

THE NEW LAWS ON TERRORIST FINANCING

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(Remarks prepared for delivery to the Conference "Dirty Money, Clean Hands," Winnipeg, Manitoba, March 21, 2003)

CANADA HAS THREE NEW laws on terrorist financing: the United Nations Suppression of Terrorism Regulations, additions to the *Criminal Code*, and a new *Charities Registration Act*. All three laws came about as a reaction to September 11th, yet, they work in inconsistent ways.

A. The United Nations Suppression of Terrorism Regulations

The United Nations Suppression of Terrorism Regulations was the first to be enacted on October 2, 2001, under the authority of the *United Nations Act*. That *Act* gives the Cabinet the power to implement resolutions of the United Nations Security Council. The *Act* provides that when:

the Security Council of the United Nations decides on a measure to be employed to give effect to any of its decisions and calls on Canada to apply the measure, the Governor in Council may make such orders and regulations as appear to him to be necessary or expedient for enabling the measure to be effectively applied.¹

Immediately after September 11th, the Security Council passed a resolution² asking member states of the United Nations to prevent and suppress the financing of terrorist acts. The resolution further declared that "... knowingly financing... terrorist acts are also contrary to the purposes and principles of the United Nations[.]"

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¹ *United Nations Act*, R.S. c. U-3, s. 2.

² Resolution 1373 passed September 28, 2001.

This last declaration, that financing of terrorist acts is contrary to the purposes and principles of the United Nations, has implications for refugee determination. The United Nations Refugee Convention states that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.³

A person who knowingly finances terrorist acts is excluded from refugee protection.

The United Nations Suppression of Terrorism Regulations has three components. One is the obligation on every person not to deal in terrorist property. The second is an obligation on every financial institution to report monthly whether it is or is not in possession of terrorist property. The third is the obligation on every person to disclose terrorist property in his or her possession and information about transactions in respect of that property.

Whether an organization is terrorist is determined by listing. An organization has to be listed to be considered terrorist for the purpose of the regulations. The regulation says this about the list:

A person whose name is listed in Schedule 1 is a person who there are reasonable grounds to believe

(a) has carried out, attempted to carry out, participated in or facilitated the carrying out of a terrorist activity;

B. Hamas and Hezbollah

This United Nations Suppression of Terrorism Regulations list led to disputes about both Hamas and Hezbollah. At one time, the Government of Canada split both organizations in two, listing one wing of the organizations and not the other.

The regulations listed the military wing of Hamas, called "Hamas-Izz al-Din al-Qassem." However, Hamas has two wings: a political wing as well as a military wing. The political wing of Hamas was not listed, which meant that Hamas could raise money in Canada and transfer it out of Canada to do its "political" work in Israel, the West Bank, and Gaza.

³ 1951 Convention Relating to the Status of Refugees, ("Refugee Convention"), Article 1F.

Canada has no control over the transfer of Hamas funds from its political wing to its military wing once the funds leave Canada. The Government of Canada has no right or opportunity to see the books of the Hamas operations in the West Bank and Gaza. Money could leave Canada under the name of the Hamas political wing and be transferred abroad to the Hamas military wing and Canada would be none the wiser.

Furthermore, Hamas as a whole is a terrorist organization, not just its military wing. The political wing preaches terrorism; the military wing practices it. The political wing indoctrinates and incites to hate; the military wing channels that hatred into suicide bombings. By freezing the funds of only the military wing of Hamas, Canada was violating the Security Council resolution that called on states to freeze the funds of terrorist organizations.

A suicide bombing operation requires more than weapons and targets. It requires a steady stream of willing suicide bombers. It is the political arm of Hamas, through the incitement to hatred in the schools, youth clubs, and mosques it finances in the West Bank and Gaza, which provides these suicide bombers.

Hamas is an Arabic acronym for Islamic Resistance Movement, and an Arabic word meaning "zeal." The organization was founded in 1987 as an overtly anti-Semitic organization. Its founding covenant charges Jews with an international conspiracy to gain control of the world. Hamas's covenant says, "Islam will obliterate" Israel, and has been engaged in suicide bombings in Israel since 1994. The Anti-Defamation League of B'nai Brith reports that "through systematic indoctrination, social pressure and the promise of paradise, Hamas religious and military leaders recruit young, poor men for suicide missions and other attacks."

Hamas is a social service organization in the West Bank and Gaza. In addition to the schools, mosques, and youth groups, it funds day care centres, athletic clubs, and medical clinics. However, Hamas is a social service organization with a twist. The Anti-Defamation League further reports:

The boundaries between Hamas' political/social and its military activities are blurred, particularly since Hamas leaders use mosques, kindergartens, and youth clubs as forums for spewing anti-Israel propaganda and mobilizing support for violence against Israel.

