

MAJOR CHANGES TO ANTI-TERRORISM LAWS RECOMMENDED BY HOUSE OF COMMONS SUBCOMMITTEE REPORT

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A. INTRODUCTION

Even amidst the perception of urgency in the fall of 2001, federal legislators introducing the unprecedented powers under Canada's new anti-terrorism legislation recognized that these powers would need to be periodically reassessed and monitored by Parliament. And while charities are the specific focus of a substantial portion of the anti-terrorism legislation, there has historically been little recognition by Parliament that the legislation poses any ongoing impediment to the operations of charities. However, with the publication of the final report of the House of Commons Subcommittee on the Review of the *Anti-terrorism Act* ("House Subcommittee") on March 27, 2007, pursuant to Section 145 of the *Anti-Terrorism Act* ("ATA"), there seems to be the first echoes of acknowledgement from Parliament of the distressing reality that charities face under this legislation.

B. RECOMMENDED CHANGES TO THE *CHARITIES REGISTRATION (SECURITY INFORMATION) ACT*

Among the recommendations of the House Subcommittee's report are substantial changes to the *Charities Registration (Security Information) Act* ("*Charities Registration Act*"), which was created by the ATA and outlines the process of issuing of a "certificate" by which a charity can be deregistered. In order to remedy some of the deficiencies in the law surrounding the deregistration process and bring clarity with respect to the due diligence burden that charities face, the House Subcommittee has recommended changes including:

1. "Due Diligence" defense for charities facing deregistration:

The House Subcommittee recommends that the *Charities Registration Act* be amended so that the Federal Court judge considering a certificate will not find the certificate to be reasonable where a charity establishes that it exercised due diligence to avoid the improper use of its resources under section 4(1)(a),(b),and(c) of the *Charities Registration Act*. The House Subcommittee recognized the "dramatic" impact on charities that are subjected to the deregistration process, and the resulting risk of civil and criminal liability for their boards of directors. The committee also recognized that a charity's due diligence best efforts "may be inadequate... and not suffice", particularly in situations where charities are operating in international disaster areas that necessitate rapid aid and assistance efforts.

2. Creation of "Best Practice" guidelines for Canadian charities:

The House Subcommittee recommends that the Canada Revenue Agency consult with the charitable sector and develop "made in Canada 'best practice' guidelines" to provide assistance to charities in their due diligence assessments. The House Subcommittee recognized that there is "little practical guidance" in Canada that would assist charities in introducing due diligence procedures. The House Subcommittee advises that these best practice guidelines should incorporate "both general policies and checklists that could be administered by applicants and registered charities" in carrying out their due diligence assessments.

3. Institution of a knowledge (*mens rea*) requirement:

The House Subcommittee recommends that the words "the applicant or registered charity knew or ought to have known that" be added into paragraphs (4)(1)(b) and (c) of the *Charities Registration Act* to institute a clear *mens rea* requirement. The House Subcommittee noted that it believes that it is

“unfair to penalize an organization when it had no reason to believe that its resources were assisting an entity engaged in terrorism.”

4. Right to Appeal a Finding of Reasonableness

The House Subcommittee recommends that a charity be able appeal to the Federal Court of Appeal a decision by a Federal Court judge that a referred certificate is reasonable. The House Subcommittee recognized that the certificate process, as it currently exists under the *Charities Registration Act*, is “parallel” to the deeply controversial security certificate process under the *Immigration and Refugee Protection Act* (“IRPA”) and that the recommended changes are needed to begin to remedy the certificate process.

C. OTHER RECOMMENDED CHANGES IMPACTING CHARITIES

There are several other recommended legislative changes that would impact charities in the House Subcommittee’s report. One of these recommendations is the establishment of a “Panel of Special Counsel” to test the need for confidentiality and closed hearings, as well as to test the evidence not disclosed to a party in proceedings. The Panel of Special Counsel would participate in proceedings surrounding the establishment of “listed entities,” the deregistration process under the *Charities Registration Act*, and the security certificate process under the IRPA.

The House Subcommittee also recommends that section 145 of the ATA be amended to require another comprehensive review of its provisions and operation, to be commenced no later than December 31, 2010. While the recommended changes briefly touched on by this article are a significant step forward for charities, there are many other recommendations of a general scope from the House Subcommittee that are potentially of concern to charities, including the recommended creation of a new *Criminal Code* offence for the “glorification of a terrorist activity for the purpose of emulation.”

D. CONCLUSION

The House Subcommittee report is a marked departure from a Senate Subcommittee report on the ATA that was released earlier this year. The Senate report, though recognizing many of the same problems with the *Charities Registration Act* as the House Subcommittee, recommended very little change to the substance of the *Charities Registration Act*. With many of the recommended changes mirroring those proposed by the Canadian Bar Association Anti-terrorism Committee in submissions to government made in 2001 and 2005, the House Subcommittee report goes a long way in recognizing that Canada's existing anti-terrorism legislation can have a considerable negative impact on charities and needs to be changed. Its recommendations seek to provide some protection and assistance for charities employing integrated and effective anti-terrorism due diligence procedures, and recognize the necessity of those procedures for charities under Canada's legislative and regulatory regime. The ultimate impact of the House Subcommittee's recommendations, and whether these recommendations will translate into any legislative or regulatory changes, however, remains to be seen.