

Submission on Bill C-16

***Charities Registration
(Security Information) Act***

**NATIONAL CHARITIES AND NOT-FOR-PROFIT LAW SECTION
CANADIAN BAR ASSOCIATION**



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TABLE OF CONTENTS

Submission on Bill C-16 *Charities Registration (Security Information) Act*

PREFACE	- i -
I. INTRODUCTION	1
II. WHAT THE BILL SAYS	1
III. CONCERNS OF THE BILL	3
A. Applicability of the Duty of Fairness	2
i) <i>General Comments</i>	2
ii) <i>Applicability to Bill C-16</i>	2
B. Procedural Fairness	3
i) <i>Limited Disclosure of Information</i>	3
ii) <i>Privative Clause</i>	4
C. Substantive Fairness	4
i) <i>“Terrorism” and “Terrorist Activity”</i>	4
ii) <i>Vague Definition of “Supporting” Terrorism</i>	5
iii) <i>Absence of Knowledge and Intention</i>	5
D. Discrimination	6
i) <i>Discrimination Generally</i>	6
ii) <i>Discrimination Against Specific Charities</i>	6
E. Public Perception Of Charities	7
i) <i>Public Alarm</i>	7
ii) <i>Confidentiality Provisions</i>	7
IV. CRIMINALIZATION AS AN ALTERNATIVE	8
V. CONCLUSION	8

PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Charities and Not-for-Profit Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement by the National Charities and Not-for-Profit Law Section of the Canadian Bar Association.

Submission on Bill C-16

Charities Registration (Security Information) Act

I. INTRODUCTION

The Canadian Bar Association's National Charities and Not-for-Profit Law Section (the Section) appreciates this opportunity to comment on Bill C-16, *Charities Registration (Security Information) Act*. While the Section fully endorses the laudable goal of denying support to those who engage in terrorism, we believe that measures taken to advance that goal must be substantively and procedurally fair. In this regard, the Section has serious concerns about Bill C-16 and recommends against its passage in the current form.

II. WHAT THE BILL SAYS

Under Bill C-16, the Solicitor General and the Minister of National Revenue (the Ministers) can sign a certificate stating that there are reasonable grounds to believe that a registered charity or an organization applying for registered charity status is involved in supporting terrorist activity. The Ministers may rely on security or criminal intelligence reports (intelligence reports), and information obtained in confidence from a foreign-based government, institution or agency or from an institution or agency of an international organization of states (foreign information).

After the Ministers have signed a certificate regarding a particular organization, the certificate must be served on the organization and submitted to the Federal Court. If the court then determines the certificate to be reasonable, the named organization will be ineligible to receive charitable status or, if already a registered charity, will have its charitable status revoked.

In considering whether to uphold a certificate, the Federal Court may examine the intelligence reports on which the Ministers based their opinion, and any other relevant information regardless of whether that information would be admissible in a court of law. Upon an application by the Ministers, the court may also consider any foreign information that the judge determines to be relevant.

The organization subject to a certificate must be given a reasonable opportunity to be heard by the Federal Court. Before that hearing, the organization would be given a summary of the information available for consideration by the judge, except that which the judge deems would injure national security or the safety of persons.

Under the Bill, the decision of the Federal Court regarding the reasonableness of a certificate would not be subject to appeal or judicial review. An organization challenging a certificate that has been adopted must apply to the Solicitor General to have the certificate reviewed by the Ministers based on a claim that there has been a material change in the circumstances of the organization. If the Ministers agree, they may then decide either to continue or cancel the certificate. In this instance, the Ministers' decision may be appealed to the Federal Court, whose decision would be final.

III. CONCERNS WITH THE BILL

A. Applicability of the Duty of Fairness

i) General Comments

The notion of a duty of fairness is a fundamental aspect of the legal system and extends to both the judicial and administrative spheres. As the Supreme Court has stated:

Like the principles of fundamental justice in section 7 of the Canadian *Charter of Rights and Freedoms*, the concept of fairness is entrenched in the principles governing our legal system, and the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making.¹

The court clarified that the duty applies generally to all bodies that derive power from statute, with no relevant distinction made between judicial, quasi-judicial and administrative decisions. As a rule, the common law duty of fairness encompasses a right to procedural and substantive fairness.

ii) Applicability to Bill C-16

Bill C-16 would involve an investigative and decision-making process by the Ministers, as well as a review of the Ministers' decision by the Federal Court. The duty of fairness applies to both the judicial and administrative components present in the Bill.

B. Procedural Fairness

The potential effect of the Bill on charitable organizations would be to suspend or limit a statutory right based on a quasi-criminal allegation. Given these potential serious consequences, we believe that greater measures of procedural fairness and protection are required than the minimal disclosure provisions and limited procedural safeguards now included in the Bill.

¹ *R. v. Beare*, [1988] 2 S.C.R. 387; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

i) Limited Disclosure of Information

We have many concerns about the limits the Bill provides on disclosure of the foreign information and intelligence reports relied on by the Ministers and the Federal Court in reaching their decisions. In our view, this is especially problematic in regard to the court's consideration of foreign information.

Foreign entities providing information may have political reasons for stifling the efforts of certain charitable organizations and may manipulate the information provided to achieve this end. If charitable organizations do not know the foreign information being considered in the case against them, they will also not be able to challenge the credibility of that information through cross-examination. This provision seriously hinders a charitable organization's right to be heard and to know the case being made against it. The Section has serious concerns about the procedural fairness of the Bill.

ii) Privative Clause

The parameters of appeal contained within administrative legislation, beginning with the most generous provision and becoming increasingly restrictive, include a trial *de novo*, an appeal on an error of fact or law, an appeal based on an error of law only, no appeal, and no appeal or judicial review.

The privative clause proposed in section 6(2) of the Bill, concerning the decision of the Federal Court as to whether the certificate issued by the Ministers is reasonable, states that "(a) determination under paragraph (1)(d) is not subject to appeal or review by any court." This falls within the most restrictive appeal provision along the spectrum mentioned above. Given the serious nature of the allegations and rights at issue, such a strict privative clause is neither justified nor warranted in this proposed legislation.

C. Substantive Fairness

i) “Terrorism” and “Terrorist Activity”

The Bill fails to define “terrorism” or “terrorist activity.” This creates uncertainty for a charitable organization in knowing exactly what constitutes a contravention of the Bill. A clear definition would also recognize that, because of divergent political and social ideals in Canada and in foreign countries, ideas about what constitutes “terrorism” can vary. Certain activities that are both legal and charitable in Canada may be considered “terrorist activity” in another country from which foreign information relied on to investigate a charitable organization may have emanated. For example, a Canadian charity offering educational services and materials relating to contraception may be unwelcomed and considered as involved in “terrorist activity” by some countries. Religious charities distributing materials relating to their religious messages may also be opposed by the governments of some countries, and such distribution may similarly be considered “terrorist activity.”

Given the risk that activities which are both legal and charitable in Canada may be considered to be “terrorist activity” in a country providing foreign information, there should be a clear definition of “terrorism” and “terrorist activity” in the Bill. If the Bill does not contain an inclusive definition of what constitutes “terrorism” and “terrorist activity,” it should at a minimum indicate what those terms do not include, specifically those activities that are legal in Canada.

ii) Vague Definition of “Supporting” Terrorism

The Bill’s vague explanation of what constitutes “support” of terrorist activities also raises concerns of substantive fairness. The Bill states that supporting a terrorist activity could include having directly or indirectly made available resources to an organization or person that was at the time, and continues to be, involved in terrorism or activities in support of terrorism. Such involvement could also include an organization that is making, or that will make available, resources to an organization or person that

engages, or will engage, in terrorism or activities in support of terrorism. The breadth and vagueness of this explanation could make it extremely difficult for an organization to determine whether or not it actually is acting in contravention of the Bill.

iii) Absence of Knowledge and Intention

We are also concerned that the Bill does not address the knowledge or intent of a charity as to how its support is used by other organizations. The present wording suggests that if one charity provides support to a second charity involved in supporting terrorism, the first charity would also be at risk under the Bill. No due diligence defence is provided, nor is there any grace period for organizations such as the first charity in the above example after becoming aware of the actions of the second charity.

