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**ANTI-TERRORISM AND CHARITY LAW ALERT NO.7**

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# THE THREE YEAR REVIEW OF C-36 *ANTI-TERRORISM ACT*: THE ONGOING CONSEQUENCES AND IMPACT FOR CANADIAN CHARITIES

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## A. INTRODUCTION

Since the burgeoning of anti-terrorism initiatives and legislation in the fall of 2001, charities have been specifically singled out as a "weak point" in the 'war on terrorism'.[1] A significant portion of Canada's particular manifestation of anti-terrorism legislation that directly relates to charities can be found in the *Anti-terrorism Act*, now Chapter 41 of the *Statutes of Canada 2001*, commonly referred to as C-36 ("C-36"). The federal government's substantial legislative and regulatory anti-terrorism initiatives have left many Canadian charities unsure of how to comply and implement their own due diligence procedures. With little guidance or examples to refer to, C-36 has become the lightning rod for much of the criticism surrounding the government's anti-terrorism initiatives. Civil society organizations, as well as professional associations such as the Canadian Bar Association, have reiterated their ongoing concerns and objections to fundamental sections of the legislation during the statutory review process of the Act described below. Among other important revelations that have surfaced during the review of C-36, Canada Revenue Agency ("CRA") has

[1] Financial Action Task Force on Money Laundering, "Combating the Abuse of Non-profit Organizations: International Best Practices" 11 October 2002.

given important testimony concerning the role of security certificates, the increasing frequency of investigations and audits of charities and potential applicants and the circumstances around which charities are voluntarily giving up their charitable status or withdrawing their applications. The purpose of this Alert is to briefly explain why and how the statutory review of C-36 is proceeding, to highlight some of the more important submissions and testimony on C-36, and to explain why the review and the legislation itself is relevant to Canadian charities.

## B. EXPANDING THE STATUTORY REVIEW

The statutory review of C-36 by Parliament was included in that act as a potential safeguard, however limited, in response to the substantial concerns over the unprecedented nature of the powers and regulatory regimes instituted by the legislation. Section 145 of C-36 mandates a "comprehensive review of the provisions and operations of the Act," stipulating that within three years of C-36 gaining Royal Assent, either a committee of the House, or the Senate, or both, should undertake this review.[2] These committees must, within a year after the review is undertaken, submit a report on the review to Parliament, including a statement of any changes that the committee recommends. Responsibility for the review of C-36 was taken up in early 2005 by the House of Commons Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness ("House Subcommittee on Public Safety and National Security") and by the Special Committee of the Senate on the *Anti-terrorism Act*.

The review, as many prominent politicians, legal scholars and representatives of civil society have publicly stated, must be broadened to encompass more than just C-36 as a single piece of legislation. Anti-terrorism initiatives in Canada include many other pieces of important and interacting pieces of legislation such as Bill C-7, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, Bill C-35, *An Act to amend the Foreign Missions and International Organizations Act* and Bill C-45, *An Act to amend the Criminal Code* (Criminal Liability of Organizations), all of which have received Royal Assent and are now in force. The federal government's anti-terrorism initiatives also encompass many non-legislated initiatives, such as the bilateral

[2] 1st sess., 37th Parl., 2002 (assented to 18 December 2001, S.C. 2001, c. 41; proclaimed in force 24 December 2001).

