BRIEF TO THE STANDING COMMITTEE ON FINANCE

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It is a pleasure to receive the invitation to appear before the House of Commons Standing Committee on Finance (Canada) on its study of the cost, economic impact, frequency and best practices to address the issue of terrorist financing both here in Canada and abroad.

To provide some of my personal background, I am the managing partner of a mid-size law firm located in the Toronto and Ottawa regions, which firm has a particular focus on providing full services to charities and not-for-profit organizations across Canada and internationally. My colleagues and I have worked with thousands of charities and not-for-profit organizations over the years, including many which carry on operations outside of Canada, with some operating in conflict areas, such as Sri Lanka, Afghanistan, Sub-Saharan Africa, Israel, West Bank and Gaza, amongst others.

In the course of advising charities operating outside of Canada, we have had to advise boards of directors and senior management of charities on the appropriate due diligence that the organizations need to carry out in order to be in compliance with Canada's anti-terrorism legislation since it was first introduced in October 2001. To assist in this regard, in 2001 we launched and have maintained a dedicated website known as www.antiterrorismlaw.ca to provide free resource materials and commentaries for charities that are seeking to become familiar and compliant with Canada's anti-terrorism legislation, as well as identifying related areas of risk management concerns.

Our firm has also been involved in making submissions to the Canadian government concerning anti-terrorism legislation, including the Air India Inquiry, and we have appeared at conferences on terrorist financing at a number of U.S. universities. As member of the Canadian Bar Association and CBA Charities and Not-for-Profit Law Section Executive, I have been involved in all of the CBA's submissions on anti-terrorism legislation made over the last 15 years.

What we have observed over the last fifteen years from working with charities that operate in the international context is that, without exception, they all want to be compliant with Canada's anti-terrorism legislation, but many find it challenging to do so from a practical standpoint. In this regard, many charities either take the position that the obligations associated with complying with anti-terrorism legislation is not material to their charitable operations or if it is, their efforts to comply may not be as robust as they could be due to perceived or real limitations in their operating budgets or overall resources. A limited number of charities have instituted comprehensive due diligence policies and procedures, but they are generally the exception to the rule.

The inability of most charities operating in the international arena to become appropriately engaged in the due diligence required to be compliant with Canada's anti-terrorism legislation is due to a great extent on the unfortunate drafting of the legislation itself and a general lack of guidance and direction from the Canadian government on how charities can best comply with the legislation.

First, when Canada's anti-terrorism legislation is explained to senior management and/or members of the boards of director of a charity operating outside Canada, they find the legislation to be overly broad, confusing and difficult, if not impossible, to comply with on a practical basis. For example, section 83.03 of the *Criminal Code* makes it an offense to make property or financial services available if it will benefit a person who is "facilitating" a terrorist activity or knowing that it will, in whole or part, benefit a terrorist group. Section 83.19 of the *Criminal Code* makes it an offense to "knowingly" facilitate a terrorist activity. However, the *mens rea* element of the offense, i.e. "knowingly" is rendered virtually meaningless by paragraph 83.19(2) in stating that a terrorist activity is in fact "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.

As well, the *Charities Registration (Security Information) Act* lacks any rigorous legal procedure, permitting the government to refuse to register or deregister a charity without the charity receiving full particulars of the allegations. Such overly broad provisions subject historically legitimate means of providing humanitarian aid in conflict zones to criminal sanctions, something which the boards and senior management of Canadian charities operating abroad are understandably very worried about.

Further, notwithstanding claims by international bodies that charities are the weak link in terrorist financing, most Canadian charities do not see how their assistance with natural disasters or other

humanitarian relief engages issues of terrorism. Thus, while charities are charged with ensuring careful stewardship of their donors' dollars, they must also implement practical procedures to ensure that "every" program, partner and donor is not tied directly or indirectly to terrorism in the past, present or even the future, as required by Canada Revenue Agency's ("CRA") interpretation of the overly broad anti-terrorism legislation. The fulfilment of CRA's expectations in this regard leaves charities faced with an extremely daunting task in addition to the numerous other regulatory challenges they must tackle while operating abroad.

However, it is not simply overly broad *Criminal Code* sanctions with which charities need to be concerned. There are also concerns with the impact of regulatory measures and processes that are related to the government's counter-terrorism measures that are of equal concern to many charities operating internationally. In this regard, there is a perception that the Canadian government could on occasion brandish the terrorism label either directly through the RCMP, or indirectly through other regulators such as CRA conducting an audit, without necessarily considering the very real personal consequences for the individual directors, management, members, donors, and families associated with charities operating in the international context. This is true whether it be criminal sanctions, revocation of registered charity status and the brandishing of those directors and senior management as "ineligible individuals", loss of essential services, e.g. bank accounts, or fear for safety if there was to be even a suggestion that a charity was not exercising adequate due diligence to ensure that it and all of its staff, board members, officers, corporate members, donors, agents, and other third parties acting on the charity's behalf did not unwittingly become involved in directly or indirectly "facilitating" terrorist activities by providing humanitarian aid in a conflict area. Moreover, the enhanced criminal sanctions and information sharing found in Bill C-51 will increase concerns for the boards and senior managers of charities in Canada.

Second, charities operating in the international arena generally find that there is a lack of clear rules or guidelines from the Canadian government to assist them in knowing exactly what it is that they should or should not do in order to be compliant with the Canada's ant-terrorism legislation. As the Canadian Bar Association has indicated in its submission to the Finance Committee on this issue, due diligence is not infallible and despite best efforts, the due diligence efforts of well-intentioned and diligent organizations do not on their own provide immunity from the possibility of criminal prosecution. With that in mind, it is frustrating for charities to be advised that the adoption, implementation and compliance with a comprehensive anti-terrorism policy that imposes due diligence on projects, partners and donors is

not a sufficient defence to allegations by regulatory authorities of directly or indirectly facilitating terrorism. While brevity is occasionally considered to be a virtue, in the context of providing registered charities with guidance with respect to anti-terrorism provisions in Canada and abroad, brevity can be a dangerous thing if the government insists on continuing to impose unrealistic expectations of charitable organizations being in essence gatekeepers for counterterrorism. If it is difficult enough for the Government of Canada to do so itself, it is virtually impossible to expect charities providing humanitarian aid to be able to do it with their significantly smaller budgets and limited resources.

A brief checklist, such as the CRA's Charity Directorate Checklist for Charities on Avoiding Terrorist Abuse (http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/vtb-eng.html), which has only passing references to international guidelines, does not provide sufficient information for domestic charities to be properly informed in order to adequately conduct the necessary due diligence investigations required for practical compliance purposes. References to international guidelines (such as the FATF's *Terrorist Financing* Guidelines or the *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities*) should only be used to enhance clearly written due diligence guidelines that Canadian charities need to follow and should not instead result in a moving target for compliance, as is currently the case.

In response to the challenges identified above, we would like to make the following recommendations:

First, consistent with the recommendations made by the Canadian Bar Association, we would recommend:

- Amend section 83.19(2) of the *Criminal Code* to eliminate the strict liability element of the offence and to require the Crown to prove criminal intent to find any person guilty of such an offence;

- Create an exception for the delivery of humanitarian aid, particularly in response to a crisis, where such aid may incidentally support or benefit a terrorist organization;

- Institute a clear *mens rea* requirement to the *Charities Registration (Security Information) Act*.

- Amend the *Charities Registration (Security Information) Act* so that the Federal Court judge, to whom a certificate is referred, shall not find the certificate to be reasonable where an applicant or registered charity has established that it has exercised due diligence to avoid the improper use of its resources.

- Amend the *Charities Registration (Security Information) Act* to allow for an appeal to the Federal Court of Appeal of a decision by a Federal Court judge that a referred certificate is reasonable.

Second, also consistent with the recommendations by the Canadian Bar Association, we would suggest "made in Canada" guidelines that will allow charities that wish to be compliant to have clear parameters with what they need to do and what they should not do in order comply with Canada's anti-terrorism legislation and be able to evaluate their performance. As well, the provision of an objective guidepost would enable CRA, in its role as the regulator, to evaluate the due diligence or lack thereof of applicants for registration and charities under audit. In this regard, CRA should be encouraged to work in collaboration with the charitable sector in the development of these guidelines.

It has been our pleasure to provide input to the Standing Committee on Finance on this important topic. Please let me know if you have any questions or if we can be of further assistance.