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AIR INDIA REPORT EXAMINES ROLE OF CHARITIES IN TERRORIST FINANCING

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A. INTRODUCTION

Dubbed a "Canadian Tragedy", the bombing of Air India Flight 182 on June 23, 1985, is deeply emblazoned in the memories of Canadians. The flight, which originated in Canada, blew up over the Atlantic Ocean south of Ireland, killing all 329 people on board, 280 of which were Canadians, and remains the largest mass murder in Canadian history.[1] Only 132 bodies were recovered, with 197 forever lost at sea. Evidence recovered from the site revealed that a bomb located in the rear cargo hold of the aircraft had detonated and opened a hole in the left aft fuselage of the aircraft.[2]

More than twenty years after the Air India bombing, two Sikh separatists were charged with 329 counts of first-degree murder, conspiracy to commit murder, in addition to other related charges. After a two-year trial, the two men were found not guilty on all counts.[3]

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[1] "Opening Remarks by the Honourable John C. Major, C.C., Q.C., On the release of the Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182" online at: http://www.majorcomm.ca/en/reports/finalreport/commissioner-remarks.pdf.

[2] Public Safety Canada, "Foreword: Lessons to be learned: The report by the Honourable Bob Rae," online at: http://www.publicsafety.gc.ca/prg/ns/ai182/rep1-for-eng.aspx.

[3] CBC News, "In-Depth: Air India Timeline: The Trial," online at: http://www.cbc.ca/news/background/airindia/timeline.html.

Subsequent to the trial, the Governor General in Council, on the recommendation of Prime Minister Stephen Harper, appointed former Supreme Court of Canada Justice John Major to conduct a commission of inquiry into the bombing of Air India Flight 182 (the "Commission"), which report has important implications for charities and not-for-profit organizations ("NPOs"). This *Anti-Terrorism and Charity Law Alert* (the "Alert") examines the findings of the Commission with regards to the role of charities in terrorism financing.[4]

B. TERMS OF REFERENCE

The Governor-in-Council charged the Commission with lengthy terms of reference, which included the specific purpose of making findings and recommendations with respect to the following issues:[5]

- if there were deficiencies in the assessment by Canadian government officials of the potential threat posed by Sikh terrorism before or after 1985, or in their response to that threat, whether any changes in practice or legislation are required to prevent the recurrence of similar deficiencies in the assessment of terrorist threats in the future;

- if there were problems in the effective cooperation between government departments and agencies, including the Canadian Security Intelligence Service ("CSIS") and the Royal Canadian Mounted Police ("RCMP"), in the investigation of the bombing of Air India Flight 182, either before or after June 23, 1985, whether any changes in practice or legislation are required to prevent the recurrence of similar problems of cooperation in the investigation of terrorism offences in the future;

- the manner in which the Canadian government should address the challenge, as revealed by the investigation and prosecutions in the Air India matter, of establishing a reliable and workable relationship between security intelligence and evidence that can be used in a criminal trial;

- whether Canada's existing legal framework provides adequate constraints on terrorist financing in, from or through Canada, including constraints on the use or misuse of funds from charitable organizations;

[4] See "Anti-terrorism and Charity Law Alert" No. 21 online at: http://www.carters.ca/pub/alert/ATCLA/ATCLA21.pdf, for an overview of the Report's recommendations.
[5] For the complete terms of reference see online at: http://www.majorcomm.ca/en/termsofreference/PC2006-293_E.pdf.

- whether existing practices or legislation provide adequate protection for witnesses against intimidation in the course of the investigation or prosecution of terrorism cases;

- whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation and, if not, the changes in practice or legislation that are required to address these challenges, including whether there is merit in having terrorism cases heard by a panel of three judges; and

- whether further changes in practice or legislation are required to address the specific aviation security breaches associated with the Air India Flight 182 bombing, particularly those relating to the screening of passengers and their baggage.

During the inquiry process, thousands of documents were submitted and hundreds of witnesses appeared before the Commission to give testimony, including one of the authors, Terrance S. Carter. The authors also made a written submission to the Commission, entitled *The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance* ("Carter Submission").[6]

In June 2010, Commissioner Major released the Commission's final report, entitled the *Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* (the "Report"),[7] which consists of five volumes and deals with all aspects of the Canadian bombing. Volume 5, which will be discussed in this Alert, deals specifically with Terrorist Financing and offers a thorough examination of the impact of Terrorist Financing and Canada's role in combating such terrorist activity.[8] Volume 5 is broken into seven chapters:

- Chapter I Terrorist Financing - an Overview
- Chapter II Canadian Legislation Governing Terrorist Financing

[6] Terrance S. Carter, "The Impact of Anti-terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance," October 26, 2007, online at: http://www.carters.ca/pub/article/2007/tsc1026.pdf.
[7] See Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 website at http://www.majorcomm.ca/en/reports/finalreport/ for the entire Report.
[8] See Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 website at http://www.majorcomm.ca/en/reports/finalreport/volume5/ for the fifth Volume of the Report.