Charities regularly face difficulties in tracking the exact use of the financial aid in providing certain types of charitable relief. In some countries, the only organizations administering humanitarian aid and through which Canadian organizations can channel support for humanitarian aid, may also be indirectly involved in terrorism or the support of terrorist activities. Even if a Canadian organization specified that its support was only for humanitarian aid and even if the local organization only used it for such, the fact that the local organization was connected to terrorist activities could result in the Canadian organization being denied charitable status. By omitting consideration of the intention or direction of Canadian organizations about the use of funds by foreign organizations, the Bill could result in stifling humanitarian aid to some countries.

D. Discrimination

The Bill singles out charitable organizations as targets for investigation in relation to involvement with terrorist activities. Targeting charities is problematic on both a general and a specific level.

i) Discrimination Generally

Targeting charitable organizations for investigation about connections with terrorist activity over other sorts of organizations could amount to discrimination against charities. Without clear evidence that charities are involved with terrorism more than other organizations, this discriminatory treatment of charities cannot be justified.

ii) Discrimination Against Specific Charities

We are concerned that the Bill would permit certain charities to be disproportionately targeted for investigation. Stereotypes linking certain cultural, religious or ethnic organizations with terrorism may result in those organizations being targeted for scrutiny based more on those stereotypes than the evidence implicating them with terrorism.

The Bill would also allow an organization to be barred from charitable registration if it is reasonable to think that it will make any of its resources available to an organization or person that will engage in terrorism or activities in support of terrorism. This proactive provision is especially open to misuse on the basis of stereotypes, particularly because the Bill does not address such potential misuse. Without evidence of a real connection between a charitable organization and involvement in terrorism, singling out a charity based upon the culture, race or religion associated with that charity would encourage discrimination based solely upon those factors.

E. Public Perception Of Charities

i) Public Alarm

We are concerned that the Bill could have a negative impact on the public perception of charities by creating an unnecessary and exaggerated sense of alarm connecting charities and terrorism. This could result in a “chilling effect” on donations to organizations that may be stereotyped as supporters of terrorism. As discussed above, there is also a risk that certain types of charities may be disproportionately targeted for investigation under the Bill as a consequence of existing prejudices.

ii) Confidentiality Provisions

The risk of damage to the public's perception of charities is exacerbated by the fact that the Bill has inadequate provisions to ensure that the investigation process will remain confidential. The Bill requires that a certificate found to be reasonable must be published in the *Canada Gazette*, and that, if a certificate is subsequently quashed because of a change in material circumstances, notice of that must also be published in the *Canada Gazette*. The Bill also provides that an organization which is the subject of a certificate may apply to a judge for an order directing that its identity not be published or broadcast except in accordance with the Bill, or that any documents filed in court be treated as confidential. However, the Bill does not delineate the criteria to be considered on an application to the court, and the decision following such an application is not subject to appeal or review by any court.

In our view, the Bill provides inadequate assurance of confidentiality for organizations. As such, it fails to recognize the potential negative impact on an organization's public image as a result of being the subject of a certificate, whether or not the certificate is eventually adopted and the organization is eventually barred from having charitable status. In addition, the disproportionate investigation of certain types of charities over others could exacerbate the negative effect upon the public perception of those charities, regardless of the outcome of the relevant investigations.

IV. CRIMINALIZATION AS AN ALTERNATIVE

In our view, an alternative to better achieve the Bill's objectives would be to criminalize the financial support of any organization involved with terrorism. Such a provision would apply to all organizations equally rather than unfairly scrutinizing charitable organizations and would still be subject to the general issues of fairness discussed above. It would require the higher burden of proof and the more stringent procedural protections of our criminal law. Further, it would alleviate the risks of discrimination

and damage to the public perception of charitable organizations that are generated by the proposed Bill C-16.

V. CONCLUSION

The goal of eliminating terrorism can and should be supported through fair and effective legislation. We believe that the proposed Bill C-16 does not achieve this objective.

Charitable organizations play an important role in society by facilitating noble and essential services. Existing government control and regulation of registered charities adequately ensures that only those organizations with legitimate charitable purposes and activities may receive status as a registered charity. The effect of the proposed Bill C-16 would be to unfairly and unnecessarily subject charitable organizations to the kind of scrutiny that would have a significant negative impact on many organizations with legitimate charitable purposes, as well as the public's perception of the work of charitable organizations in general. We believe that the preferable approach would be to criminalize any financial support of terrorism or terrorist activities and strongly recommend against the passage of Bill C-16 in its present form.