Canada-US *32 Point Smart Border Agreement*, and the adoption in Canadian law of lists of hundreds of entities and individuals purportedly linked to terrorism by means of the *United Nations Suppression of Terrorism Regulations*.[3]

## C. PUBLIC SUBMISSIONS CONCERNING REVIEW OF C-36

The review and hearings by the committees of the Senate and the House of Commons are not yet complete. Substantial debate, however, has been already initiated in both committees, informed by many important submissions and testimonies that have been given. Among those organizations contributing to the debate are the Canadian Bar Association ("CBA"),[4] the International Civil Liberties Monitoring Group,[5] and the Canadian Association of University Teachers.[6] In particular, the CBA, in its press release accompanying the submission, pressed the government to expand the scope of the review and create proper oversight mechanisms to ensure accountability, stating that "the government has not yet come up with the right equations" that otherwise means that "violations of fundamental rights are creeping into Canadian law." With respect to charities, the CBA submission incorporates much of the analysis and concerns that were raised in *Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law.*[7] The message of many of the submissions is that the unprecedented provisions of C-36 and other anti-terrorism legislation constitute a substantial threat to fundamental individual rights and necessitates that immediate action be taken, whether it be the withdrawal of certain overly onerous provisions, substantive oversight mechanisms and/or the establishment of detailed compliance guidelines.

[3] For more information concerning non-legislative anti-terrorism initiatives, particularly those that involve information sharing and collection and have ramifications for Canadian charities, please refer to *Anti-terrorism and Charity Law Alert No.4* available at http://www.carters.ca/pub/alert/atcla/atcla04.pdf.

[4] Canadian Bar Association, "Submission on the Three Year Review of the Anti-terrorism Act," available at http://www.cba.org/CBA/submissions/pdf/05-28-eng.pdf

[5] International Civil Liberties Monitoring Group, "Anti-Terrorism and the Security Agenda: Impacts on Rights, Freedoms and Democracy," available at: http://www.carters.ca/terorism/Public%20Forum%20-%20ICLMG.pdf

[6] Canadian Association of University Teachers, "Submission to the House of Commons Subcommittee on Public Safety and National Security Regarding the Review of the Anti-Terrorism Act," available at: http://www.caut.ca/en/publications/briefs/2005anti_terrorism_brief.pdf.

[7] Terrance S. Carter, "Charities and Compliance with Anti-terrorism Legislation: The Shadow of the Law," Oct. 8, 2004, available at: http://www.carters.ca/pub/article/charity/2004/tsc1028a.pdf

## D. FEDERAL CABINET MINISTERS' TESTIMONY

Key federal cabinet ministers that have given testimony before the Parliamentary committees thus far include Deputy Prime Minister Anne McLellan and Justice Minister Irwin Cotler. During Justice Minister Irwin Cotler's recent appearance before the Special Committee of the Senate on the *Anti-terrorism Act*,[8] Cotler did not reiterate his specific concerns he had publicly voiced over the legislation. In a speech to the Canadian Bar Association in August 2004 Cotler had expressed his openness "to the idea of an integrated and inclusive approach to appreciating the fallout with respect to civil liberties from our whole approach to anti-terrorism law and policy in this country which is not limited to the *Anti-terrorism Act*."[9]

Though Cotler has always supported the need for anti-terrorism legislation over the years, he had been vocal concerning significant shortcomings of C-36 and the other pieces of anti-terrorism legislation. In an article he wrote for the Ottawa Citizen, September 14, 2002, Cotler suggested a "cluster of concerns" with Canada's anti-terrorism legislation, including the definition of terrorism, the lack of a strong *mens rea* (guilty mind) requirement and effective safeguards against discriminatory application of the legislation. With reference to the specific ramifications for charities of anti-terrorism legislation, Cotler noted in the article that "the legislation also imposes significant liability on charities without provision for appropriate defenses, such as due diligence, thereby 'chilling' the work of charities."[10] However, these concerns were absent from his testimony before the Special Committee of the Senate.

## E. CANADA REVENUE AGENCY OFFICIALS' TESTIMONY

Senior officials from CRA in their testimony provided a vigorous defense of C-36 and the anti-terrorism measures carried out by the agency. There were several instructive revelations, however, that emerged from their testimony before the House Subcommittee on Public Safety and National Security.[11] Though CRA

[8] Justice Minister Irwin Cotler, transcript available at: http://canada.justice.gc.ca/en/news/sp/2005/doc_31398.html
[9] Speech given by Justice minister Irwin Cotler to the Canadian Bar Association on "Law and Borders: Agenda for Justice", August 16, 2004 as reported by *The Ottawa Citizen* on August 17, 2004.
[10] Irwin Cotler, "Two Cheers for Anti-terror Laws" *The Ottawa Citizen*. September 14, 2002. B7.
[11] Subcommittee on Public Safety and National Security of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness for Wednesday, May 18, 2005, transcripts available at: http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=117505

officials stressed the "necessity of the legislation" to the Subcommittee, they testified that controversial provisions, such as the security certificate provisions under the *Charities Registration (Security Information) Act*, constituted "prudent reserve power" as opposed to the powers already available to CRA under the *Income Tax Act*.

Senior CRA officials further testified that the powers bestowed upon them before C-36 were sufficient to address situations relating to possible cases of the facilitation of terrorist activities. As CRA Commissioner Michel Dorais acknowledged:

> In all fairness, if there was an organization that had some link with terrorist organizations, it would probably be faulting on other grounds, so before we'd get to that point the process of decertification would already be launched on the grounds of money not flowing for charity purposes or books not being kept properly.

The officials also acknowledged that the CRA has not issued any security certificates to date. When confronted with why the provisions of C-36 were needed, the officials pointed to the deterrence effect of the legislation and suggested that it prevents potential terrorist activity within the charitable sector by inducing the voluntary deregistrations of charities. The officials testified that information obtained through CRA audits, investigations, and from "shared information from other agencies," was being collected and compiled, and in a number of cases, where CRA sought additional information from the charity or applicant, it "prompt[ed] the organizations to withdraw the applications" or to "not question when a revocation action [had] taken place."

The frequency of these investigations and the availability of staff to carry them out has recently increased as CRA officials noted they had received "additional resources" and were "creating a new capability for [a] more in-depth analysis." CRA officials testified that their goal was to double the number of charities audited each year in keeping with the initiative to "strengthen and enhance the monitoring of charities." Some of the aspects of these audits by CRA that relate to anti-terrorism issues and investigations that officials recognized in their testimony included: the extent to which there was monitoring how donations were being utilized, whether there was proper financial record keeping and reporting in compliance with legislation, the control and direction the charity has over its resources, and where and from whom donations are being collected.

It is interesting to note that, as the CRA officials recognized in their testimony, the security certificate provisions under C-36 are directly drawn from the *Immigration and Refugee Protection Act*'s security certificate process,[12] which the United Nations Working group on Arbitrary Detention expressed "grave concerns" about in June 2005 after spending several weeks in Canada at the federal government's invitation.[13] In addition, the reference to 'prudent reserve power' by CRA officials gives credence to the concern raised by many charities in Canada that they are operating under 'the shadow of the law.'

## F. CONCLUSION

Charities continue to be very much a focal point of the federal government's anti-terrorism initiatives. Important information provided in testimony from CRA officials to the Parliamentary review committees underscores the increasing level of investigation, intelligence gathering, and monitoring of charities concerning anti-terrorism issues that is taking place. With the knowledge and assurance of the substantive powers afforded to CRA by C-36, CRA is continuing to utilize existing powers under the *Income Tax Act*, as well as approaching charities directly with information gathered from investigations and audits, to bring about the deregistration or withdrawal of application for charitable status of organizations that CRA has anti-terrorism concerns with. Consequently, charities must continue to be vigilant and proactive in their due diligence procedures in order to ensure compliance with C-36 and other anti-terrorism legislation.

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[12] R.S.C. 2001, c. 27 (see "Division 9: Protection of Information).

[13] Press Conference by the Working group on Arbitrary Detention of the United Nations Commission on Human Rights. June 15, 2005. Ottawa, Ontario. Available at http://www.unhchr.ch/huricane/huricane.nsf/view01/3BF0D474B35B1526C125702200470A2A?opendocument

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