- Chapter III The Roles of Federal Departments and Agencies in Efforts to Suppress Terrorist Financing
- Chapter IV External Reviews of Canada's Anti Terrorist Financing Program
- Chapter V Canada's Response to Reviews of its Anti Terrorist Financing Program
- Chapter VI The Links Between the Charitable Sector and Terrorist Financing
- Chapter VII Resolving the Challenges of Terrorist Financing

The Carter Submission, which is mentioned throughout Chapter VI in Volume 5, relates to charities and the danger of utilizing broad terminology adopted by the *Criminal Code*, as such terms have the potential of defining innocent charitable activity as terrorism or as facilitating terrorism. The Carter Submission incorporated recommendations, such as, the need for a *mens rea* requirement, due diligence defence and appeal options in the *Charities Registration (Security Information) Act* ("CRSIA").[9]

It is significant to note that these concerns were mentioned by the Commission and although not directly recommended were partially heeded. The Report gives sufficient attention to the issues that impact Canadian charities and examines the anti-terrorism legislation and organizations in detail. The Commission is careful to add at the end of Volume 5 that charities must be consulted before recommendations are followed and changes should take into consideration the legitimate charitable sector.[10] Yet, the Report fails charities in several ways and falls short of providing all of the necessary reform that is advocated in the Carter Submission.

C. THE COMMISSION'S EXAMINATION OF CHARITIES' ROLE IN TERRORIST FINANCING

1. Sharing Intelligence

The Report suggested that there is a lack of institutionalized co-ordination and direction in national security matters, and that Canadian agencies have developed a culture of managing information in a manner designed to protect their individual institutional interests. Referring to the practice of limiting disclosure of information between the Canadian Security Intelligence Service ("CSIS"), Royal Canadian Mounted Police ("RCMP") and Canada Revenue Agency ("CRA") as "an impoverished response to terrorist threats", the Report suggested that the processes and procedures by which

[9] *Supra* note 6 at 55.
[10] *Supra* note 4.

decisions are made concerning what information should be passed or exchanged between intelligence and law enforcement communities requires substantial revision.

The Commission warned that CRA should work closely with other agencies to identify charities that may be involved in Terrorist Financing and lauded Bill C-25's expansion of the information that could be shared between agencies. Bill C-25 permits "designated information" to include, "the name, address, electronic mail address and telephone number of each partner, director or officer" along with "any other similar identifying information."[11] The Report determined that the lack of authority by the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") and the *Income Tax Act* ("ITA") to disclose information beyond the designated information "is a significant deficiency."[12] In fact, the Commission went so far as to recommend that the exchange of information between the CRA, FINTRAC, CSIS and the RCMP be mandatory, or at the very least be encouraged.[13]

The Carter Submission cautioned that the expansion of the designated information under Bill C-25 made charities and their directors "explicitly central to the anti-terrorism vetting" in spite of the charities' honest intentions.[14] Changes to the PCMLTFA authorize FINTRAC to enter into agreements with foreign governments in order that FINTRAC may send and receive designated information between foreign agencies. The Carter Submission suggested that the reports detailing "suspicious" transactions could be the basis for "facilitation" of terrorism charges under section 83.19 of the *Criminal Code*; which could potentially initiate the de-registration process under the CRSIA; or even result in personal liability for the directors and officers of a charity. Even an initiation of an investigation under anti-terrorism provisions could lead to seizure or freezing of charitable property and immeasurable damage to public perception and donor confidence. In this regard, it is unfortunate that the Report did not connect the expansion of information sharing by Bill C-25 to the potentially disastrous consequences that such reports could have on innocent charities as outlined in our Submission.

[11] S.C. 2006, c. 12. Even though Bill C-25 has received Royal Assent, it is still commonly referred to as Bill C-25 and not by its proper name, *An Act to amend the* Proceeds of Crime (Money Laundering) and Terrorist Financing Act *and the* Income Tax Act *and to make a consequential amendment to another Act*.
[12] *Supra* note 8 at 253.
[13] *Ibid.*, at 260.
[14] *Supra* note 6 at 26.

2. Intermediate Sanctions

The Report praised CRA's use of intermediate sanctions, such as monetary penalties and the suspension of a charity's power to issue tax receipts for donations,[15] suggesting that when a charity was restrained by a sanction it would prompt such charity to remove directors or trustees who might be involved in terrorist activities and let the public know that the charity was in the process of "shaping up."[16]

As laudable the concept of intermediate sanctions might be, which is recognized as a more practical alternative to de-registration under the ITA or prosecution under the *Criminal Code*, the Report fails to acknowledge the "chill-effect" an intermediate sanction could have on a charity and the inequitable resources that may be brought to bear against a charity in imposing intermediate sanctions. In this regard, it is self-evident that a charity is dependent on its goodwill and status to attract donations, and any negative publicity could significantly curtail donations. Even where the charity did indeed "shape-up" so to speak, the intermediate sanction may have a lasting affect on its ability to attract support, not only because the confidence of donors is lost, but also because there is not a mechanism to demonstrate to the public that the charity did indeed reform itself. In many instances, an intermediate sanction, or even the threat of an intermediate sanction, may exhaust the resources of a charity in the pursuit of defending its reputation. It is a stark reality that few charities have the resources to properly defend accusations of impropriety by CRA.

