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TRADE LAW MEMORANDUM

To: Clients and Friends

Re: ANTI-TERRORISM MEASURES AND THE ROLE OF FINTRAC

Date: October 24, 2001

New Anti-Terrorism Measures

Bill C-36, the *Anti-Terrorism Act*, introduced in Parliament on October 15th and quickly working its way through Committee, represents a fundamental shift in Canadian security policy. By any measure, the package, once enacted, will constitute a major ratcheting up of the power of the Canadian State to deal both with the current international terrorist crisis and with the longer-term dangers posed by the kind of Islamic fundamentalism represented by Osama bin Laden and the Taliban in all of its guises.

While the Bill is large in dimension and covers many aspects, two are of key significance. First, the amendments extend Canada's *Criminal Code* well beyond its current scope, criminalizing a wide array of direct and indirect terrorist-related activities, including acts related to the financing, facilitating and providing other services to terrorist organizations. These amendments seek to combat terrorism in its pocketbook, giving enforcement agencies the power to seize terrorist assets and root out ongoing financial support, the heart and soul of the global problem.

Second, the Bill changes the way financial institutions must behave in dealing with suspected terrorist groups and activities, extending both existing *Criminal Code* offenses and the reporting and recording obligations under the *Proceeds of Crime (Money Laundering) Act* and the *United Nations Suppression of Terrorism Regulations* reviewed in previous memoranda.

In this area, the Bill carves out an important new role for the Financial Transactions and Reports and Analysis Centre (FINTRAC). Banks, trust companies, insurance companies and other institutions will be required to report to FINTRAC on an ongoing basis and FINTRAC, in turn, is authorized to provide information on suspected terrorist activities to the RCMP and to CSIS and, in some cases, to local police forces.

Public comments on Bill C-36 have focused on its impact on individual rights, such as due process, privacy, etc., under the *Charter of Rights and Freedoms*. Some of these criticisms have tended to minimize the extent of the current peril faced by western societies and the urgent need, which most Canadians seem to recognize, to re-balance individual rights and collective security.

The Definition of “Terrorism”

The proposed *Criminal Code* amendments will make all “terrorist activity” a criminal offense. “Terrorist activity” is defined in a three-pronged manner as: (1) any act or omission committed for political, religious or ideological purpose, objective or cause and (2) committed in whole or in part with the intention of “intimidating the public” or compelling anyone, including a government, from doing or refraining to do any act and (3) intended to cause death, bodily harm or serious risk to health or safety or substantial property damage or serious interference with or disruption of an essential service.

Together with this stand-alone definition, the Bill includes as a terrorist activity any of the offenses covered by ten U.N. treaties on terrorism, such as the Suppression of Terrorist Financing Convention and the Suppression of Terrorist Bombings Convention. This means that each of the separate offenses in these treaties are to be incorporated into Canadian law and will become as important as the stand-alone definition itself.

In exceptional fashion, the Criminal Code will criminalize these acts whether committed inside or outside of Canada, thereby extending the reach of Canadian law beyond Canadian territorial limits. The Bill also allows the Federal Cabinet to establish a list of persons and groups deemed to be terrorists, a point that has attracted comment by its opponents in the Parliamentary committees studying the legislation.

To be within the stand-alone definition, each of the above requisite elements must be proven. To protect acts of legitimate political protest, the definition specifically excludes activity involving lawful advocacy, protest, dissent or work stoppage not intended to result in the harm referred to above. The Minister of Justice has stated her belief that these safeguards will ensure that the Bill meets the requirements of the *Charter of Rights and Freedoms*.

Terrorism-Related Activities Also Covered

Together with direct acts of terrorism, the Bill covers a range of indirect activities in the financial and assistance area that are designed to aid or abet the commission of terrorism:

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- ?? The Bill makes it a criminal offense for anyone, directly or indirectly, willfully and without lawful justification, to finance terrorist activity by “providing or collecting” property intended for use in that activity.
- ?? Together with preventing financing without lawful justification, the Bill makes it a criminal offense to collect property, or to invite others to provide money or to assist in financing or in other services, intended to be used, in whole or in part, for terrorist activity or for terrorist groups.
- ?? Along with the usual provisions including conspiracy and being accessories to acts of terrorism, the Bill makes it a criminal offense to “*facilitate*” terrorist activity. Facilitation occurs whether or not the person knows that a particular terrorist activity is facilitated and irrespective of whether any such activity was planned or foreseen at the time.

Freezing and Seizure of Property

Extending the reach of the *United Nations Suppression of Terrorism Regulations* and the other regulations made under the *United Nations Act* that were specifically directed to the Taliban and Iraq, the Bill freezes assets of all terrorist groups by making it a criminal offense for any person in or outside of Canada to knowingly deal, directly or indirectly, in the property or assets of any terrorist group. It also will permit the Federal government, on *ex parte* application to the Federal Court, to seize any property on suspicion that it is owned or controlled or will be used by such terrorist group or to facilitate terrorist activity.

Extension of the Role and Powers of FINTRAC

The *Proceeds of Crime (Money Laundering) Act*, passed in 2000, requires banks, credit societies, insurance, trust and loan companies and a range of other businesses and professions to keep records and to regularly report certain transactions and suspicious activities to FINTRAC.

The *Money Laundering Act* will be amended to extend the reporting requirements to all “terrorist activity financing offenses”. Such types of activities are spelled out in the new definitions in the amended *Criminal Code*, discussed above.

The right of seizure and detention of monies, securities and other instruments contained in the *Money Laundering Act* is extended, as is the authority of search by enforcement officers, to cover terrorist activities and terrorist groups.

In addition to the right of the Centre to disclose suspected money laundering to police authorities, where it now has “reasonable grounds to suspect that designated information would be relevant to threats to the security of Canada”, FINTRAC will be authorized to disclose that information to CSIS and the RCMP.

Amendments in the Bill also extend the authority of the Minister of Revenue or any other specially designated minister as well as FINTRAC itself to enter into international agreements with both foreign States and international organizations. The exchange of confidential security-related information between the Centre and that foreign State or organization related to terrorist financing activities will be authorized, enhancing the network of international efforts to deal with the terrorist threat.

Some Brief Conclusions

Bill C-36 is a wide-ranging response to the terrorist attacks of September 11th. It significantly extends the existing criminal provisions in Canadian law to include direct and indirect actions tied to terrorism and a range of terrorist-related activity. These go well beyond current crimes of murder, hijacking and other acts of violence in the *Criminal Code*. Notably, terrorist financing activities and a range of other kinds of activities that facilitate, aid and abet terrorism are now criminalized.

In league with enhanced powers of police and CSIS to identify and prosecute terrorists, these amendments add weight to the investigative tools and powers of law enforcement and security agencies across Canada.

The reporting and monitoring obligations of banks, insurance companies, securities dealers and other financial institutions will be significantly increased. Such entities must ensure they are in a position to report all transactions of which there are “reasonable grounds” to suspect may be related to a terrorist activity financing offense. This makes it incumbent on them to create the appropriate early-warning mechanisms, in combination with the FINTRAC and other data gathering reporting systems already in place. It seems that anti-terrorist functions will now become an integral part of the operation of all financial institutions, corporations and professional bodies, irrespective of the nature of their international activity.

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