Incitement to hatred is a Canadian criminal law offence. It is a violation of international human rights standards, prohibited in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the United Nations Convention on the Elimination of

All Forms of Racial Discrimination. Canada has signed and ratified both the International Covenant on Civil and Political Rights and the United Nations Convention on the Elimination of All Forms of Racial Discrimination and, at international law, is bound to respect them.

It is no comfort and no answer that it is only the military wing of Hamas that sends the suicide bombers to their deadly tasks. Hamas supporters cannot be heard to say that once the money goes to schools, mosques and youth clubs, what they teach and preach in those places is their own business. Nor does the good that Hamas does in the West Bank and Gaza cancel out or justify the gross violations of human rights it incites against Jews.

It was the political wing of Hamas, not its military wing, which sent an appeal to the Organization of Islamic Conference meeting in Qatar on December 9th, asking for support for its suicide operations. Their appeal said, "The suicide operations come as part of the war of attrition waged by our people...." Hamas urged the conference to differentiate between suicide attacks on Israelis and those carrying out terrorist acts.

It is the political wing of Hamas, not its military wing that gives money to surviving families of suicide bombers. This money provides an incentive for new suicidal killers to volunteer.

It is naive to think that we can separate incitement to terrorism and terrorism itself. Without the hate propaganda of the sort that the political wing of Hamas foments against Israel, Israelis, and Jews, the suicide bombings would never occur.

By allowing any money at all to go from Canada to Hamas, Canada was complicit in terrorism. The freezing of the Canadian assets of Hamas should not have been limited to its military wing. All the Canadian assets of Hamas should have been frozen.

Eventually, that did happen. An order in council of December 14, 2001, listed Hamas as a whole. The accompanying regulatory impact analysis statement said:

The change has been made on the basis of the deterioration of the situation in the Middle East. There are reasonable grounds to believe the Hamas organization as a whole is involved in or associated with terrorist activities.

The shift for Hezbollah took a lot longer. Like Hamas, the regulations originally listed only the military wing of Hezbollah, called "Hizballah External Security Organization."

Everything mentioned about the split in Hamas could also be said about the split in Hezbollah. Nizar Hamzeh, professor of political science

at the American University of Beirut and author of a forthcoming book about Hezbollah, stated in an interview with Stewart Bell of the National Post from Beirut Lebanon in February of this year that he has "no doubts" that money given to Hezbollah for humanitarian work is diverted for military purposes.

Hezbollah was founded in Lebanon in 1982 with the help of Iranian Revolutionary Guards. According to its 1985 platform, "The conflict with Israel is viewed as a central concern... the complete destruction of the State of Israel and the establishment of Islamic rule over Jerusalem is an expressed goal."

According to the Anti-Defamation League of B'nai Brith Canada, Hezbollah is believed to be responsible for a number of terrorist incidents in the Middle East, Western Europe and Asia, including two bombings in Buenos Aires: the 1993 bombing of the Israeli embassy and the 1994 bombing of the Jewish community building.

The split in Hezbollah ended on December 10, 2002, one year later, and only after I launched a lawsuit on the matter on behalf of B'nai Brith Canada. B'nai Brith Canada wrote a letter to the Minister of Foreign Affairs asking that the Government of Canada include Hezbollah in its entirety in the United Nations Suppression of Terrorism Regulations list. Minister Bill Graham wrote back to B'nai Brith Canada refusing that request.

B'nai Brith then went to court to ask the Court to set aside that decision and to order the Government of Canada to list Hezbollah in its entirety. Shortly before the Government had to file its position on the decision in court, the Cabinet reversed the decision to split Hezbollah and listed Hezbollah in its entirety. Once that was done, B'nai Brith discontinued its lawsuit.

If the matter had gone to court, the position that B'nai Brith would have taken is that Hezbollah is legally indivisible. In our view, a determination that a part of Hezbollah is terrorist is a determination that all of Hezbollah is terrorist.

This time, the Canada Gazette regulatory impact analysis statement said:

The change has been made on the basis of the close connection between the organisation as a whole and the Hizballah External Security Organization, and the recent statement by Sheikh Hassan Nasrallah, the Secretary-General of Hezbollah, encouraging suicide bombings. There are reasonable grounds to believe the Hizballah organisation as a whole is involved in or associated with terrorist activities.

C. *Criminal Code* changes

The *Criminal Code* additions on terrorist financing are an almost complete replica of the United Nations Suppression of Terrorism Regulations. The *Anti-Terrorist Act*, which introduced these *Criminal Code* additions, dealt with many more matters than just the law on terrorist financing. For one, the *Act* added to the *Criminal Code* a prohibition of terrorist activity.

