security, Including its Economic Security,
- Causes Injury, Substantial Property Damage or a Serious Disruption of Essential Services,
- Includes Conspiracy, Attempt or Threat to Commit a Terrorist Activity,
- Includes Being an Accessory After the Fact or Counseling in Relation to Any Terrorist Act

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- Definitions Also Include Actions Taken Against “Internationally Protected Individuals” That May Result in Creation of Domestic Terrorists
- Bill C-35 Extends the Definition of “International Organizations” to Include “an Inter-governmental Conference” and Extends the “Internationally Protected Person” Status to Foreign Representatives Including Diplomatic and Other Officers At Economic Summits.
- The Means of Transportation and the Area That the Internationally Protected Persons Are to Meet at Are Also Protected

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- Any Threatening or Commissioning of Acts to Such “Persons”, “Official Premises”, or “Means of Transport” Which is Likely to Endanger the Life or Liberty of Such Persons is a Terrorist Activity
- Therefore Protestors Blocking a Road to a WTO Conference or a G8 Summit Run the Risk of Committing a Terrorist Activity
- Bill C-17 Will No Longer Provide the Government with the Statutory Authority to Create a “Controlled Access Military Zone”
- The Fact Remains That Military Zones Can be Created under Bill C-35 or by Royal Prerogative

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“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”, i.e. An Entity That The Government Has Reasonable Grounds To Believe
 - Has Knowingly Carried Out, Attempted To Carry Out, Participated In Or Facilitated A Terrorist Activity, or
 - An Entity Is Knowingly Acting On Behalf Of , At The Direction Of, Or In Association With Such 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

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“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
- The Definition of “Facilitate” Continues to Apply to the Entire “Part” of The Criminal Code and Not to a Particular “Section” Requiring Knowledge and Intent
- The Broad Definition of Facilitation Therefore Applies to All Criminal Code Offences Involving Terrorism Without Reference to the Modifier of Having Knowledge and Intent in 83.19(1)

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- To “Facilitate” a Terrorist Activity May Require Only a Limited “Mens Rea” or Guilty Mind, Particularly Where There Is No Requirement for Knowledge and Intent, i.e. S. 83.04(a)
- This Is Different From the 1999 U.N. Convention for the Suppression of the Financing of Terrorism That Uses More Intentional Language of “Willfully” and “Knowledge” in Describing Offences of Financing Terrorism
- Under Bill C-36, Unexpected Actions of a Charity May Therefore Result in a Charity Unwittingly Becoming a Terrorist Group
- In Addition, “Actus Rea” or Guilty Act is No Longer a Necessity

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4. Specific Criminal Code Offences That May Impact Charities under Bill C-36

(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”

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(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

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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

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- **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
- **In All of These Fact Situations, the Charity, the Fundraiser, the Agent and the Donor May Be Found to Have Violated the Criminal Code, With Corresponding Loss of Charitable Status.**

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5. The Charities Registration (Security Information) Act (Part 6) under Bill-36

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:

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- 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 Grounds to Believe” Utilized
- No Explanation Required for the Issuance of a Certificate
- “Confidential” Information Considered may not be Disclosed to the Charity Which May Severely Handicap the Ability of the Charity to Present a Competent Defence

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Referral to Federal Court Judge

- The Certificate Must Be Served Upon the Charity or the Applicant and Referred to a Single Federal Court Judge for Judicial Consideration
- The Charity or The Applicant is to be Provided With a Reasonable Opportunity to be Heard After Being Provided With a Judicial Summary of Information in Order to Enable The Charity or The Applicant to be Reasonably Informed of the Circumstances Giving Rise to the Certificate
- The Fed. Ct. 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 Fed. Ct. Judge’s Determination Is Not Subject to Appeal or Review by any Court which makes the Certificate Final

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Evidence to be Heard

- The Fed. Ct. Judge “Shall” Examine in Private the Security or Criminal Intelligence Reports Considered by the Ministers
- The Fed. Ct. Judge May Also Examine Other Evidence in the Absence of the Charity If the Disclosure Would Injure National Security or the Safety of Anyone
- The Fed. Ct. Judge Can Admit Any Reliable and Relevant Information, Whether or Not the Information Is or Would Be Admissible in a Court of Law
- The Fed. Ct. Judge 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

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Effect of Certificate

- Once a Certificate Is Determined to Be Relevant by a Fed. Ct. 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

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6. Proceeds of Crime (Money Laundering) Act (Part 4) under Bill C-36

- *Proceeds of Crime (Money Laundering) Act* Has Now Been Amended to Include the Financing of Terrorist Activities
- 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
- Subsequent Regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, Released on May 9, 2002, Include Definitions such as “Financial Entity” and “Money Services Business” that May Implicate Charities under that Act

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- Charities Need To Understand Legislation Because of:
 - Possible Reporting Duties it May be Responsible For
 - Understanding When the Charity May be the Subject of Reporting by Another Entity
 - Who the Information Goes to, ie. FINTRAC
 - What the Information May be Used For, ie. Deregistration Under “Charities Registration Act”
- Since Lawyers Fall Under the Legislation to a Limited Extent, Monies Intended For Charities Given Through a Lawyer May Be Under the Jurisdiction of the Legislation

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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

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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

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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

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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 NGOs.
- Exposure of the Charity and it’s Board to Third Party Liability on Behalf of Victims of 9/11 “Terrorist Attacks”, i.e. 1 Trillion Dollars Law Suit Against, Among Others, Saudi Arabian Charities

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- 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
- A Charity Must Now Look not Only at the Donor and their Funds, but the Means by Which the Donor Raised its Funds i.e. Author of Book Reported to “encourage” Terrorism who offers all proceeds to Oxfam, resulting in Oxfam Refusing Donations

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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

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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
- But 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

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- Undertaking Due Diligence Is Mandatory in Accordance With the Common Law Fiduciary Obligations of Directors to Protect Charitable Property

What Does Due Diligence Include

- Due Diligence Through Education
- Due Diligence at the Board Level
- Due Diligence at Staff and Volunteer Level
- Due Diligence Checklist of Charitable Program

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- Due Diligence With Umbrella Associations
- Due Diligence Concerning “Affiliated Charities”
- Due Diligence With Regards to Third Party Agents
- Due Diligence Concerning Donors
- Documenting Due Diligence Through an Anti-terrorism Policy Statement
- Evidencing Due Diligence With CCRA
- Evidencing Due Diligence With Legal Counsel

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