3. The Charities Registration (Security Information) Act Process

In many instances, the Commission did not provide a recommendation for how the issues addressed in the Report could be solved. One such instance is the questions raised concerning the security certificate process provided by the CRSIA process.[17] The Report thoroughly discusses the initiation and approval of security certificates, while highlighting the shortcomings in procedural justice outlined by the Carter Submission and other scholars. Yet, as there have been no certificates issued, the Commission used the justification that improvements could not be offered until the process has been tested.[18]

[15] *Supra* note 8 at 260.
[16] *Ibid.*, at 212.
[17] S.C. 2001, c. 41, s. 113.
[18] *Supra* note 8 at 261.

As has been frequently suggested by the authors, part of the impact of Canadian anti-terrorism legislation is coping with the fear of the law, not the law itself.[19] The Report failed to recognize that even having the CRSIA as a possible threat can result in charities taking unnecessary precautions, which could result in slowing Canadian charitable activity. Especially problematic, however, is the lack of concern about the certificate process. At one point the Commission goes so far to note that a due diligence defence may not be necessary, as "charitable status is not a consequence of the same magnitude as the prospect, for example, of detention or punishment of an individual."[20] This suggests that even though the Commission admits it is not possible to determine the extent of terrorist financing linked to charities[21] the government should maintain a "reserve power" to deregister a charity without any rigorous legal procedures.

4. Terrorism Provisions in the Criminal Code

One of the serious deficiencies in Canada's anti-terrorism legislation, which is identified in the Carter Submission, is the amendments to the *Criminal Code* implemented by the *Anti-terrorism Act*.[22] As the authors have repeatedly warned, the sweeping definitions of "Terrorist activity," "Terrorist group," and "Facilitation" all have the potential of including unsuspecting charities. The Commission in Chapter II of Volume 5 offers a summary of the *Criminal Code* provisions relevant to terrorist financing, but offers no critical analysis. In fact, the only suggestive comment of the *Criminal Code*'s role in terrorist financing is a passing reference to the Carter Submission description of the code as a "Super *Criminal Code*." This falls short of the necessary reform the *Criminal Code* should experience, since the Report lacked a recommendation to include the *mens rea* element as part of the pertinent criminal provisions.

5. Avoiding Harm to Legitimate Charities

The Air India Report does, however, end on an extremely positive note by recommending that Canada's anti-terrorism legislation may overburden legitimate charities. The Commission ends Volume 5, Chapter VII with the following caution:

[19] *Supra* note 6 at 2.
[20] *Supra* note 8 at 261
[21] *Ibid.,* at 210.
[22] S.C. 2001, c. 41.

> It is essential that measures to defeat the use of charities or NPOs for TF ["terrorist financing"] not unnecessarily impede the valuable activities of legitimate organizations. Any new guidelines or best practices that the CRA may contemplate to help it address TF in the charitable sector should be developed in close cooperation with the charitable sector. The work of honest charities should not be hindered because of unrealistic guidelines or best practices.[23]

Not only is the Commission recognizing that the CRA may need to develop additional guidelines for the charitable sector to address terrorist financing concerns, but the Commission very clearly states that the charitable sector should be consulted. In other words, the Commission recognizes that Canada has many valuable legitimate charities that could be hindered if Canada does not respond appropriately when suppressing terrorist financing. This caveat to the CRA goes a long way to balance out the Commission's lack of concern relating to the *Criminal Code* and the CRSIA and one can hope, if taken seriously, will result in positive reform to anti-terrorism legislation affecting charities.

D. THE COMMISSION EXAMINATION OF CANADA'S INTERNATIONAL STANDARDS

Although focusing on Canada's efforts, the Commission also examined the international structure involved in fighting Terrorist Financing. Three UN instruments, which are important in Terrorist Financing matters are: the *International Convention for the Suppression of the Financing of Terrorism*[24]*, UN Security Council Resolution 1373*[25] and *UN Security Council Resolution 1267*.[26] The other international organization of interest is the Financial Action Task Force on Money Laundering ("FATF"). FATF is an inter-governmental body established by the G7 group in 1989 with the purpose to develop policies to combat the laundering of drug money. This original mandate has been refocused to join the war on terrorism.

FATF has two documents that form its primary policy regarding non-profit organizations: *The Forty Recommendations*[27] and the *Nine Special Recommendations on Terrorist Financing*.[28] Although the FATF recommendations are not legally binding, FATF has developed an evaluation system that examines a member state's activities against terrorist financing. The Commission looked at FATF's 2008 Mutual Evaluation of Canada as an indication of how compliant Canada is to international standards. The 2008

[23] *Supra* note 8 at 262.
[24] Online: United Nations Treaty Collection <http://untreaty.un.org>.
[25] