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April 27, 2015

Via email: FINA@parl.gc.ca

James Rajotte, M.P.
Chair, Finance Committee
House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6

Dear Mr. Rajotte:

Re: Terrorist Financing Study

The Canadian Bar Association Charities and Not-for-Profit Law (CBA Section) appreciates the opportunity to contribute to the Finance Committee's study on the cost, economic impact, frequency and best practices to address the issue of terrorist financing in Canada and abroad.

The CBA is a national association representing 36,000 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. The CBA Section comprises lawyers across Canada who advise or serve on the boards of charitable and other not-for-profit organizations.

Our comments highlight the impact of the current legal framework governing anti-terrorist financing on charities and not-for-profit organisations, and propose changes to that framework.

Charities and Terrorism

The CBA Section agrees with other witnesses in this study that charitable status carries the potential for abuse to finance terrorism. At the same time, it is important to appreciate that the fight against terrorism is not only a conflict fuelled by funds and arms, but a battle for hearts and minds, often in places rife with corruption and violence and lacking material basics and the rule of law.

Canadian charities have a significant role to play in winning over hearts and minds in these communities through the delivery of humanitarian aid and capacity building. While the work of charities is primarily driven by moral imperatives, rather than self-interest, this charitable work should be viewed as an asset in the war on terrorism. We urge Canadian legislators to take care that the rules fashioned to fight terrorism, while protecting charities from abuse or subversion by would-be terrorists, do not unduly undermine their value as an asset against terrorism.

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The Regulatory Framework and Costs of Compliance

The legal regime to combat terrorism and terrorist financing mandates that charities conduct due diligence on multiple levels to avoid inadvertently facilitating terrorist activity. Compliance measures are complex and the costs are steep.

Boards, staff, volunteers and subcontractors of charities require legal education on domestic requirements and internationally established best practices. Screening policies must be in place when staff is hired and volunteers are enlisted. Project planning calls for risk assessments of the potential for the inadvertent facilitation of terrorist activity. Procurement policies mandate the assessment of suppliers and subcontractors. Other parties with whom a charity might engage in an international relief effort must also be vetted. Operating procedures are needed to ensure these processes are consistently applied, and these processes are periodically audited for compliance. Due diligence must be properly documented, necessitating appropriate record retention policies, information management hardware and software, and cyber security measures. Gift acceptance policies are required to guard against unwittingly funneling funds through the charity to finance a terrorist activity. These policies must be managed and enforced by knowledgeable and trained personnel.

There are a plethora of charity-specific rules. For example, the Canada Revenue Agency has issued guidance[1] which outlines the obligations of charities working in foreign jurisdictions, including requirements for written agreements, appropriate procurement practices and security measures, among others. These are advisable practices, but they result in considerable compliance costs.

Charities are heavily regulated, for good reason. However, limitations on revenue-generating activities make it difficult for charities to meet the challenge of paying the high costs of compliance. Complex rules under the *Income Tax Act* restrict the ability of charities to engage in business, leaving little scope for "social entrepreneurship". Administrative and fundraising costs are expected to comprise a small percentage of revenues generated; the bulk of donated funds, or government grants, are directed to support the charity's beneficiaries. Since charitable assets are, under the common law, generally held in trust for the benefit of an organization's charitable purposes, a charity's Board of Directors, acting as quasi-trustees, must invest those funds conservatively, limiting the potential for increasing investment income and further restricting the charity's potential for generating revenue needed to meet its compliance obligations.

In our view, charities with expertise to deliver humanitarian relief and build capacity in problematic regions should be better supported in developing their compliance capabilities.

We propose several options for consideration:

- Increase the CRA's educational efforts on anti-terrorism compliance, pre-audit. Being aware in advance of the compliance costs and the risks of unintentional non-compliance may have the effect of dissuading ill-equipped charities from operating in problematic jurisdictions.
- Allocate specific sums under government funding agreements for compliance costs (as the Department of Foreign Affairs, Trade and Development sometimes does, when requested). Inform charities that they can apply for and may be granted money to recover some of the costs.
- Allocate government funds to an anti-terrorism compliance program for charities. Applicant charities would describe the due diligence processes, education or professional compliance services (legal and accounting for example) for which the funds would be used.

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[1] CG-002 *Canadian Register Charities Operating Carrying Out Activities Outside Canada* www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html

Unreasonable Criminal Liability on Charities

Due diligence is not infallible. Despite best efforts, it can sometimes be circumvented by resourceful and malevolent individuals. We question whether the expectations imposed on charities by Canada's anti-terrorism regime are reasonable or realistic. Specifically, subsection 83.19(2) of the *Criminal Code* provides that a terrorist activity is facilitated whether or not: the facilitator knows that a particular terrorist activity is facilitated; any particular terrorist activity was foreseen or planned at the time that it was facilitated; or any terrorist activity was carried out. This arguably creates a strict liability offence since *mens rea* – a guilty mind – is not an element of the offence. The potential impact on charities is troubling.

This issue was raised by the charitable sector at the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. The 2010 report of the Commissioner, the Honourable John C. Major, did not consider the specific arguments raised about the strict liability nature of section 83.19(2) of the *Criminal Code*, but did make the point that Canada's anti-terrorism legislation should not "...unnecessarily impede the valuable activities of legitimate organizations…". He went on to recommend that the CRA develop any further guidance on terrorist financing in close consultation with the charitable sector. He noted that "...the work of honest charities should not be hindered because of unrealistic guidelines or best practices."

We offer several possible solutions to correct subsection 83.19(2) of the *Criminal Code* or ameliorate its impact.

- Amend the section to eliminate the strict liability element of the offence, requiring the Crown to prove criminal intent.
- Create an exception for the delivery of humanitarian aid that incidentally supports a member of a terrorist group. For example, a charity that delivers medical supplies to a hospital which treated a member of a terrorist group would not be subject to prosecution.
- Provide more detailed guidance, through the CRA, on compliance with the terrorist financing legal regime, in consultation with the charitable sector.
- Specify in the *Charities Registration (Security Information) Act* that deregistration of a charity would not occur in the absence of *mens rea* or where humanitarian aid had incidentally supported a member of a terrorist group.

The CBA Section is pleased to provide this input, and would welcome an opportunity to be of further assistance in developing any changes to the law or policy.

Yours truly,

(original signed by Sarah Mackenzie for Margaret Mason)

Margaret Mason
Chair, Charities and Not-for-Profit Law Section