There are two significant differences between the United Nations Suppression of Terrorism Regulations and the *Anti-Terrorist Act's Criminal Code* additions about terrorist financing. One is that the lists do not have the same significance in the *Criminal Code* as they do in the United Nations Suppression of Terrorism Regulations. Violation of the regulations can come about only in relation to a listed terrorist group. Under the United Nations Suppression of Terrorism Regulations, those who deal in the property of an unlisted entity face no risk.

In contrast, a violation of the *Criminal Code* additions can be perpetrated even in relation to a non-listed terrorist group. Even under the *Criminal Code*, the obligation of financial institutions to report monthly whether they are in possession of terrorist property is an obligation only in relation to listed entities. But the other two obligations that fall on everyone, not to deal in terrorist property and to report the existence of property that the person possesses and knows is owned by a terrorist group, apply whether the terrorist group is listed or not.

The *Anti-Terrorist Act* defines a terrorist group to include both a listed entity and "an entity that has as one of its purpose or activities facilitating or carrying out any terrorist activity."⁴ This means that even those who deal in property of non-listed entities can conflict with the law.

Listing means that the authorities will pay increased attention dealing in its property. With a listed entity, there is no need for law enforcement staff to establish that the entity has as one of its purposes or activities as facilitating or carrying out any terrorist activity. That purpose has already been presumptively established by the listing.

The second major difference between the two quasi-identical laws is the source of the list. Nominally, both lists come from the Governor in Council. In reality, the first list, in the United Nations Suppression of Terrorism Regulations, is generated by the Department of Foreign Affairs. The Minister of Foreign Affairs brings to the Cabinet the recommendation that an organization should be placed on the United Nations Suppression of Terrorism Regulations list. When B'nai Brith Canada went to Federal Court to ask the Court to order the government to put Hezbollah in its

⁴ *Anti-Terrorist Act*, S.C. 2001, c-41, s. 83.01(1).

entirety on the United Nations Suppression of Terrorism Regulations list, the respondents to the motion were the Attorney General of Canada, the Governor in Council, and the Minister of Foreign Affairs.

The second list, the *Criminal Code* list, is generated by the Department of the Solicitor General. The Solicitor General brings to Cabinet the recommendation that an organization should be placed on the *Criminal Code* list.

This practical difference explains the very different appearance of the two lists. The United Nations Suppression of Terrorism Regulations is very long, while the *Criminal Code* list, in contrast, is very short.

This difference in appearance in the two lists is puzzling. As I mentioned, the substantive provisions about freezing of property, disclosure, and reporting are virtually identical. The *Criminal Code* provisions are more extensive, allowing also for prosecution of terrorist activity. Nevertheless, that greater scope cannot explain the difference in the lists.

The penalty for violating both laws is the same. The *Anti-Terrorism Act* made many consequential changes to other statutes, including a change to the *United Nations Act*. With the change, the penalty for violating regulations made under the *United Nations Act* and the penalty for violating the new anti-terrorist provisions in the *Criminal Code* are the same.

Both laws state:

Any person who contravenes an order or regulation made under this Act is guilty of an offence and liable

(a) 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

(b) on conviction on indictment, to imprisonment for a term of not more than 10 years.

The *Criminal Code* amendments have provisions allowing for seizure and forfeiture of terrorist property, but so does the *United Nations Act*. The *United Nations Act* provides:

Any property dealt with contrary to any order or regulation made under this Act may be seized and detained and is liable to forfeiture at the instance of the Minister of Justice, on proceedings in the Federal Court, or in any superior court, and any such court may make rules governing the procedure on any proceedings taken before the court or a judge thereof under this section.⁵

⁵ *United Nations Act*, R.S. c. U-3, s. 3(2).

The test for determining whether a group should be listed as a terrorist entity is also the same for both laws. Under the *Criminal Code*, as under the United Nations Suppression of Terrorism Regulations previously quoted, the Governor in Council may place on a list any entity if:

the Governor in Council is satisfied that there are reasonable grounds to believe that

(a) the entity has carried out, or attempted to carry out, participated in or facilitated a terrorist activity;⁶

What, indeed, is accomplished by the two lists? Put another way, what is the effect when an organization is on the larger list, the United Nations Suppression of Terrorism Regulations list, but not on the smaller *Criminal Code* list?

If we look at the examples of Al Aqsa, Hamas, and Hezbollah, the Al Aqsa Martyrs Brigade is on the United Nations Suppression of Terrorism Regulations list,⁷ but not on the *Criminal Code* list. Hamas and Hezbollah are now on both lists.

In the view of B'nai Brith Canada, Al Aqsa should be on both lists. But what is the effective difference in legal liability now between, on the one hand, those who are part of Al Aqsa and those who deal with the property of Al Aqsa, and on the other hand, those who are part of Hamas or Hezbollah and those who deal with the property of Hamas or Hezbollah?

The answer, it would seem, is none. For those who deal in property and those obliged to report and disclose, the answer is simple. It does not matter whether or not Al Aqsa is on the *Criminal Code* list, nor whether the organization is caught by the *Criminal Code* provisions about dealing in property, reporting, and disclosing because Al Aqsa is plainly caught by its listing under the United Nations Suppression of Terrorism Regulations. The wording of the substantive provisions of the United Nations Suppression of Terrorism Regulations and the *Criminal Code* is the same; the penalties for violating the provisions are the same; and the risk of seizure and forfeiture of property exists under both laws.

For participation in Al Aqsa, it would seem there is also no legal difference. For participation in terrorist activity without a financial component, only the *Criminal Code* applies. Keep in mind that the *Criminal Code* prohibition is not restricted to listed entities, but includes "an entity that has as one of its purpose or activities facilitating or carrying out any terrorist

⁶ *Anti-Terrorist Act*, S.C. 2001, c-41, s. 4 adding section 83.05 to the *Criminal Code*.

⁷ As of March 28, 2002.

activity.” By adding Al Aqsa to the United Nations Suppression of Terrorism Regulations, the Governor in Council has made a determination “that there are reasonable grounds to believe that the entity has carried out, or attempted to carry out, participated in or facilitated a terrorist activity,” which is the very same determination that is needed to add an entity to the *Criminal Code* list. So surely, the issue of whether Al Aqsa is “an entity that has as one of its purpose or activities facilitating or carrying out any terrorist activity,” has already been determined.

When B’nai Brith Canada asked for Al Aqsa to be added to the *Criminal Code* list, the answer was not a straight “no,” like we received initially for the political arm of Hezbollah. Rather, it was that the standards of proof are different for the two lists. We were told that the United Nations Suppression of Terrorism Regulations list is a civil list, requiring only that the Governor in Council be satisfied on a balance of probabilities that the organization is terrorist. The *Criminal Code*, in contrast, because it is a criminal list, requires that the Governor in Council be satisfied beyond a reasonable doubt. The higher standard requires more care, more proof, and therefore takes longer to meet.

Yet, surely, that is nonsense. As I have mentioned, the legal consequences of violating both laws are the same. The consequence of violating the United Nations Suppression of Terrorism Regulations, a maximum of ten years in prison, can hardly be described as a civil or regulatory consequence. As well, the test for determining whether an entity should be listed is identical for both laws. Furthermore, it seems apparent that an entity, once listed under the United Nations Suppression of Terrorism Regulations, must fall within the *Criminal Code* prohibition in any case.

While I think the difference in the two lists is legally hollow, the Government obviously does not agree, otherwise the lists would look the same. However, there are practical consequences to a *Criminal Code* listing even if it would seem that legally, it should make no difference. It is far less likely that the Crown will prosecute an offence committed in relation to an unlisted entity than in relation to a listed entity. As well, policing of listed entities is going to be a lot more rigorous than policing of unlisted entities. The police are going to be paying more attention to the activities of the likes of Hamas in Canada, than activities of the likes of Al Aqsa. Because of these practical differences, it is important that the lists be the same. Once an entity is on the United Nations Suppression of Terrorism Regulations list, it should also be on the *Criminal Code* list.

D. Registration of Charities

The new *Charities Registration (Security Information) Act* was enacted as another part of the omnibus *Anti-Terrorism Act*. Although the new leg-

islation is called the *Charities Registration (Security Information) Act*, the *Act* is about deregistration of charities rather than their registration.

It should come as no surprise that terrorist entities cannot be registered as charities, which was the law in place before the new *Anti-Terrorism Act*. Terrorism was never considered a charitable activity. The new law allows for deregistration of existing charities which donate to a terrorist entity. The deregistration flows from donations both to *Criminal Code* listed terrorist groups and to *Criminal Code* unlisted groups, groups that fall within the general description of terrorist groups.

Here, yet a third government Minister is involved. The process of deregistration starts with a certificate signed jointly by the Solicitor General and the Minister of National Revenue indicating that there are reasonable grounds to believe the registered charity is making resources available to a terrorist entity.

One has to wonder here again about the practical effects of the absence of listings of the likes of an organization like Al Aqsa. Would the Government decline to initiate deregistration proceedings against a charity donating to Al Aqsa because Al Aqsa is not on the *Criminal Code* list? Given the Government's resistance thus far to putting Al Aqsa' on the list, I have to fear that this is so.

* The Al Aqsa organization was finally added to the *Criminal Code* list April 2, 2003 (Part II.1 of the Criminal Code), online: Department of Justice Canada <<http://laws.justice.gc.ca/en/C-46/SOR-2002-284/84456.html>>; <<http://laws.justice.gc.ca/en/C-46/SOR-2002-284/84456.html>>
See also online: Public Safety and Emergency Preparedness Canada - Listed Entities <http://www.psepc-sppcc.gc.ca/national_security/counter_terrorism/Entities_e.asp>.