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# **PROVOST'S FORUM ON INTERNATIONAL AFFAIRS 2008: COUNTER-TERRORISM AND CIVIL SOCIETY**

**University of Iowa – April 19, 2008**

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## **The Impact of Anti-terrorism Legislation On Charities in Canada: The Need for Balance**

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**By Terrance S. Carter, B.A., LL.B. and Trade-Mark Agent  
Assisted By Sean S. Carter, B.A., LL.B. and J.D. Candidate  
and Nancy E. Claridge, B.A., M.A., LL.B.**

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**A. INTRODUCTION**

As we have recently passed the sixth anniversary of the terrorist attacks on New York City, Pennsylvania and Washington, D.C., which prompted the introduction of increasingly strict anti-terrorism legislative measures around the world, the threat of further attacks has not dissipated and the political will to eradicate terrorist organizations and their supporters remains strong. In this regard, charitable organizations remain a significant focus of the war on terror, and such organizations have repeatedly, but arguably unjustifiably for the most part, been dubbed the “crucial weak point”<sup>1</sup> in the war on terror.

The co-ordinated attack on terrorist financing and activities has revealed that in many cases, charitable activities that were previously thought to be commonplace and uneventful may now lead to a charity becoming susceptible to criminal charges for having facilitated “terrorist activities” or for supporting “terrorist groups.” This, in turn, may result in a charity losing its charitable status and its directors being exposed to personal liability. In addition, financial transactions involving charities may lead to allegations of terrorist financing or to the surveillance and monitoring of a charity’s financial activities. It has become increasingly evident that charities, both in Canada and worldwide, have become one of the silent victims of the global

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\* This paper is based in part on a paper by the author, entitled “The What, Where and When of Canadian Anti-Terrorism Legislation for Charities in the International Context,” from the CBA/OBA 4<sup>th</sup> National Symposium on Charity Law (May 11, 2006), as well as a submission to the Air India Inquiry (October 25, 2007), available at [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca). The author wishes to thank Kimberley A. LeBlanc, Student-at-Law, for her assistance in preparing this paper.

<sup>1</sup> FATF, *Combating the Abuse of Non-Profit Organisations: International Best Practices* (Paris: FATF, 2002) at 1.

anti-terrorism initiatives that have been carried out during the past five years. Charities face the uncertainty of whether overly broad legislation will be applied to their activities, a literally impossible task of ensuring strict compliance, and uncertainty as to whether they will be able to effectively continue their operations in the face of mounting restrictions.

In many instances, the enforcement of the law *per se* may not be the key issue. The concern may not be what the authorities *will do* in enforcing anti-terrorism legislation, but rather that they *may* enforce such legislation. As a result, part of the impact of Canada's anti-terrorism legislation may have as much to do with coping with a fear of the law as it will with coping with the law itself. This "shadow of the law" effect may create a chill upon charitable activities in Canada, as charities may hesitate to undertake programs that might expose them to violation of anti-terrorism legislation, and with it the possible loss of their charitable status. This effect is coupled with a fundamental tension within Canada's anti-terrorism legislative regime with respect to charities: while charities are the specific focus of a substantial portion of the anti-terrorism legislation, there has historically been little recognition by Parliament or sector regulators that the legislation poses any ongoing impediment to the operations of charities. In order for charities to move out from under the "shadow of the law," existing laws and regulations in Canada will require revisions to provide a clear and attainable benchmark of operations and due diligence standards for charities.

In this regard, while Canada's anti-terrorism legislation is very much a product of a complex array of international initiatives, conventions and multilateral agreements that establish daunting requirements for charities, these same international requirements at least acknowledge the need to strike a balance between efforts to thwart terrorist financing and ensuring that legitimate charitable programs can continue to operate. Specifically, the Financial Action Task Force ("FATF"), in a key policy document concerning the oversight of the non-profit organizations sector internationally, reminds its member countries to ensure that "(m)asures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities" and also that those measures "should to the extent reasonably possible avoid any negative impact on innocent and legitimate beneficiaries of charitable

activity”<sup>2</sup>. There remains a need to address the extent to which Canada’s anti-terrorism legislation currently does not strike an appropriate balance in this regard.

In order to see how the various parts of Canada’s anti-terrorism legislation interact with each other, as well as how the legislation may affect charities, this paper will examine some of the more important anti-terrorism provisions under the amended *Criminal Code*, the amendments made to money laundering legislation, as well as legislation providing for the de-registration of charities. However, given the complexities involved in the anti-terrorism legislation in Canada, the discussion that follows is, by necessity, of a summary nature only, and is neither detailed nor comprehensive in its scope or comments. For additional comments by the author on the topic of anti-terrorism legislation and charities, as well as access to resource materials, legislation and international conventions related to charities and anti-terrorism legislation, reference can be made to either [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca) or [www.charitylaw.ca](http://www.charitylaw.ca).

## **B. ANTI-TERRORISM LEGISLATION IN CANADA**

Canada’s anti-terrorism legislation has not been enacted in a legal vacuum. Most conceivable acts of terrorism have for some time been subject to prosecution in one way or another as criminal offences under the provisions of Canada’s *Criminal Code*.<sup>3</sup> Many other statutes, such as the *Immigration and Refugee Protection Act*,<sup>4</sup> include provisions that deal with terrorism or people suspected of terrorism. The new provisions and the legislative amendments provided for under Canada’s new anti-terrorism legislation have likely been under development for some time, purportedly in order to supplement the legislation that is already in place. The events of September 11, 2001 (“September 11”) have simply galvanized these efforts, giving them a sense of added urgency and political justification.

In Canada, the four legislative initiatives are Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act*

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<sup>2</sup> FATF, *Interpretative Note to Special Recommendation VIII: Non-Profit Organizations* (Paris: FATF, 2006).

<sup>3</sup> R.S.C. 1985, c. C-46. See, for example, s. 7 for offences committed on aircraft. See also K. Roach, “The New Terrorism Offences and the Criminal Law” in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-terrorism Bill* (Toronto: Univ. of Toronto Press, 2001) 151 at 152-154 [“New Terrorism Offences and Criminal Law”]; see also K. Roach, *September 11: Consequences for Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2003) at 29-33 [*September 11: Consequences for Canada*].

<sup>4</sup> S.C. 2001, c. 27.

*and other Acts, and to Enact Measures Respecting the Registration of Charities, In Order to Combat Terrorism* (“Bill C-36” or “*Anti-terrorism Act*”), which includes the *Charities Registration (Security Information) Act* as Part VI of the *Anti-terrorism Act*;<sup>5</sup> Bill C-35, *An Act to Amend the Foreign Missions and International Organizations Act* (“Bill C-35” or “*Foreign Missions Act*”);<sup>6</sup> 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-7” or “*Public Safety Act*”);<sup>7</sup> and, Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act* (“Bill C-25”).<sup>8</sup> While other statutes deal with issues related to terrorism, for the purposes of this paper, the above four pieces of legislation are collectively referred to as Canada’s anti-terrorism legislation.

## 1. International Legislative Context

In order to understand the long-term impact of Canada’s anti-terrorism legislation beyond September 11, Canada’s legislative initiative must be viewed within the international context in which it has evolved. Over the last two or three decades, the international community has developed a broad range of measures that have attempted to combat terrorism. These documents range from non-binding resolutions, declarations, or recommendations of the United Nations General Assembly and various intergovernmental bodies, to binding multilateral conventions and Security Council Resolutions. Canada has also been involved in several other international organizations or intergovernmental policy-making bodies, such as the G-8, G-20, the FATF, the International Monetary Fund, and the World Bank, as part of Canada’s current commitment to combat terrorism. All of these bodies have and continue to take measures to curtail terrorism and terrorist financing, and require considerably different levels of compliance from member states.

The enactment of Canadian legislation is directly related to developments in the international arena. This is reflected in the preambles of the four Acts making up the Anti-terrorism legislation, which include references to Canada’s “commitments” to international treaties and

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<sup>5</sup> S.C. 2001, c. 41. 41[“Bill C-36” or “*Anti-terrorism Act*”].

<sup>6</sup> S.C. 2002, c. 12 [“Bill C-35” or “*Foreign Missions Act*”].

<sup>7</sup> S.C. 2004, c. 15 [“Bill C-7” or “*Public Safety Act*”].

<sup>8</sup> S.C. 2006, c. 12 [“Bill C-25”].

its response to developments in international law or participation in a global anti-terrorism initiative. It is beyond the scope of this paper to examine the international context in detail, but the main international documents are highlighted below to provide a brief overview of the international dynamics behind the recent legislative initiatives in Canada.

## 2. United Nations Commitments

Over the years, the United Nations has issued a number of resolutions and declarations, and has concluded various conventions, all in an effort to combat terrorism. The *Anti-terrorism Act* purports to ratify or comply with eleven specific U.N. conventions concerning terrorism. Another significant United Nations obligation is Security Council Resolution 1373 adopted on September 28, 2001.<sup>9</sup> These documents explain Canada's international obligations to limit terrorism and sheds light on the extent to which Canada's initiative is consistent with those obligations. They also provide a useful background to understanding the new legal paradigm facing charities that operate in multiple jurisdictions.

Multilateral Conventions referred to in the *Anti-terrorism Act* include the following:

- the Convention on the Safety of United Nations and Associated Personnel;<sup>10</sup>
- the Convention on the Suppression of Unlawful Seizure of Aircraft;<sup>11</sup>
- the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;<sup>12</sup>
- the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents;<sup>13</sup>
- the International Convention against the Taking of Hostages;<sup>14</sup>
- the Convention on the Physical Protection of Nuclear Material;<sup>15</sup>

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<sup>9</sup> UN SCOR, 4385<sup>th</sup> Mtg., UN Doc. S/RES/1373(2001) ["Resolution 1373"].

<sup>10</sup> *Convention on the Safety of United Nations and Associated Personnel*, 9 December 1994, U.N. Doc. A/49/49.

<sup>11</sup> *Convention on the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105.

<sup>12</sup> *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177.

<sup>13</sup> *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, 14 December 1973, 1035 U.N.T.S. 167.

<sup>14</sup> *International Convention against the Taking of Hostages*, 17 December 1979, 1316 U.N.T.S. 205.

<sup>15</sup> *Convention on the Physical Protection of Nuclear Material*, 3 March 1980, 1456 U.N.T.S. 124.



- the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation;<sup>16</sup>
- the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;<sup>17</sup>
- the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;<sup>18</sup>
- the International Convention for the Suppression of Terrorist Bombings;<sup>19</sup> and,
- the International Convention for the Suppression of the Financing of Terrorism.<sup>20</sup>

### C. “SUPER CRIMINAL CODE”: NEW DEFINITIONS AND IMPLICATIONS FOR CHARITIES

The amendments to the *Criminal Code* implemented by the *Anti-terrorism Act* constitute the creation of a new type of criminal offence under the heading of terrorism. The assumption underlying these amendments to the *Criminal Code* is that certain offences, specifically terrorism offences, including the threat of or attempt to commit such offences, warrant an extraordinary approach in the methods of investigation, incarceration and punishment due to the very nature of those offences.

The idea that some criminal offences are extraordinary in nature is not new. This principle has most recently received expression in the *Crimes Against Humanity and War Crimes Act*.<sup>21</sup> However, even the *War Crimes Act* contains substantially more principles of natural justice than are to be found in the amendments to the *Criminal Code* provided for under the *Anti-terrorism Act*.<sup>22</sup> The changes brought about by the *Anti-terrorism Act* are without precedent in Canadian legal history and demonstrate a disturbing disregard for the principle of due process and natural justice. The amendments implemented by the *Anti-terrorism Act* arguably amount to the creation

<sup>16</sup> *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation*, 23 September 1971, 1589 U.N.T.S. 474.

<sup>17</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221.

<sup>18</sup> *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 U.N.T.S. 304.

<sup>19</sup> *International Convention for the Suppression of Terrorist Bombings*, 12 January 1998, U.N. Doc. A/RES/52/164 [“Convention on Terrorist Bombings”].

<sup>20</sup> *International Convention for the Suppression of the Financing of Terrorism*, 10 January 2000, annex to UNGA Res. A/RES/54/109 [“Convention on Terrorist Financing”].

<sup>21</sup> S.C. 2000, c. 24 [“*War Crimes Act*”].

<sup>22</sup> Section 10 specifically applies the rules of evidence and procedure in force at the time of proceedings and section 11 allows the defendant all defences and justifications that are otherwise available under Canadian or international law at the time of the offence or proceedings.

of a “Super *Criminal Code*” within Canada’s existing *Criminal Code*. While it is beyond the scope of this paper to discuss in any detail the ramifications of this “Super *Criminal Code*,” this paper does review those areas of the amended *Criminal Code* that impact charities, with particular reference to the new definitions of “terrorist activity,” “terrorist group,” and “facilitation of terrorist activities or terrorist group,” implemented by the *Anti-terrorism Act*.

## 1. Definitions under the *Anti-terrorism Act*

### a) “Terrorist activity”

The definition of “terrorist activities” in section 83.01(1) of the *Criminal Code*, as amended by section 4 of the *Anti-terrorism Act*, is split into two disjunctive parts, parts (a) and (b).

Part (a) of the definition of “terrorist activity” incorporates ten offences that already exist under section 7 of the *Criminal Code*, each of which implements a specific U.N. Convention regarding terrorism. These provisions include various offences against “internationally protected persons” under subsection 7(3). Combined with section 431 of the *Criminal Code* and specifically the amended definition of “internationally protected persons” in the *Foreign Missions Act*, part (a) of section 83.01(1), as will be seen later in this paper, could negatively impact charities in some situations.

The more familiar part of the definition of “terrorist activity” is contained in part (b) of section 83.01(1). It defines a “terrorist activity” as:

- b) *an act or omission, in or outside Canada,*
  - (i) *that is committed*
    - (A) *in whole or in part for a political, religious or ideological purpose, objective or cause, and*
    - (B) *in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and*
  - (ii) *that intentionally*
    - (A) *causes death or serious bodily harm to a person by the use of violence,*

- (B) endangers a person's life,
- (C) causes a serious risk to the health or safety of the public or any segment of the public,
- (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
- (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)

Both of these parts of the definition include conspiracy, attempt or threat to commit a terrorist activity, as well as being an accessory after the fact or counselling in relation to any “terrorist activity.”

The requirement that was at issue in the *Khawaja* decision discussed below, that an act be “committed in whole or in part for political, religious or ideological purposes, objectives or causes” is particularly concerning. It has been said that this provision represents the “criminalization of certain political, religious or ideological motives.”<sup>23</sup> Canada’s international obligations simply require the government ensure that the acts contemplated by anti-terrorism legislation are “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”<sup>24</sup>

The difference between ensuring a political, religious, or ideological consideration cannot be used as a defence, and incorporating such considerations as an integral part of the definition of the offence itself, is significant. At the very least, this should raise concern about the level of care with which the provisions were drafted and, more importantly, about the way in which they may be enforced.

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<sup>23</sup> “New Terrorism Offences and Criminal Law,” *supra* note 3 at 156, and for a discussion about the role of motive in criminal law and the ramifications of this approach, see the surrounding text. For further discussion refer to *September 11: Consequences for Canada*, *supra* note 3 at 25-28. See also, J. Travers, “9/11 fears turn chance remark into visit by Mounties” (*Toronto Star*, 26 September 2002, A31).

<sup>24</sup> See Article 5 of the *Convention on Terrorist Bombings*, *supra* note 19, and Article 6 of the *Convention on Terrorist Financing*, *supra* note 20.

For instance, comments made by authorities about law enforcement in the matter of terrorism do not inspire confidence that the enforcement of these provisions will take into consideration the legitimate right of dissent of charities within society. For example, in an article published in October 2001 (before the *Anti-terrorism Act* was introduced in the House of Commons, but in anticipation of what was to come in the subsequent legislation as evidenced by the fact that the article remained posted on the RCMP website a year later), a spokesperson for the RCMP stated that, “Since there is no definition in the *Criminal Code* for terrorism ..., the RCMP prefers the term *criminal extremism*.”<sup>25</sup> This is of particular concern when viewed in light of the comment that in the RCMP’s view, “[protests] against genetically modified food and ongoing environmental concerns about water, forest preservation and animal rights are issues to watch.”<sup>26</sup> When applied to “political, religious or ideological purposes or causes,” the definition of “terrorist activity” could not only encompass activities that are rightly criminal (*although* not necessarily “terrorist”), but also potentially deter dissident views that in and of themselves have been and should continue to be tolerated in a free and democratic society.

b) “Terrorist group”

A “terrorist group” under subsection 83.01(1) of the *Criminal Code*, as amended by the *Anti-terrorism Act*, is defined as:

- (a) *an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity [as defined in subsection 83.01(1) and discussed above], or*
- (b) *a listed entity, [as defined by section 83.05 and discussed below]*

The definition of “terrorist group” is very broad and could include unsuspecting charities if they are not diligent. In this regard, the reference to “entity” casts a broad net by including trusts, unincorporated associations and organizations, as well as an association of such entities.

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<sup>25</sup> H. Hamilton, “The Hands of Terror: Is Canada safe from the grasp of terrorists?” *RCMP Online* (4 October 2001) online: RCMP <<http://www.rcmp-grc.gc.ca/online/online000607.htm>> (This document is no longer available but was last modified: 1 October 2002) at part I, para. 4 [emphasis added].

<sup>26</sup> *Ibid.* at part II, para. 4.

Even the inclusion of “listed entities”<sup>27</sup> is problematic, since, as discussed later in this paper, even some well-known charities could in theory find themselves a “listed entity” in consideration of the nature and location of the international humanitarian work that they do if the Government felt that it had “reasonable grounds” to believe the entity had knowingly carried out, attempted to carry out, participated in, or *facilitated* a terrorist activity. Given the breadth in the definition of “facilitate” as explained below, the definition of “terrorist group” under either paragraph 83.01(1)(a) and (b) of the *Criminal Code* could apply to charitable organizations that have no direct or indirect involvement or intention to participate in “terrorist activities.” In this regard, the expansive definition of “terrorist group” may leave open the possibility that many legitimate charitable organizations in Canada could fall within the definition.

c) “Facilitation”

The definition of “facilitation” in subsection 83.19(2) of the *Criminal Code*, as amended by the *Anti-terrorism Act*, is of even more concern. The definition is so broad that it has the effect of extending the definition of “terrorist activity” and “terrorist group” to otherwise innocent organizations and people who unwittingly become tarred by association without any culpability or intent to be part of terrorist activity. Subsection 83.19(2) defines “facilitation” as follows:

*For the purposes of this Part, a terrorist activity is facilitated whether or not*

- (a) the facilitator knows that a particular terrorist activity is facilitated;*
- (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or*
- (c) any terrorist activity was actually carried out.*

A plain reading of this subsection implies the *mens rea* element of the offence has been diminished to the point that it verges on a strict liability offence. In her appearance before the House of Commons Standing Committee on Justice and Human Rights, Justice Minister Anne McLellan stated that the purpose for moving the definition of “facilitate” from section 83.01 (the definitions section) to section 83.19 was to respond to criticism that the separation of the definition from the offence was confusing and failed to clearly

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<sup>27</sup> Discussed in greater detail in C.2.b)ii) below.

emphasize that facilitation must be “knowing.”<sup>28</sup> Yet, it is precisely the lack of clarity in the legislative drafting that perpetuates the peril in which innocent third parties currently find themselves.

The stated purpose of subsection 83.19(2) is to capture circumstances in which the person is prepared to assist a terrorist group without specifically knowing the specific objective,<sup>29</sup> yet its wording can be read as nothing more than a qualification of the fault element of subsection 83.19(1), which provides that “every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.”

As Eunice Machado has argued,

*Reading the legislation in its best possible light, one can interpret subsection (2)(a) as emphasizing the word “particular” which would mean that the facilitator need not know which terrorist activity is being assisted. The accused need merely know that they are somehow assisting in a terrorist activity. Similarly, subsection (2)(c) can be understood to mean that the act of aiding is itself the offence regardless of the plan’s outcome. However, subsection (2)(b) provides a temporal problem for the mens rea minimal requirement of “knowledge.” How can a person knowingly facilitate a terrorist activity that has not even been foreseen, much less planned? This provision may be meant to catch those who know that they are aiding terrorists without regard for the unlawful acts that the terrorists may potentially commit. However, the mens rea requirement is seriously distorted by requiring knowledge of future, possible offences.<sup>30</sup>*

Thus, the broad definition of “facilitation,” in subsection 83.19(2), which applies to all *Criminal Code* offences involving “facilitation” of terrorism, has not been moderated at all by any requirement for knowledge or intent referred to in section 83.19(1).

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<sup>28</sup> Anne McLellan, “Notes for the Justice Minister” (Appearance before the House of Commons Standing Committee on Justice and Human Rights – Bill C-36, November 2001).

<sup>29</sup> Richard G. Mosley, “Preventing Terrorism. Bill C-36: The *Anti-terrorism Act 2001*” (Paper presented to the Terrorism, Law & Democracy: How is Canada Changing following September 11? Conference, March 2002) 145 at 165. Mr. Mosley is the Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada.

<sup>30</sup> Eunice Machado, “A Note on the Terrorism Financing Offences” (2002) 60 U.T. Fac. L. Rev. 103 at 105.

From a practical standpoint, charities could very well become involved unwittingly in violating the *Criminal Code* in “facilitating” a “terrorist activity” without actually intending to directly or indirectly support any terrorist activity whatsoever and without knowing or even imagining the ramifications of their actions. This concern is particularly relevant in the wake of recent natural disasters, like the devastating tsunami that hit Southeast Asia in December 2004,<sup>31</sup> and the destructive earthquake in Pakistan in October 2005,<sup>32</sup> both of which prompted an outpouring of international humanitarian support. Despite the desperate need for aid in these areas, charities still had to comply with the significant legal requirements in providing aid, regardless of their size or the method of providing assistance.

At the same time, the potential application of anti-terrorism legislation is heightened, in part, because these areas have been identified as one of the central operating areas for several terrorist organizations.<sup>33</sup> The chances of contravening anti-terrorism legislation are heightened even more when charities are not able to deliver aid directly and support local recipient or donee organizations in the regions. The charities, in this situation, are potentially accountable for the recipient organization’s actions and are therefore responsible for conducting due diligence investigations of the recipient organizations.

As mentioned previously, the *Criminal Code* already has in place numerous provisions to deal with terrorist offences. One of the primary purposes of amendments to the *Criminal Code* under the *Anti-terrorism Act*, presumably, should have been to highlight the qualitative difference between existing *Criminal Code* offences and the commission of offences in circumstances where it would be considered a “terrorist activity.” In other words, the ostensible intention of the *Anti-terrorism Act* should have been to demonstrate that the same act should be perceived to be more reprehensible when committed in circumstances that attribute an actual terrorist motivation to the accused, and to exact

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<sup>31</sup> The 9.0 magnitude earthquake off the western coast of Sumatra, Indonesia, which was the cause of the tsunami, killed an estimated 275,950: National Earthquake Information Center, U.S. Geological Survey.

<sup>32</sup> The 7.6 magnitude earthquake killed an estimated 87,351 dead: National Earthquake Information Center, U.S. Geological Survey.

<sup>33</sup> For more discussion on this topic, see e.g. Terrance S. Carter and Sean S. Carter, “Anti-terrorism legislation requires due diligence from tsunami relief agencies” (*The Lawyers Weekly*, 11 March 2005, p. 9); Terrance s. Carter and Sean S. Carter, “The Implications for Charities of Anti-Terrorism Initiatives on Humanitarian Assistance for Southeast Asia” in *Anti-Terrorism and Charity Law Alert No. 6* (11 January 2005), available at [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca).

appropriate punishment under the assumption that existing penalties inadequately reflect the gravity of such offences.

It is a well-established principle of criminal law that the more serious a crime, the more specific the required intent needs to be. Consequently, the substantive curtailment of a *mens rea* requirement for the definition of “facilitation” of a terrorist offence is disturbing, since it does the opposite of being commensurate with the assured gravity of the offence or its punishment. Instead it exposes arguably innocent third parties who had no intention or foreknowledge their acts or omissions would be considered to be “facilitating” a “terrorist activity” in the same manner as an individual who has an actual *mens rea* element to their participation in a terrorist activity.

The relationship between the broad definition of “facilitation” with the corresponding lessening of a *mens rea* requirement on the one hand and Canada’s international commitments to adapt anti-terrorism legislation on the other is itself problematic. Resolution 1373 of the U.N. Security Council declares in paragraph 1(b) that all countries must:

Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

The international obligation with which Canada seeks to justify its anti-terrorism legislation requires, at a minimum, knowledge on the part of the facilitator of the nature of the activity or purpose to which the funds will be applied. By not requiring a clear *mens rea* element for *Criminal Code* offences, or even a minimum requirement of knowledge, Canada is stepping beyond its international obligations and, by doing so, violating well-established principles of natural justice, criminal law, and due process, without any purported justification from the context of international obligations.

It is also questionable whether an *actus reus* element of the offence need occur for the “facilitation” of a “terrorist activity” to take place under the *Anti-terrorism Act*. This is because the definition of “facilitation” does not require a “terrorist activity” actually be



carried out, planned or even foreseen. This raises the prospect that a charity might be found guilty of facilitating a “terrorist activity” even though no terrorist act was ever planned, let alone committed. In a very real sense, a charity might now find itself “guilty by association,” without intending or in fact doing anything that actually ends up facilitating a “terrorist activity.”

d) *R. v. Khawaja*

In *R. v. Khawaja*, [2006] O.J. No. 4245 (Sup. C.J.),<sup>34</sup> Mr. Justice Rutherford of the Ontario Superior Court of Justice struck down a portion of a definition of “terrorist activity” in the *Criminal Code* that dealt with purpose and motive. The particularly troubling part of the decision for charities was the court’s decision to uphold the law in terms of its breadth and the *mens rea* requirement concerning the definition of “facilitation.” In this regard, there are significant risks that a charity involved in conducting aid or humanitarian programs in a conflict area could unwittingly be found to have facilitated a terrorist activity. Justice Rutherford recognized that there would be situations “in the periphery” that would inadvertently be caught by the sweeping net of the definition, such as a doctor administering emergency aid to a patient involved in a “terrorist activity” or a waitress serving food to members of a “terrorist group.” However, even though the decision recognizes that some humanitarian activities could be caught by the applicable definitions under the *Criminal Code*, the law as a whole was upheld because it purportedly would be counterbalanced by a “judicial determination.”

Yet, even if a trial judge adopted the same interpretation of the *Criminal Code* as Justice Rutherford, the detrimental effect on a charity and its operations would have already occurred once charges had been laid. A charity charged with facilitation could undergo the freezing of its charitable assets, and the charges would likely jumpstart the deregistration process under the *Charities Registration (Security Information) Act*. The fact that these types of charges were being laid in Canada against a charity would likely create a domino effect throughout a charity’s worldwide operations. In addition, these charges would have a disastrous effect on donor confidence and public trust.

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<sup>34</sup> The Supreme Court of Canada denied leave to appeal this decision on 5 April 2007.

e) “Financing of Terrorism”

The offences contained in the “Financing of Terrorism” section of the *Criminal Code*, as amended by the *Anti-terrorism Act*, are contained in subsections 83.02, 83.03 and 83.04. These provisions make it a criminal offence to provide, collect, use, possess, invite a person to provide or make available property or financial services, intending or knowing that it be used in whole or part for various purposes. Depending on the provision, the prohibited purposes range from the commission of a “terrorist activity”, to “benefiting” a “terrorist group” or “any person facilitating or carrying out [terrorist] activity”.

These offences relating to terrorist financing are broad and potentially uncertain in scope, using phrases such as “directly or indirectly”, “in whole or in part”, “facilitating”, and “benefiting”. Under these terrorist financing provisions, for example, it is an offence to “indirectly provide related services which will be used, in part, for the purpose of benefiting a person who is facilitating any terrorist activity” or to “indirectly use property, in part, for the purpose of facilitating terrorist activity”.<sup>35</sup> In conjunction with the definition of “facilitation”, these provisions cast a tremendously broad net in order to encompass any economic connection, however remote, with “terrorist activities”.

These provisions had remained dormant until March 14, 2008, when the first person in Canada to be charged under the terrorism financing provisions was arrested in New Westminster, British Columbia. The accused has now been charged with committing an offence under section 83.03(b) of the *Criminal Code*, the section that makes it an offence to provide, or make available property or services for terrorist purposes.<sup>36</sup> It is alleged that the accused solicited donations in British Columbia for the World Tamil Movement (WTM), a humanitarian organization, which the police claim is the leading Liberation Tigers of Tamil Eelam (“LTTE”) front organization in Canada. This case will merit careful attention from charities and not-for-profits, as it highlights an increasing level of scrutiny by law enforcement and regulators concerning various types of fundraising activities.

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<sup>35</sup> Canadian Bar Association, *Submission on the Three-Year Review of the Anti-terrorism Act* (May 2005).

<sup>36</sup> Stewart Bell, “Canadian raised funds for Tamil Tigers, RCMP alleges” *National Post*, March 17, 2008.

f) “Internationally Protected Persons,” “International Organizations,” and Political Protests

In addition to the amendments to the *Criminal Code* under the *Anti-terrorism Act*, the combined effect of part (a) of the definition of “terrorist activity” under the *Anti-terrorism Act* and the provisions of the *Foreign Missions Act* will impact political protesters, among others, and raises concerns about the further application of the “Super *Criminal Code*” provisions in instances of what may now be labeled as domestic terrorism. Charities should be particularly concerned about the expanded definition of the terms “international organization” and “internationally protected person” and the sweeping powers afforded to the RCMP contained within the part on “Security of Intergovernmental Conferences” in the *Foreign Missions Act*.

i) Interaction of Definitions

Under paragraph 83.01(1)(a) of the *Criminal Code*, as amended by the *Anti-terrorism Act*, the definition of “terrorist activities” includes actions taken against “internationally protected persons.” Section 2(1) of the *Foreign Missions Act* expands the definition of “international organization” to include “an inter-governmental conference in which two or more states participate.” In addition, the term “international organization” is expanded to include an “inter-governmental conference,” such as a meeting of the WTO or the G-8 in combination with section 2 of the *Criminal Code*, this extends the status of “internationally protected person,” to foreign representatives, including diplomats and other officials, possibly even low-level bureaucrats.

The means of transportation for, and the areas in which the “internationally protected persons” are to meet, are now protected under section 431 of the *Criminal Code*. The interaction between the expanded definitions contained within part (a) of the definition of “terrorist activity” in subsection 83.01(1) of the amendments to the *Criminal Code* and section 431 of the *Code* means that the definition of “terrorist activity” could include any threatening or commission of acts against such “internationally protected persons,” “official premises,” or “means of transport” that is likely to endanger the life or liberty of such persons. As a result, protestors blocking a road to a WTO Conference or a G8 Summit could run the risk of

committing a “terrorist activity” where the road-block is such that it is likely to endanger the life or liberty of protected persons participating in the conference.

ii) Application to Protestors at Inter-Governmental Conferences

As well as expanding the definitions of “internationally protected persons” and “international organizations,” section 10.1 of the *Foreign Missions Act* provides the RCMP with the mandate to ensure the “proper functioning” of an “inter-governmental conference” and protection of “internationally protected persons.” Citing this legislation as authority, the RCMP established an “access control area” in downtown Calgary, nearly 100 km from the June 2002 G-8 Summit in Kananaskis. The RCMP established this “access control area” in anticipation of protests surrounding the G-8 Summit, claiming that it was not meant to affect “legitimate business in the area.”<sup>37</sup> In a notice published on the G8 Summit Security website entitled “Legal Information for Protesters,”<sup>38</sup> the RCMP advised that it would retain the authority to limit the *Charter*-guaranteed rights and freedoms of protestors when deemed necessary in order to ensure the “proper functioning” of the conference and the “protection of internationally protected persons.” It is apparent that the amended *Foreign Missions Act* is and will be used for the purpose of controlling political protest at the discretion of the RCMP.

Previous versions of the *Public Safety Act*, Bill C-55 and Bill C-42, proposed to amend the *National Defence Act* by giving the Minister of Defence power to proclaim a broad “military security zone” or “controlled access military zone.” Among other things, many feared that this power could be used to subdue legitimate democratic dissent, a right that is guaranteed in the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). Bill C-7 removed this provision in response to numerous concerns that were raised about the expansive powers it afforded to the government. Nevertheless, the government may still create limited access zones by using royal prerogative or by justifying its actions, as they did during the G-8 Summit, by

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<sup>37</sup> Royal Canadian Mounted Police, News Release, “Access Control Area to Be Established in Downtown Calgary” (21 June 2002) online: RCMP <[www.g8summitsecurity.ca/g8/news/nr-02-04.htm](http://www.g8summitsecurity.ca/g8/news/nr-02-04.htm)> (This document is no longer available but was last accessed: 24 June 2002)

<sup>38</sup> This document is no longer available under the section “Information for Visitors” at [www.g8summitsecurity.ca](http://www.g8summitsecurity.ca), but was accessed in June 2002.

referring to the duties imposed on law enforcement authorities under the *Foreign Missions Act*.

As the legislative guidelines for security and safety are redrawn through the anti-terrorism legislation, charitable organizations will need to be careful that they do not violate anti-terrorism legislation in situations where their charitable activities lead them to assist individuals who may be exercising rights of political dissent. This should be of particular concern for charities that may become involved, even peripherally, in areas of potential controversy and confrontation, such as native rights, the environment, animal rights, and the pro-life/abortion debate.

Charities, such as hospitals, that might provide medical assistance, or churches that might offer accommodation or other forms of assistance to protestors who infringe on a zone that has been designated limited access or interfere in a meeting that qualifies as an “international organization” will need to be aware of the consequences that could result from aiding or facilitating protestors in these situations. As well, Canadian charities that are involved in humanitarian, social justice, or civil libertarian issues and participate in public rallies or demonstrations may unwittingly become subject to martial law. Consequently, measures taken by the authorities for the protection of “internationally protected persons,” “international organizations,” and declared limited access zones, may pose a threat to members and volunteers of charitable organizations that operate and provide assistance within these theatres of potential conflict and confrontation.

## 2. Practical Implications for Charities

Whether or not a particular charity will be subject to prosecution under the “Super *Criminal Code*” provisions provided for under the *Anti-terrorism Act* remains conjecture at this time. The immediate practical concern for charities is not that they will be prosecuted under these provisions, but that they may be vulnerable to de-registration under the *Charities Registration (Security Information) Act*. This could happen where a charity may have become unwittingly involved in activities or with groups that meet the definition of “terrorist activity” or “terrorist group” under the *Criminal Code*, even if no criminal charges are

brought against the charity. A charity may also find that it meets the broad and inclusive definition of “facilitating” a “terrorist activity” or “terrorist group” under the *Anti-terrorism Act*, which could result in the seizure or freezing of its assets. Considering the stigma, suspicion, and loss of goodwill that this would have on a charity, the implications are both disturbing in theory and devastating in practice.

a) Specific Criminal Code Offences that may Impact Charities

In recognition of the complexities of the anti-terrorism legislation, the co-ordination of several federal Acts and the lack of evidence to date concerning how the legislation may be implemented because of its relative novelty and the fact that much of the enforcement of these Acts is and will be conducted in secrecy, it is difficult to speculate concerning what sections of the amended *Criminal Code* will in fact affect charities. The most that can be done is to draw a few examples from the applicable *Criminal Code* provisions as amended by the *Anti-terrorism Act* where charities might be caught under those provisions. In this regard, some of the relevant *Criminal Code* provisions that may impact charities include the following:

- s. 83.02: Directly or indirectly providing or collecting property that is intended to be used or knowing that it will be used in whole or in part in a terrorist activity;
- s. 83.03: Directly or indirectly providing or inviting the provision of property, financial or other related services that facilitate or carry 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 owned or controlled by or on behalf of a terrorist group, facilitating, directly or indirectly, transactions or financial or related services for the benefit or at the direction of a terrorist group;
- s. 83.18: Directly or indirectly participating or contributing to any actions that enhance 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; and,
- s. 83.14: The Attorney General may apply for an order of forfeiture of property of a terrorist group if property had or will be used, in whole or in part, to facilitate or carry out a terrorist activity.

The interaction between the *Criminal Code* provisions amended by the *Anti-terrorism Act*, the *Foreign Missions Act*, and the *Public Safety Act* could lead to charities unwittingly violating the *Criminal Code* in numerous situations, including the following:

#### SCENARIO #1

A charity, through a fundraiser, requests the donation of medical supplies to be provided to a humanitarian organization in the Middle East as its agent and gives instructions to the agent to use the supplies at a local hospital where the hospital might happen to treat or give medicine to a member of a “terrorist group” in an emergency situation.

#### SCENARIO #2

A charity, through a fundraiser, solicits funds for a program to conduct aerial drops of food packages to the civilian population in Afghanistan where a few remaining members of the al Qaida (a “listed entity”) might conceivably receive a few of the food packages.

#### SCENARIO #3

A hospital foundation raises funds for the general operations of a hospital that provides medical care to student protestors participating in an anti-globalization protest who erect a roadblock on a road leading to an international economic summit.

#### SCENARIO #4

A religious denomination provides funding or other assistance to a local church that assisted the student protestors in scenario #3 by providing sleeping facilities in its church basement.

#### SCENARIO #5

A church bulletin publicizes a prayer vigil to take place on a continuous basis over two weeks in front of a new abortion clinic in the hope that in doing so there will be fewer abortions taking place at the abortion clinic. Some members of the church decide to participate on behalf of the church. During the two-week vigil, clients of the clinic complain that they cannot adequately access services at the clinic because of fear of intimidation from members of the prayer vigil even though those participating in the vigil utter no threats against them. The owners of the abortion clinic are also upset because they have lost revenue over the two-week period of the prayer vigil.

#### SCENARIO #6

A charitable organization that deals with refugees finds a church or a group of individuals willing to sponsor a refugee claimant from a Southeast Asian country. The organization has interviewed the refugee, but does not know that the refugee's brother, who occasionally receives financial help from the refugee, may be linked to al Qaida.

#### SCENARIO #7

A church collects donations for a young Afghan boy who is undergoing emergency medical treatment in Canada. Some of the funds are wired to family members in Afghanistan who will be caring for the boy when he returns home. One of his relatives in Afghanistan who helps manage the funds that have been received has some link to members of the Taliban.

In each of the above scenarios, the charity, its donors, third party, agents, and fundraisers, where applicable, could all be found to have been involved, either directly or indirectly, in a "terrorist activity" as a result of the interaction of the various definitions described above. Even if the charities are not involved directly in engaging in terrorist activity, they could be involved in "facilitating" a "terrorist activity" or a "terrorist group." As such, any charitable organization considering providing humanitarian aid or assistance to individuals or groups in circumstances such as those described above need to be aware that they could be involved in violating the *Criminal Code* as amended by the *Anti-terrorism Act*.



b) Consequences of *Criminal Code* Offences

A charity that is found to be in violation of the *Criminal Code* provisions applicable to terrorism could face consequences on many fronts. Not only might the charity be subject to the relevant penalties under the *Criminal Code* and inclusion as a “listed entity” but it could also be subject to possible loss of charitable status under the *Charities Registration (Security Information) Act*, as well as the freezing, seizure, restraint, and forfeiture of its charitable property.

i) *Criminal Code* Offences

The *Criminal Code* offences carry heavy penalties and directors of charities could face fines, penalties, and even imprisonment if the charity is found to be engaged in terrorist-related activities. For example, the financing of terrorism is an indictable offence, carrying a maximum sentence of ten years which could apply to the directors of a charity found to be guilty of this offence.<sup>39</sup> Dealing in property or assets that have been frozen as belonging to a “terrorist group” could lead, on summary conviction, to a fine of not more than \$100,000 or to imprisonment for a term of not more than one year, or to both, or, on indictment, to imprisonment for a term of not more than ten years.<sup>40</sup> Facilitating a “terrorist activity” is an indictable offence with a maximum penalty of imprisonment for a term not exceeding fourteen years.<sup>41</sup>

ii) Inclusion as a “Listed Entity”

While the *Criminal Code* provisions apply to charities, a further concern for charities lies in the latent potential that a charity could conceivably be included as a “listed entity” under section 83.05 of the *Criminal Code*. Specifically, section 83.05 of the *Criminal Code* authorizes the Governor in Council to:

*... establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that*

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<sup>39</sup> *Criminal Code*, *supra* note 3, ss. 83.02-83.04.

<sup>40</sup> *Ibid.*, s. 83.12(1).

<sup>41</sup> *Ibid.*, s. 83.19(1).

- (a) *the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or*
- (b) *the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).*

The list was last updated October 23, 2006, expanding the list to include 40 organizations.<sup>42</sup> Nevertheless, it should not be taken for granted that a charity will not find its way onto the list. The procedure for being placed on or removed from the list is set out in sections 83.05-83.07 of the *Anti-terrorism Act* and is very similar to that used in the charities de-registration process, which is discussed later in this paper. However, the listing process is even more problematic, since there is no notification or automatic quasi-judicial review process for a decision to list an entity. This puts the onus on organizations to review the list in order to determine if they are on it and to apply to be removed if they are found to be included in a case of mistaken identity. Each charity must also review the list regularly to ensure that it is not dealing, or has not dealt in the past, with an organization that is a “listed entity.”

There is also a separate United Nations list of terrorist organizations, the assets of which Canada is obligated to freeze under UN Security Council Resolutions 1267 and 1390. An entity that is not on Canada’s anti-terrorism list could still find itself in effectively the same position if a foreign government requested that the United Nations place it on the U.N. list. Moreover, the U.N. list applies to individuals as well as to entities. In this regard, Canada maintains a separate list of U.N.-listed organizations under the *United Nations Suppression of Terrorism Regulations* pursuant to the *United Nations Act*.<sup>43</sup> As changes are made to the U.N. list, organizations and individuals are automatically added or removed from the corresponding Canadian list through amendments to the regulations.<sup>44</sup> This separate U.N. list of terrorist organizations should be of particular concern to organizations that work in, or have contacts in, areas of conflict. A human rights or mission board

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<sup>42</sup> The list is available online at: Solicitor General of Canada <http://www.psepc-sppcc.gc.ca/prg/ns/le/cle-en.asp>.

<sup>43</sup> *United Nations Suppression of Terrorism Regulations*, SOR/2001-360.

<sup>44</sup> The Consolidated List of Names subject to the Regulations Establishing a List of Entities made under subsection 83.05(1) of the *Criminal Code* or the *United Nations Suppression of Terrorism Regulations* is available from the Office of the Superintendent of Financial Institutions (OSFI) website at <http://www.osfi-bsif.gc.ca>.

organization could even find itself subject to a concerted effort on the part of the government of a country in which it works to have the charity or an agent with whom the charity works placed on the list even though neither it nor the agent with whom it works is made a “listed entity” by the Canadian Government.

### iii) Freezing or Seizure of Assets

The potential consequences of being listed or meeting the definition of a “terrorist group” are grave. Under section 83.08 of the *Criminal Code*, the assets of all “terrorist groups” can be frozen. No person in Canada or Canadians overseas may, either directly or indirectly, deal with any property of a “terrorist group” or facilitate any transactions regarding such property or provide any financial services in relation to such property. Under sections 83.13 and 83.14, a judge may make an order for the seizure or forfeiture of property that is owned or controlled by or on behalf of a “terrorist group” or that has been or will be used, in whole or in part, to “facilitate” a “terrorist activity.”

These provisions could mean that if a charity was found to be a “terrorist group,” either by being listed or by virtue of “facilitating” a “terrorist activity,” its charitable assets could be subject to seizure and forfeiture by the government. Likewise, if the charity accepted a donation from a “terrorist group,” its assets could also be subject to forfeiture for dealing in frozen assets. The judge would then make an order for the disposal of the assets. This in turn could expose the directors to civil liability for breach of their fiduciary duties to protect and preserve the charitable assets of the charity. Similar consequences could follow for the directors and the charitable assets of a charity from de-registration of the charity’s charitable status. For a discussion of the de-registration process and its implications for charities, see Part E of this paper, “De-Registration Under *The Charities Registration (Security Information) Act*.”

## **D. PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT**

The *Proceeds of Crime (Money Laundering) Act* was originally enacted in 1991 and overhauled in the year 2000. It was originally enacted to combat organized crime in furtherance of Canada’s international obligations (particularly its commitments to the FATF) but, after the events of

September 11, it was amended again through Part 4 of the *Anti-terrorism Act*, which expanded its scope to include terrorist financing. The amended *Act* was renamed the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>45</sup> (“*Proceeds of Crime Act*”).

Canada’s terrorist financing laws will clearly have a significant impact on Canadian charities, as well as lawyers who are involved in advising charities. Under the new provisions, charities may be subject to the prescribed record keeping and reporting duties outlined in the *Proceeds of Crime Act* and its Regulations. These duties have been referred to as a new compliance regime for financial entities, the definition of which may well include charities. However, even if charities do not fall within the definition of a reporting entity, charities could still be subject to reporting by other reporting entities, such as a bank, an accountant or life insurance company, without the charity’s knowledge.

Even where lawyers or their charitable clients are not themselves subject to a duty to report, the process of being subject to the monitoring of financial transactions under the *Proceeds of Crime Act* for the purposes of detecting criminal behaviour will likely involve intrusive monitoring of the financial activities of otherwise innocent charities and organizations that deal with them. The amendments to the *Proceeds of Crime Act* brought about by both the *Anti-terrorism Act* and the *Public Safety Act* mean that charities, their fundraisers and their legal counsel may be drawn into the ambit of the *Act*, possibly as entities required to report, in addition to being the subjects of such reports.

The expansion of the federal government’s power to share and collect information with respect to terrorist financing compliance issues may have an indirect but significant impact upon charities. The information collected by the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) and shared with various government and law enforcement agencies could lead to any of the consequences affecting a charity including investigation, criminal charges, listing, de-registration, as well as the freezing and seizing of assets. Whether any of these consequences materialize or not, the knowledge that the authorities are monitoring the activities of charities will have a detrimental chill effect upon the motivation and ability of charities to pursue their charitable objectives, particularly in the international arena.

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<sup>45</sup> S.C. 2000, c. 17; For an in-depth discussion of the Act, see A. Manzer, *A Guide to Canadian Money Laundering Legislation*, (Markham: Butterworths, 2002).

1. Bill C-25

Bill C-25, which received Royal Assent on December 14, 2006, represents a poignant and recent example of the concerted effort to increase the monitoring and oversight of the charitable sector and has a significantly negative impact on charities that transfer funds internationally. With Bill C-25's expansion of reporting entities, virtually any means of transmitting funds (i.e. banks, money order businesses, securities dealers) used by a charity may result in reports being made to FINTRAC. The *Proceeds of Crime Act* refers to this information, which is retained for up to five years, as "designated information," which may potentially be disclosed to both foreign and domestic government agencies. Most pertinent to charities that transfer funds domestically and internationally is Bill C-25's expansion of designated information to include "the name, address, electronic mail address and telephone number of each partner, director or officer" of the charity and "any other similar identifying information." As such, a charity's directors and officers are now explicitly central to the anti-terrorism vetting that is being carried out by private sector financial service providers and government agencies.

In addition, under section 65(1) of the *Proceeds of Crime Act*, as amended by Bill C-25, FINTRAC is specifically authorized to enter into agreements with foreign governments in order that FINTRAC may send and receive designated information between foreign agencies. The reports detailing "suspicious" transactions that are sent to FINTRAC and passed on to various government agencies could have potentially disastrous consequences for a charity. These reports could be the basis for "facilitation" of terrorism charges under section 83.19 of the *Criminal Code*; potentially initiate the de-registration process under the *Charities Registration (Security Information) Act*; or even result in personal liability for the directors and officers of a charity. Even an initiation of an investigation under anti-terrorism provisions could lead to seizure or freezing of charitable property and immeasurable damage to public perception and donor confidence.

What raises the spectre of being investigated under suspicions of contravening anti-terrorism legislation is not only the expansion of the information being collected and retained by FINTRAC, but the burgeoning domestic and foreign sources to which this information is being disclosed. For example, the grounds to disclose information to Canada Revenue

Agency (“CRA”) have become very broad under the Bill C-25 amendments. Under section 55 of the *Proceeds of Crime Act*, the “designated information” would be disclosed to CRA if there were grounds to even “suspect” that the information is relevant to maintaining its charitable status. Under the Bill C-25 amendments, the expanded designated information could also be disclosed to the Canada Border Services Agency, the Canadian Security Intelligence Service (“CSIS”), Communications Security Establishment and the RCMP.

## 2. International Context: FATF

The amendments to the *Proceeds of Crime Act* are clearly part of a larger international drive to curtail the financing of terrorism involving large international organizations, such as the International Monetary Fund, the World Bank, the G-8 and G-20 Finance Ministers’ groups, as well as various regional organizations. The amendments reflect the implementation of Canada’s commitment to comply with the *International Convention on the Suppression of Terrorist Financing* and Canada’s desire to implement the recommendations of the Financial Action Task Force on Money Laundering (“FATF”).

Subsequent to identifying non-profits as an area of concern in its *Special Recommendations on Terrorist Financing*, the FATF issued a report on October 11, 2002, entitled *Combating the Abuse of Non-Profit Organizations: International Best Practices*.<sup>46</sup> This report identifies non-profit organizations as “a crucial weak point in the global struggle to stop such funding at its source” because of their perceived potential misuse as conduits for terrorist financing. The report subsequently outlines specific recommendations, expressed as “international best practices” that apply to both non-profit organizations and regulatory authorities.<sup>47</sup> This special focus on non-profit organizations is reflected in the expansion of the definitions in the *Proceeds of Crime Act* to include charitable organizations within its scope and in the creation of the deregistration process under the *Charities Registration (Security Information) Act*. This same focus is also highlighted in FINTRAC’s first annual report, which states:

*Terrorist financing operates somewhat differently from money laundering but no less insidiously. While terrorist groups do generate funds from*

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<sup>46</sup> For a summary and commentary on the FATF report *Combating the Abuse of Non-Profit Organizations: International Best Practices* and the consequences for Canadian charities refer to *Antiterrorism and Charity Law Alert No. 3* (7 August 2003), available at [www.antiterrorism.ca](http://www.antiterrorism.ca).

<sup>47</sup> *Special Recommendations on Terrorist Financing*, online: FATF <[http://www1.oecd.org/fatf/SRecsTF\\_en.htm](http://www1.oecd.org/fatf/SRecsTF_en.htm)>

*criminal activities such as drug trafficking and arms smuggling, they may also obtain revenue through legal means. Supporters of terrorist causes may, for example, raise funds from their local communities by hosting events or membership drives. In addition, some charity or relief organizations may unwittingly become the conduit through which donors contribute funds that may eventually be used to commit a terrorist act. The funds are then routed to the recipient terrorist organizations through both informal networks and the formal financial system.*<sup>48</sup>

Two documents form the primary policy issued by FATF regarding non-profit organizations: *The Forty Recommendations*<sup>49</sup> and the *Nine Special Recommendations on Terrorist Financing*.<sup>50</sup> Together, these two policies set the international standard for combating the financing of terrorism, of which money laundering is considered a key factor. In the words of FATF, the policies “provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing.”<sup>51</sup> The 40 Recommendations focuses on four areas deemed vital to combating money laundering and international terrorist activities. First, recommendations one to three deal with domestic legal systems and the need for countries to criminalize money laundering with respect to the widest range of predicate offences, thereby implementing two U.N. conventions: the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (the “Vienna Convention”) and the *United Nations Convention against Transnational Organized Crime, 2000* (the “Palermo Convention”). These money laundering laws should enable authorities to confiscate the proceeds of money laundering. Recommendations four through twenty-five detail the measures to be taken by financial institutions and non-financial businesses and professions, like the legal profession, in order to prevent money laundering and terrorist financing. This would require member countries to ensure that financial institution secrecy laws do not inhibit implementation of the FATF recommendations, and that financial institutions implement customer due diligence and record keeping, ensuring that anonymous accounts and accounts in fictitious names are not kept. These recommendations also require financial institutions, non-financial businesses and professions to report suspicious transactions. Recommendations twenty-six through thirty-four discuss

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<sup>48</sup> *Report of the Financial Transactions and Reports Analysis Centre of Canada: Building a Solid Foundation*, online: FINTRAC <[http://www.fintrac.gc.ca/publications/annualreport/2002/AR\\_e.pdf](http://www.fintrac.gc.ca/publications/annualreport/2002/AR_e.pdf)> (last modified: 5 November 2002) at 10 [“FINTRAC Report”].

<sup>49</sup> FATF, *The Forty Recommendations* (France: FATF, 2003) [40 Recommendations].

<sup>50</sup> FATF, *Nine Special Recommendations on Terrorist Financing* (France: FATF, 2004) [Special Recommendations].

<sup>51</sup> 40 Recommendations, *supra* note 48 at 1.

the need for countries to establish a financial intelligence unit to serve as a national centre for receiving, requesting, analyzing and disseminating suspicious transaction reports and other information regarding potential money laundering or terrorist financing. Finally, recommendations thirty-five to forty deal with international co-operation, including mutual legal assistance and extradition.

The first eight Special Recommendations were issued in October 2001, following the September 11 attacks. The ninth Special Recommendation was issued three years later, in October 2004. They broadly extend the application of the 40 Recommendations to terrorist financing, for example requiring ratification and implementation of the *United Nations International Convention for the Suppression of the Financing of Terrorism*, the criminalization of the financing of terrorism and associated money laundering, the freezing and confiscation of terrorist assets and the reporting of suspicious transactions related to terrorism.<sup>52</sup> Special Recommendation VIII focuses on non-profit organizations:

*Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organizations are particularly vulnerable, and countries should ensure that they cannot be misused:*

*(i) by terrorist organizations posing as legitimate entities;*

*(ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and*

*(iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organizations.<sup>53</sup>*

The *Interpretative Note to Special Recommendation VIII* indicates that despite the important role non-profit organizations play in the world economy and social systems, “the ongoing international campaign against terrorist financing has unfortunately demonstrated however that terrorists and terrorist organizations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment and otherwise support terrorist organizations and operations.”<sup>54</sup> The objective of the special recommendation is to ensure

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<sup>52</sup> Special Recommendations, *supra* note 49, Special Recommendations 1-4.

<sup>53</sup> *Ibid.* at Special Recommendation VIII.

<sup>54</sup> *Supra* note 3.



that NPOs are not misused by terrorist organizations in order to pose as legitimate entities; exploit legitimate entities as conduits for terrorist financing; or to conceal or obscure the clandestine diversion of funds intended for legitimate purposes.<sup>55</sup> In order to comply with Special Recommendation VIII, countries must have the capacity to obtain “timely information on [the NPO sector’s] activities, size and other relevant features.”<sup>56</sup> It is suggested that an effective approach to identifying, preventing and combating terrorist misuse of NPOs is to have an approach that includes the following elements: (a) outreach to the sector; (b) supervision and monitoring; (c) effective investigation and information gathering; and (d) effective mechanisms for international co-operation.<sup>57</sup> This interpretative note appears to mirror the controversial U.S. Treasury Department’s *Anti-terrorist Financing Guidelines: Voluntary Best Practices*. Now that the Guidelines have been incorporated into these Special recommendations, there is now an obligation by member countries, such as Canada, to implement them. This is highly ironic considering these unprecedented and unachievable standards have been defended as being only “best practices” or “voluntary,” but will now have the force of law.

Although the FATF has no legislative authority, it is proving to have increasing influence over policy dealing with counterterrorism measures in member nations. As one commentator has observed, “cumulatively, the international arena has created significant pressure for all states to modify frequently introspective and protectionist domestic laws and financial regimes to accommodate [anti-money laundering and countering of the financing of terrorism] obligations.”<sup>58</sup> On a purely policy level, the ability of a non-elected body to have such control over domestic policy is disturbing, especially when it is not plainly evident who may be pulling the strings of the policymakers at FATF. While FATF makes it clear that member countries are free to develop their own methods for complying with the 40 Recommendations and the Special Recommendations, the reality is that there are limited means in order to comply and avoid sanctions.

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Daniel P. Murphy, “Canada’s AML/CFT Response and the Financial Action Task Force” (Paper presented to the Second Annual Symposium on Money Laundering, Toronto, Osgoode Hall Law School Professional Development Program, 11 February 2006) at 4.

### 3. International Context: United States Department of the Treasury

The effort to quell terrorist financing and money laundering has been identified by the U.S. as the second phase in its “war on terrorism.”<sup>59</sup> The U.S. Treasury Department, which spearheads a significant portion of anti-terrorist financing and money laundering initiatives, first issued its *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (“Guidelines”) in 2002, and later revised those guidelines based on review and comments from stakeholders.<sup>60</sup> Although they are termed “voluntary,” and the Treasury Department states that the “Guidelines are intended to assist charities in developing a risk-based approach to guard against the threat of diversion of charitable funds for use by terrorists and their support networks,”<sup>61</sup> the reality is that they are viewed as mandatory by a vast majority of U.S. charitable organizations. In March 2007, the Office of Foreign Assets Control released its *Risk Matrix for the Charitable Sector* (“Risk Matrix”), to “assist the charitable sector in adopting an effective, risk-based approach” to disbursing funds and resources.<sup>62</sup> As the Guidelines and Risk Matrix are issued by the Treasury Department, there is the appearance that they have the force of law and that any charitable organization that fails to comply with the Guidelines or employ the Risk Matrix will face increased scrutiny from authorities and may lose their tax exempt status. Further, the use of some mandatory language in the Guidelines belies the voluntary nature of the Guidelines

The Guidelines set out fundamental principles of good charitable practice, which include the necessity for fiscal responsibility, for fiduciaries of the charity to exercise due care and for charitable organizations to comply with U.S. laws. Another fundamental principle is for charitable organizations to adopt practices in addition to those required by law in order to provide additional assurances that all assets are used exclusively for charitable or other legitimate purposes.

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<sup>59</sup> Kenneth W. Dam, Deputy Secretary of the Treasury, “The Financial Front of the War on Terrorism: The Next Phase” (Presentation to the Council on Foreign Relations, New York, 8 June 2002), available at <http://www.treas.gov/press/releases/po3163.htm>.

<sup>60</sup> U.S. Department of the Treasury *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (December 2005), available at <http://www.treas.gov/press/releases/docs/tocc.pdf>.

<sup>61</sup> *Ibid.* at 2.

<sup>62</sup> U.S. Department of the Treasury, *Risk Matrix for the Charitable Sector* (March 2007), available at [http://www.ustreas.gov/offices/enforcement/ofac/policy/charity\\_risk\\_matrix.pdf](http://www.ustreas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf).

#### 4. Impact of the *Proceeds of Crime Act* and Regulations on Charities

##### a) Information Gathering under the *Proceeds of Crime Act*

The expansion of the federal government's power to share and collect information with respect to terrorist financing compliance issues may have an indirect but significant impact upon charities. The information collected by FINTRAC and shared with various government and law enforcement agencies could lead to many of the consequences affecting a charity including investigation, criminal charges, listing, de-registration, as well as the freezing and seizing of assets. Whether any of these consequences materialize or not, the knowledge that the authorities are monitoring the activities of charities will have a detrimental chill effect upon the motivation and ability of charities to pursue their charitable objectives, particularly in the international arena.

In this regard, a charity that funds international programs may unwittingly become the subject matter of a reported transaction without even being aware of it. For example, a charity's bank, its lawyers or its accountants may now either individually or collectively be required by law to report to FINTRAC any suspicious transactions (currently not applicable to lawyers), large cash transactions, or cross border transactions of the charity as specified in the legislation and regulations. Moreover, such reporting entities are specifically enjoined from letting the organization that is the subject of the report know, either directly or by implication, that they have made such a report.<sup>63</sup> On the other hand, if FINTRAC suspects terrorist financing or money laundering activity based on its analysis of the reports it receives, it may release the reported information to law enforcement and other government agencies. Based on this information, government agencies may take action to investigate the subject transactions, retain and search the subject persons, lay charges, and seize the property in question for forfeiture.

The information reported to FINTRAC can also affect charities through the broad powers granted under Part 6 of the *Anti-terrorism Act*, (the *Charities Registration (Security Information) Act*), to the Solicitor General and the Minister of National Revenue.

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<sup>63</sup> *Proceeds of Crime Act*, *supra* note 45, s. 8; see also Manzer, *supra* note 44, at 10-11, regarding the difficulties this creates for reporting entities. Essentially, the implications are that reporting entities are required to obtain detailed information for all transactions, not only reported transactions, in order not to tip a client off about an intended report.

Information collected by FINTRAC may be made available to, and used by, the Solicitor General and the Minister of National Revenue in considering whether to revoke an organization's charitable status or to deny a charitable status application.

The reporting requirements may also have an impact on charitable fundraising involving any large cash donations or the funding of international projects. This may unduly deter *bona fide* donors from making significant donations to Canadian charities, especially organizations that the donors are not intimately familiar with, or discourage Canadian charities from transferring much-needed funds to support projects in foreign jurisdictions. A Canadian charity that transfers charitable funds to a foreign charity under an agency or joint-venture agreement may find itself becoming the subject of a reported transaction to FINTRAC.

b) Reporting Requirements under the *Proceeds of Crime Act*

The reporting requirements included in the amendments to the *Proceeds of Crime Act* may also impact charities to the extent that some charities involved in certain activities may be found to fall within the definition of entities that are required to report under the Act. This may occur indirectly under paragraph 5(g) of the *Proceeds of Crime Act*, which states that persons and entities “authorized under provincial legislation to engage in the business of dealing in securities” have a statutory obligation to record and report the financial transactions referred to in the amended *Proceeds of Crime Act*. Paragraph 5(g) could apply to charities by virtue of the fact that charities in Ontario for example, are exempted from the requirements for registration under the *Securities Act*<sup>64</sup> and therefore could, in some situations, be considered to be “authorized to engage in the business of dealing in securities” under section 5(g) of the revised *Proceeds of Crime Act*, whether or not they in fact engage in said activities.

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<sup>64</sup> R.S.O. 1990, c. S.5.

In this regard, according to paragraph 2.38(1) of the National Instrument 45-102<sup>65</sup> dealer registration under provincial securities legislation would not be required with respect to a trade in securities by an issuer:

that is organized exclusively for educational, benevolent, fraternal, charitable, religious or recreational purposes and not for profit in a security of its own issue if

- (a) no part of the net earnings benefit any security holder of the issuer, and
- (b) no commission or other remuneration is paid in connection with the sale of the security.

In Ontario, where a charity fulfills the exemption requirements under paragraph 2.38(1) of National Instrument 45-102 and becomes involved in a related business of issuing securities for a profit, such as the issuance of bonds by a church denomination at a low interest rate in order to reinvest the monies received in market securities or in loans to member congregations at a higher interest rate, may have become both “authorized” and “engaged” in the business of dealing in securities for the purposes of paragraph 5(g) of the *Proceeds of Crime Act*. If so, it might become subject to the mandatory recording and reporting obligations of the *Proceeds of Crime Act*. This could also happen in other provinces with similar securities legislation.

Charities may also be included within the expanded definition of reporting entities set out in the regulations under the *Proceeds of Crime Act*, recently amended by Bill C-25. The regulations now include definitions of “financial entity” which in some situations may include charities. Specifically, the regulations state that a “financial entity” includes “a company to which the *Trust and Loan Companies Act* applies.” In this regard, where a national charity incorporated by a special act of Parliament or under the *Canada Corporations Act* receives monies from other charities in order to pool those monies for investment purposes, the receiving charity might be involved in trust activities that could require it to be registered under the federal *Trust and Loan Companies Act*. If so, then the

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<sup>65</sup> National Instrument 45-106 *Prospectus and Registration Exemptions* [“NI 45-106”] was adopted on September 14, 2005 by the Canadian Securities Administrators (CSA), which represent the securities regulators of each Canadian province and territory. NI 45-106 came into effect either as a rule, a policy, or a regulation, in all CSA jurisdictions, except Yukon, on September 14, 2005. NI 45-106 harmonizes and consolidates many of the exemptions from the prospectus and registration requirements previously contained in provincial statutes, and national, multilateral and local instruments.

charity would have become a reporting entity for the purposes of the *Proceeds of Crime Act*.

## E. DEREGISTRATION UNDER THE *CHARITIES REGISTRATION (SECURITY INFORMATION) ACT*

### 1. The Process: *Charities Registration (Security Information) Act*

Part 6 of the *Anti-terrorism Act* enacts the new *Charities Registration (Security Information) Act*.<sup>66</sup> This Act enables the government to revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity. Such de-registration is initiated by the issuance of a “certificate” against the charity or applicant for charitable status and could have consequences beyond simple de-registration for the charitable organization.

#### a) Grounds for the Issuance of a Certificate

Under the new legislation, a certificate can be issued against an existing charitable organization or an applicant for charitable status where there are “reasonable grounds” to believe the organization has made, makes or will make resources available, directly or indirectly, to an entity that has engaged or will engage in a “terrorist activity” as defined in subsection 83.01(1) of the *Criminal Code*. The process is initiated by the Minister of Public Safety and Emergency Preparedness and the Minister of National Revenue who, if reasonable grounds are found, jointly sign the certificate. However, the *Act* does not define “reasonable grounds” nor does it give examples of the kinds of factors that could be considered reasonable grounds.

#### b) Judicial Consideration of the Certificate

The judicial consideration stage of the de-registration process is meant to address the issue of procedural fairness and to give the charity an opportunity to respond to the claims made against it. However, the judicial consideration process itself raises several concerns about aspects of the procedural fairness that this involves.

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<sup>66</sup> *Charities Registration (Security Information) Act* (being part VI of the *Anti-terrorism Act*, *supra* note 5).

The charity must be served notice of the issuance of a certificate as soon as this has been signed by the Ministers. A minimum of seven days after the charity has been served, the certificate must be submitted to a judge of the Federal Court for a determination of its reasonableness. The charity is then given the opportunity to respond to the issuance of the certificate. However, this right is severely limited due to a number of factors related primarily to the unavailability of information.

During the judicial consideration stage of the process, the judge must give the charity or applicant for charitable status a summary of the grounds that gave rise to the issuance of the certificate. This summary is comprised of security and criminal intelligence information that, in the judge's opinion, may be disclosed under the *Act*. In practice, the charity's right to respond is limited by the resulting imbalance of information. The de-registration process therefore raises concerns about the breadth of information available to the judge and the Ministers, and the potential lack of information available to the charity.

c) Evidence

Section 6(j) of the *Charities Registration Act* states that "anything that ... is reliable and appropriate" may be admitted into consideration by a Federal Court judge "even if it is inadmissible in a court of law." The determination of the reasonableness of the certificate would be based in part upon this broad base of information available to the court for its consideration. This should be of concern to charities since it means that, despite the serious consequences of a certificate, section 6(j) of the *Charities Registration Act* effectively waives the ordinary rules governing the admissibility of evidence for the purposes of the Federal Court review of the certificate.

Another provision within the *Charities Registration Act* that raises concerns about the fairness of the process is paragraph 6(e) which also deals with evidence to be considered by the Federal Court Judge. Section 3 defines "information" as "security or criminal intelligence information and information that is obtained in confidence from a source in Canada, from the government of a foreign state, from an international organization of states or from an institution of such a government or organization." Paragraph 6(e) states that "on each request of the Minister [of Public Safety and Emergency Preparedness] or

the Minister of National Revenue, the judge shall hear all or part of the information or evidence in the absence of the applicant or registered charity named in the certificate and their counsel if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person”. This evidence can be relied upon in determining the reasonableness of the certificate by the Federal Court Judge, even though it may not be disclosed to the charity in question by virtue of paragraph 6(g) which states that “the information or evidence described in paragraph (e) shall not be included in the summary but may be considered by the judge in determining whether the certificate is reasonable if the judge determines that the information or evidence is relevant but that its disclosure would be injurious to national security or endanger the safety of any person”.

Furthermore, the judge is to decide on the relevance of such information after hearing arguments from the Minister seeking to include it. The charity is not given an opportunity to argue the relevance of such evidence or cross-examine it to challenge its credibility. However, even if it were granted the opportunity, the charity could not argue the relevance or credibility of evidence to which it has no access. Whether the information is ultimately relied upon or not, the determination takes place entirely in the absence of the charity or its counsel.

Paragraph 6(b) of the *Charities Registration Act* grants the judge considering the certificate discretionary power to decide whether any information should not be disclosed to the applicant or registered charity or any counsel representing it because the “disclosure would be injurious to national security or endanger the safety of any person.” Combined with the possible exclusion of foreign or government evidence, this raises the possibility that much of the security information and intelligence reports considered by a Federal Court judge might be deemed too sensitive to disclose to the affected charity. In fact, it is altogether possible for a charity to be de-registered based entirely on information to which it has no access.

#### d) Effect of Certificate

After a Federal Court judge has determined that a certificate is reasonable, the Ministers must publish the certificate in the *Canada Gazette*. Once it is published, the charity is stripped of its charitable status. The certificate is effective for seven years after which the



Ministers would have to start the process over again if they feel the organization is still a risk. However, by that time the charity would not likely be still in existence.

e) Appeal

Finally, after a certificate is issued, subsection 11(5) of the *Charities Registration Act* precludes any avenue for judicial appeal or review, other than a limited right to apply to the Ministers to review the certificate if there has been a material change in circumstances. However, considering that a charity might not even know what information the certificate was based on in the first place, it would be very difficult for it to know when its circumstances might have changed materially. In any event, once a charity has been de-registered, it is highly unlikely any organizational infrastructure or support base would remain to launch an application to reconsider the certificate for a material change in circumstance.

f) Concerns about the De-Registration Process

The certificate and de-registration process raises several concerns from the point of view of basic principles of natural justice and due process. These factors are of even greater concern in light of the serious consequences of the issuance of the certificate. De-registration not only entails a charity losing its ability to enjoy the tax benefits of charitable status, but there is also a possibility that the issuance of a certificate might expose the charity or its directors to investigation and prosecution under the enhanced “*Super Criminal Code*” provisions. More important from a practical standpoint, however, is the strong possibility that issuance of a certificate could lead to the freezing or seizure of the charity’s assets under sections 83.08 or 83.13-83.14 of the *Criminal Code*. This could entail the bankruptcy, insolvency, or winding up of the charity and, in turn, expose the charity’s directors to civil liability at common law for breach of their fiduciary duties by not adequately protecting the assets of the charity.

The lack of procedural safeguards available to a charity subject to de-registration is of serious concern in light of these potentially serious consequences to a charity and its directors. Some specific concerns about the process include the following:

- No knowledge or intent is required;

- The provision is retroactive - past, present and future actions can be considered;
- Normal rules for the admissibility of evidence do not apply;
- “Confidential” information considered may not be disclosed to the charity, even if it was relied upon in making the determination of reasonableness, which may severely handicap the ability of the charity to present a competent defence;
- No warning is issued or opportunity given to the charity to change its practices;
- There is no ability for appeal or review by any Court;
- The justification for the certificate is based on the low standard of “reasonable belief”; and
- The burden of proof is shifted, requiring the charity to respond and prove its innocence, even where it may not really know what the charges are against it.

During the judicial consideration of the certificate, the charity is given the opportunity to respond. However, because of the limitations on disclosure of information to the charity, a charity’s knowledge of the case against it and ability to respond may be severely limited. The effect of these limitations will, in essence, impose a burden of proof on the charity that it cannot meet. The “reasonability” of a certificate under these circumstances may effectively be a foregone conclusion. This concern is borne out by experience under similar provisions in the *Immigration and Refugee Protection Act* that have been in force for many years, which indicate Federal Court judges usually endorse security certificates.<sup>67</sup> It is likely that the certificate process under the *Charities Registration Act* could be challenged under the *Charter* in a similar manner as was done in *Charkaoui v. Canada (Citizenship and Immigration)*.<sup>68</sup> In *Charkaoui*, the controversial procedure for determining the reasonableness of security certificates and the detention review procedure, the substance of which has been a fixture in immigration law for well over a decade and which predates the bulk of Canada’s anti-terrorism legislation enacted since the fall of 2001, was held to contravene the Canadian *Charter of Rights and Freedoms*.

If the certificate is found to be reasonable by the Federal Court judge, then the certificate is valid for seven years, during which time a registered charity is stripped of its charitable status or an applicant for charitable status is ineligible to obtain charitable status. Given that there is no right to appeal a certificate, that the ordinary rules of evidence have been

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<sup>67</sup> C. Freeze, “Powerful antiterror tool rarely employed by Ottawa” *The Globe and Mail* (30 October 2002) A9.

<sup>68</sup> 2007 SCC 9.

waived, and that evidence deemed to be injurious to national security or a person's safety is not to be disclosed to the charity, it is difficult to see how the de-registration process could be considered fair, notwithstanding CRA's recent suggestion to the contrary.<sup>69</sup>

## 2. House Subcommittee Report

A final report of the House of Commons Subcommittee on the Review of the *Anti-terrorism Act* ("House Subcommittee"), issued pursuant to Section 145 of the *Anti-terrorism Act*, recommended changes to the *Charities Registration (Security Information) Act* that mirror those recommended changes proposed by the Canadian Bar Association Anti-terrorism Committee in submissions to government made in 2001 and 2005.<sup>70</sup> One of the recommended changes that addresses the concerns raised is that the *Charities Registration (Security Information) Act* be amended to establish a defence for charities that are able to demonstrate that it exercised due diligence to avoid the improper use of its resources under section 4(1)(a), (b), and (c). The House Subcommittee also recognized a charities' 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.

One of the other important recommendations that the House Subcommittee had agreed was important to institute was the establishment of a clear *mens rea* requirement by adding 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 (Security Information) Act*. 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." The House Subcommittee recognized that the certificate process, as it currently exists under the *Charities Registration (Security Information) Act*, is "parallel" to the deeply controversial

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<sup>69</sup> "The New Anti-terrorism Law: Impact on Charities" *Registered Charities Newsletter* (Spring 2002 – No.12) online: CRA < [http://www.cra-arc.gc.ca/tax/charities/newsletters\\_archives-e.html](http://www.cra-arc.gc.ca/tax/charities/newsletters_archives-e.html) > (last modified: 30 July 2002). See also *Charity Law Bulletin* #16 (20 September 2002) online: Carters Professional Corporation < <http://www.carters.ca/pub/bulletin/charity/2002/chylb16.pdf> > (last accessed: 11 November 2002).

<sup>70</sup> The House Subcommittee report is a marked departure from a Senate Subcommittee report on the *Anti-terrorism Act* 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*. 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.

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. The certificate process under the *Charities Registration (Security Information) Act* is in need of a complete overhaul to institute, among many other things, basic rights of appeal, the ability to test evidence brought against a charity, and a clear *mens rea* requirement.

### 3. CRA Enforcement

A number of important revelations surfaced during the parliamentary review of the *Anti-terrorism Act*. Canada Revenue Agency (“CRA”) has given important testimony concerning the role of certificates, the increasing frequency of investigations and audits of charities and potential applicants, as well as the circumstances around which charities are voluntarily giving up their charitable status or withdrawing their applications. 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.<sup>71</sup> Though CRA officials stressed the “necessity of the legislation” to the Subcommittee, they testified that controversial provisions, such as the 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 certificates to date. When confronted with why the provisions of C-36 were needed, the officials pointed to the

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<sup>71</sup> 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>.

deterrence effect of the legislation and suggested that it prevents potential terrorist activity within the charitable sector by inducing the voluntary deregistration 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 certificate provisions under C-36 are directly drawn from the IRPA’s security certificate process, 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.<sup>72</sup> 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.”

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<sup>72</sup> Press Conference by the Working group on Arbitrary Detention of the United Nations Commission on Human Rights. 15 June 2005. Ottawa, Ontario. Available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/3BF0D474B35B1526C125702200470A2A?opendocument>.

## F. DUE DILIGENCE RESPONSE

### 1. The Need for Due Diligence

Although due diligence is not a defence for violations of the anti-terrorism laws in Canada and abroad, or against revocation of charitable or tax exempt status under tax laws, effective due diligence is, at the very least, necessary in order to show a desire to comply. Apart from compliance with anti-terrorism laws, maintaining due diligence is also mandatory in accordance with the common law fiduciary duties of directors to protect charitable property. While due diligence is not a defence against anti-terrorism charges, the anti-terrorism laws do not abrogate directors' fiduciary duties to the charity and its donors. As such, it can provide powerful protection for directors against complaints at common law. If a charity's assets are frozen or seized, the charity's directors and officers could be exposed to civil liability for breaching their fiduciary duty to protect the organizations' charitable assets. If they are found to have been negligent, this could be a very significant liability quite apart from any possible criminal sanctions. Directors and officers may be able to protect themselves against a finding of negligence by demonstrating their intent to comply through exercising due diligence.

On a more practical level, however, the greatest benefit from exercising due diligence may be in its preventative effect. While it may not provide a defence after the fact, when a violation has already occurred, it is one measure that a charity can use in advance to protect itself from unwittingly committing a violation. Due diligence can help avoid the occurrence of the kind of event or association that might lead to a charity to be implicated under the anti-terrorism laws. By being more knowledgeable about the charity and its operations, officers will have more power to respond appropriately.

Through exercising due diligence the charity can identify potentially problematic individuals or organizations before it is too late. Due diligence can highlight programs that need to be restructured or discontinued in order to avoid exposure. It can alert officers to the need to decline donations from questionable donors. While no one can guarantee that due diligence will identify all possible risks, it can certainly help to minimize a charity's exposure by eliminating obvious risks.

## 2. Global Standards Required for Charities that Operate Internationally

Due diligence procedures for charities that operate internationally are not only important as a response to Canada's anti-terrorism initiatives, but are the only prudent course of action in the face of emerging global standards concerning NGOs and charities. CRA's publication "Charities in the International Context"<sup>73</sup> stresses the importance of taking into account "Best Practice" guidelines that are promulgated by relevant international policy making institutions, such as the FATF, and by key jurisdictions, such as the United Kingdom and United States.<sup>74</sup> These "Best Practice" guidelines are reflective of an emerging global standard of due diligence procedures that are becoming accepted as the benchmark for international charitable operations.

In addition, it has become apparent that a charity need not have operations in one of the key jurisdictions spearheading the "war on terrorism" for their operations to be subject to monitoring by agencies of these key jurisdictions for compliance with their "Best Practice" standards.<sup>75</sup> This is especially true for charities that operate in areas that may be considered a "conflict zone" by a particular jurisdiction, subjecting the charity to heightened levels of surveillance and monitoring. The consideration of international "Best Practice" guidelines is also important for charities that engage in cross-border funds transfers, work with international partners, or utilize foreign financial institutions, as they may be subject to the same type of scrutiny.

Furthermore, information collected during the monitoring of a charity's operations by agencies of these key jurisdictions may well directly impact the charity, regardless of whether it is based or has operations in the jurisdiction that has conducted the investigation and monitoring. This is primarily due to the increased sharing between countries of information collected concerning non-profit organizations over the past few years. Information obtained by foreign jurisdictions that is shared with Canadian authorities may well be sufficient for Canada to launch its own investigations or processes under its anti-

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<sup>73</sup> Canada Revenue Agency, "Charities in the International Context," online: <http://www.cra-arc.gc.ca/tax/charities/international-e.html>> last accessed: 23 August 2005.

<sup>74</sup> For a further discussion of these issues please reference *Anti-terrorism and Charity Law Alert No. 5*, available at <http://www.carters.ca/pub/alert/atcla/atcla05.pdf>.

<sup>75</sup> Department of the Treasury of the United States, "2007 National Money Laundering Strategy" online: <http://www.treas.gov/press/releases/docs/nmls.pdf> [last accessed: 29 October 2007].

terrorism legislation. This may result in the commencement of preliminary procedures for the deregistration process under the *Charities Registration Act*. Being aware of international “Best Practice” due diligence guidelines and demonstrating compliance with them by implementing due diligence procedures in the operations of a charity can help minimize such risks associated with operating internationally.

### 3. In-House Due Diligence

#### a) Due Diligence through Education

First and foremost, lawyers must educate their charitable clients, especially the executive, staff and directors, about the requirements of domestic legislation and international best practice guidelines, encouraging them to develop a proactive response and assisting them in the creation and implementation of an effective anti-terrorism policy. Charities should continually educate their directors, staff, members, donors, and agents about the applicable legal requirements. They should develop access to general resource materials on anti-terrorism legislation in Canada and in all other countries in which they operate.

Charities need to compare and coordinate educational materials with other charities, either directly or indirectly, through umbrella organizations. Communicating with other organizations can help charities learn from each other’s mistakes and successes, as everyone struggles to understand the full implications of these legislative initiatives. As they develop a body of material on the legislation and on their unique risks, charities need to provide ongoing educational materials and presentations to board members, staff, volunteers, donors and agents of the charity to keep them up-to-date about developments in the law and the enforcement of these laws.

#### b) Due Diligence at the Board Level

In light of the heightened expectations on charities under the anti-terrorism legislation, it will be important to choose the directors of a charity very carefully. The importance for the organization in avoiding association with a director who may have ties to terrorist organizations is obvious. In this regard, it would not be unreasonable to assume that CRA may conduct Canadian Security Intelligence Service (“CSIS”) security checks of board members of both new and existing charities. The discovery of even a suggested link



between a director and a terrorist group could expose the charity to de-registration. Potential board members should therefore be advised that a CSIS security check may be carried out on them.

As the charity implements its new anti-terrorism policy statement and procedures, all new and existing board members should be required to complete disclosure statements so that an assessment of compliance with anti-terrorism legislation can be made. These disclosure statements should include consents from the directors to share the results of such statements with legal counsel, board members, executive staff, and nominating committee members, if applicable. Moreover, such disclosure statements should be required regularly, for example yearly, in order to enable the charity to determine compliance with anti-terrorism legislation on an ongoing basis. The directors' consent to be a director should include an undertaking to immediately report any material change in the director's circumstances that might affect the disclosure statements.

Once directors have passed the charity's screening procedures determined to meet the requirements of its anti-terrorism initiatives, they must exercise continued vigilance and due diligence in the conduct of the charity's affairs. Directors should continually educate themselves and the members and donors of their charities about legal developments in this area. They must also familiarize themselves with the activities of their own organization and about possible risk areas with respect to the day-to-day work and programs of the charity itself, as well as its affiliated organizations, donors, and agents. Directors must also continue to actively supervise the staff and volunteers of the organization and to ensure that staff and volunteers meet the organization's policy requirements.

c) Due Diligence at Staff and Volunteer Level

Like directors, existing and potential staff members in key positions should be advised that CSIS security checks might be carried out on them. They should be required to complete initial disclosure statements and consents and to provide an undertaking to immediately report any change in circumstance that might be relevant to their disclosure statements. Like directors, key staff members should also be required to complete these Disclosures annually. Staff and volunteers, both current and prospective, should be

required to complete disclosure statements and consents along with an undertaking to report any material change in circumstance that might be relevant to the disclosure statements. Staff and key volunteers should also be requested to complete yearly disclosure statements to permit an ongoing review of compliance with anti-terrorist legislation.

d) Due Diligence Checklist of Charitable Programs and Ongoing Assessments of Projects

A due diligence checklist should be developed in keeping with the unique characteristics of each charity. The checklist should identify and eliminate potential risk areas for the particular charity, taking into consideration how the anti-terrorism and related legislation will apply to its unique programs. At the same time, it must be designed in order to give guidance to the charity on how to continue to be effective in meeting its charitable objects and avoid unnecessary limitations on its activities. The due diligence checklist should be designed to enable the charity to assess the level of compliance of its charitable programs with anti-terrorism legislation and the level of risk that each of its programs might pose. All relevant aspects of anti-terrorism legislation and of the charity's Anti-terrorism policy that apply to its charitable programs should be incorporated into the due diligence compliance checklist. The checklist should reflect the "Super *Criminal Code*," money-laundering and terrorist financing provisions, as well as any relevant provisions in the *Foreign Missions Act* and the *Public Safety Act*.

Each existing and proposed charitable program should be evaluated in accordance with the due diligence compliance checklist. All new and proposed programs should be screened using the due diligence checklist as part of the initial decision of whether to undertake a program or not. A comprehensive review of all ongoing charitable programs should also be conducted on a regular basis, for example once a year. The results of all such due diligence audits should be communicated to the board of directors promptly.

e) Due Diligence Concerning Umbrella Associations

Umbrella associations to which a charity belongs can expose the charity, the umbrella association itself, and other members of the association to the risk of being part of a "terrorist group." Charities should demand a high standard of diligence and be vigilant in monitoring the compliance of any umbrella associations to which they belong. Members

of an umbrella association should be required to submit disclosure statements to determine compliance with anti-terrorism legislation. These disclosure statements should include consents to share the results of the Statements with the directors of the umbrella association, as well as with its members. The consents from members should also include an undertaking to immediately report any material change in the disclosure statements. Members of the umbrella association should be required to submit updated disclosure statements annually to confirm ongoing compliance with anti-terrorism legislation. Charities should also encourage umbrella associations to require members of the umbrella association to adopt their own Anti-terrorism policy statements.

#### 4. Due Diligence Concerning Third Parties

##### a) Due Diligence Concerning Affiliated Charities

Charities should also conduct a comprehensive Anti-terrorism audit of the organizations, individuals, and institutions they are affiliated with. This would include (as mentioned above) umbrella associations to which the charity belongs or, if the charity itself is an umbrella organization, other organizations that are members of the charity. It would also include other registered charities in conjunction with which the charity works, whether 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 put the charity at risk if they are not complying with Bill C-36.

##### b) Due Diligence with Regard to Third Party Agents

All third party agents of a charity, including agents that act on behalf of a third party agent for a charity, can expose the charity to liability by directly or indirectly being involved in the facilitation of a “terrorist activity.” In addition to reviewing third parties for potential risks, charities should encourage their agents to take their own steps to ensure compliance with the law by establishing Anti-terrorism policies and regular audits, due diligence check-lists, etc. Agents should be required to provide releases and indemnities to the charity in the event of non-compliance with anti-terrorism legislation. Third party agents may include foreign financial institutions and recipient or subcontracting organizations.

c) Due Diligence Concerning Donors

Charities should exercise vigilance in monitoring incoming donations with respect to the identity of the donor, and the manner in which the donor obtained the funds, as well as with regard to any donor restrictions on donated funds that could put the charity in contravention of anti-terrorism legislation. Charities must regularly review their donor-lists for “listed entities” or organizations that may be terrorist groups, affiliated with terrorist groups, or inadvertently facilitating terrorist activity. They must also ensure that a donor would not be able to use any of the charity’s programs to permit the flow-through of funds directly or indirectly to a terrorist activity.

d) Due Diligence Concerning Publications, Websites, and Public Statements

Charities should exercise vigilance in monitoring the content of their public communications. A charity must assume that the contents of publications, websites and the substance of all public statements are being, or may be in the future, reviewed by governmental agencies in the course of preliminary anti-terrorism investigations. This type of in-house due diligence should also be carried out with respect to third parties with whom the charity is associated. Public communications that may be perceived in any way as constituting the support or tolerance of an entity associated in any way with terrorism could result in serious, detrimental consequences for a charity, even if the communications are only loosely associated with the charity.

5. Documenting Due Diligence

a) Anti-terrorism Policy Statements

An anti-terrorism policy statement is a charity’s obvious first line of defence to show that it has addressed the possible risks to the charity and is making every effort to comply with applicable legislation. Along with the due diligence checklist, it is also a very effective tool to educate a charity’s directors and officers about the charity’s potential risks and liabilities. An anti-terrorism policy statement must be carefully thought out with the guidance of legal counsel. The full cooperation of the charity’s board and officers is necessary in order to make the policy statement reflect the individual needs and risks of each charity and to enable it to continue to meet its charitable objectives with the least possible interference. The process of preparing such a statement will, of course, require a

comprehensive review of the charity's operations in order to identify the charity's risks and objectives. In fact, a charity's anti-terrorism policy statement should include a requirement to complete a comprehensive audit of the charity's existing programs on a regular basis and of all new program proposals as part of the initial review to decide whether to undertake a new program. These audits should be executed in accordance with the due diligence checklist which reflects the unique characteristics of each charity.

An appropriate policy adopted with the direction of legal counsel will give the organization guidance on how to document all other aspects of due diligence related to anti-terrorism, including all applicable documents, such as statements of disclosure and checklists. It will identify documents that could be filed with third parties such as CRA as preventive measures and describe how to meet reporting requirements in the event that there is an actual or potential violation. The anti-terrorism policy may be published on the charity's website, with excerpts possibly being reproduced in reports and brochures of the charity, as well as in communications to donors.

As the above suggests, a boilerplate anti-terrorism policy will likely be ineffective. The following provides a skeleton view of the contents of an anti-terrorism policy:

- Preamble: the preamble will generally set out, in brief terms, the nature of the organization, its statement of faith or the objects of the organization, as well as a statement with respect to the incompatibility of the organization's beliefs and/or goals and any acts of terrorism;
- Definitions: although this is self-explanatory, it is important to ensure that certain terms are clearly spelled out, including the definition of terrorism, terrorist group, as well as detailing the persons to whom this policy will apply. With respect to the definition of "terrorism" and "terrorist group," it is best to adhere to statutory definitions in force in the organization's jurisdiction;
- General Policy Guidelines and Principles: under this heading, the organization should set out its commitment to complying with anti-terrorism laws, both domestically and in the foreign countries in which they plan to operate, ensuring compliance with any

- investigations by law enforcement authorities. The organization will also want to indicate that the organization will promptly review any concerns or allegations of non-compliance with legal counsel and review such advice with the board;
- **Reporting:** this section of the policy will detail the reporting requirements should anyone become aware of any concerns or allegation of non-compliance. The organization will likely want to set out when law enforcement or tax authorities should be consulted and who is responsible for such actions;
  - **Program Review:** as was discussed above, program reviews are an essential component of demonstrating due diligence. This section of the policy should set out when such program reviews will be conducted. It is advisable to ensure that programs are reviewed on a regular basis, not just on start-up;
  - **Donor Review:** donors, as much as recipients, can compromise the integrity of the organization. As such, the anti-terrorism policy should establish the threshold for investigating the donor, and the information required from donors before the charity is satisfied;
  - **Review of Participants:** the policy should set out which participants are to be subject to review, and what information will be required;
  - **Review of Associates:** as with the participant review, the policy should set out which associates are to be subject to review, and what information will be required;
  - **Financial Governance:** as detailed above, both the domestic legislation and FATF Guidelines have set out strict requirements in relation to financial governance. This section of the policy should confirm compliance with those measures, and set out the due diligence requirements the organization has in place in order to ensure the charity's funds do not fall into the wrong hands;
  - **Review and Amendment of Anti-Terrorism Policy:** as is the case with most policies, the organization should commit to reviewing the anti-terrorism policy on a regular basis, and making appropriate amendments to the policy as is required by changing national and international requirements;

- Schedules: the Schedules should contain the checklists for the various reviews discussed above, i.e. Program Review Checklist, Donor Review Checklist, etc., as well as a Waiver and Release that will enable the charity to terminate the relationship with a participant, member or client if the individual or entity is compromised by any connection to terrorist activity or groups. This is also an appropriate place to reproduce the lists of Listed Entities from both the Solicitor General and the United Nations, or other sources, as well as information on how to obtain updated lists in this respect.

b) Evidencing Due Diligence with CRA

Canadian-based charities should forward as much evidence of due diligence compliance to CRA as possible. This would include forwarding a copy of the anti-terrorism policy, along with a request that CRA advise the charity of any deficiencies in the policy statement. If the charity is considering embarking on a new program and it is not clear whether the proposed program would result in non-compliance, a letter granting advance approval of the program should be sought from CRA. Also, copies of all agency agreements should be filed with CRA with a request that CRA approve the agreements specifically as they relate to compliance with the anti-terrorism legislation.

c) Evidencing Due Diligence with Legal Counsel

Legal counsel is an important part of the due diligence strategy of a charity. The very act of involving legal counsel can provide tangible evidence of due diligence and can assist in insulating the charity and its directors from liability. However, legal counsel can also help to identify risk areas and recommend strategies for addressing actual or potential risks. Legal counsel should review, comment and amend anti-terrorism policy statements, disclosure statements, due diligence compliance checklists, and the particulars of a charitable program. Legal counsel can also assist in communicating with CRA in evidencing due diligence compliance.

## 6. Limits of Due Diligence

Although due diligence is not a defence for violations of the anti-terrorism laws in Canada and abroad, or against revocation of charitable or tax exempt status under tax laws, effective due diligence is, at the very least, necessary in order to show a desire to comply. Apart from

compliance with anti-terrorism laws, maintaining due diligence is also mandatory in accordance with the common law fiduciary duties of directors to protect charitable property. While due diligence is not a defence against anti-terrorism charges, the anti-terrorism laws do not abrogate directors' fiduciary duties to the charity and its donors. As such, it can provide powerful protection for directors against complaints at common law. If a charity's assets are frozen or seized, the charity's directors and officers could be exposed to civil liability for breaching their fiduciary duty to protect the organizations' charitable assets. If they are found to have been negligent, this could be a very significant liability quite apart from any possible criminal sanctions. Directors and officers may be able to protect themselves against a finding of negligence by demonstrating their intent to comply through exercising due diligence.

One of the most significant benefits of exercising due diligence may be in its preventive effect. While it may not provide a defence after the fact, when a violation has already occurred, it is one measure that a charity can use in advance to protect itself from unwittingly committing a violation. Due diligence can help avoid the occurrence of the kind of event or association that might lead to a charity to be implicated under the anti-terrorism laws. By being more knowledgeable about the charity and its operations, officers will have more power to respond appropriately. Through exercising due diligence the charity can identify potentially problematic individuals or organizations before it is too late. Due diligence can highlight programs that need to be restructured or discontinued in order to avoid exposure. It can alert officers to the need to decline donations from questionable donors. While no one can guarantee that due diligence will identify all possible risks, it can certainly help to minimize a charity's exposure by eliminating obvious risks. Some important changes are therefore needed in Canada's anti-terrorism legislation, in conjunction with the creation of "made in Canada" "Best Practice" guidelines, the institution of a due diligence defence to both "facilitation" charges under the *Criminal Code* and, as previously mentioned, for the improper use of a charities' resources under relevant sections of the *Charities Registration (Security Information) Act*.

## **G. THE PRACTICAL REALITY FACING CHARITIES IN CANADA**

As the preceding discussion suggests, charities in Canada are faced with a troubling choice in relation to the issue of anti-terrorism and whether the charity should ignore the risk of the charity



or its resources being used to facilitate terrorists or terrorist activity or whether the charity should undertake the burdensome project of developing and implementing a comprehensive anti-terrorism policy.

It is an undisputable fact that governments are putting significant resources into developing new measures to stem the tide of terrorism. At the same time, governments and law enforcement agencies continue to point to charities as a prime target for terrorist organizations due to a perceived lack of accountability and the façade of legitimacy. Failure to comprehend the seriousness of these realities and failure to comply with a charity's obligations under the anti-terrorism regime will result in the charity and its board of directors being unable to manage or assess their risk of inadvertent contravention and the resulting serious penalties. In many senses, the choice to comply or not is a difficult business decision that may on the one hand have no serious consequences or on the other hand may be devastating to both the charity and the individual directors. In this regard, the charity may never encounter any difficulties with its programs or disbursements, or a single misstep may result in the charity's assets being seized and the individual directors being held accountable to both the government and the charity's stakeholders. In the face of the alternative of complicated and burdensome policies and due diligence inquiries, the option of burying one's head in the sand becomes more and more the pragmatic option by default.

Charities who choose to try and implement what amounts to an onerous and sometimes crushing internal compliance framework, will face a number of additional troubling issues without the benefit of a guarantee that the charity will be safe from charges of facilitating terrorism and the devastating effects such a charge can have on the organization. Experience has demonstrated that while boards of charities agree in principle with the concept that the charity does not condone terrorism and will not materially support terrorists or terrorist activity, adoption and implementation of an appropriate policy may be a Herculean task. In this regard, boards and charities must struggle with issues of having to comply with guidelines and practices from multiple jurisdictions; issues of having material and human resources sufficient to implement anti-terrorism policies; issues of policy measures that unduly restrict or bind the organization; issues of recipient organizations being unwilling to undergo what is sometimes an intrusive and insulting due diligence investigation; issues of the embarrassment and unease of collecting what

amounts to a “dossier” on colleagues; issues of attempting to develop guidelines that bear a rational relationship to the quantum of the disbursement while still being compliant; as well as a number of additional important issues. In reality, the anti-terrorism regime imposes a significant burden on charitable organizations that significantly interferes with the charity’s ability to achieve its real purpose, without receiving a commensurate return on its investment.

## **H. CONCLUSION**

The collective insecurity resulting from September 11 and other subsequent terrorist acts has served as a catalyst for the introduction of extraordinary laws in Canada and elsewhere aimed at curtailing the threat of further terrorist attacks and the ability of such terrorist organizations to finance their operations. As a result, it is no longer possible for charities participating in international initiatives to ignore this new international reality. The ramifications of anti-terrorism legislation for charities in Canada are broad and unprecedented. The legislation necessitates a concerted proactive and vigilant response on the part of charities, their directors, executive staff and legal counsel. Charities will therefore need to diligently educate themselves about its requirements, and undertake all necessary due diligence measures to ensure compliance as best they can.

The balance has yet to be struck in Canada’s anti-terrorism legislation between thwarting terrorist financing and protecting *bona fide* charitable endeavours. Without clear and realistic standards for compliance, charities in Canada will, in large part, continue to choose to ignore the reality of the application of the legislation. Those who choose or are forced to attempt meet the requirements will face the implementation of onerous and potentially crushing compliance measures that cannot even ensure protection from inadvertent contravention of the legislation. Canada’s anti-terrorism legislation, as it now stands, has and will continue to cast a shadow over charities in Canada, leaving them susceptible to possible discriminatory and arbitrary enforcement of the law.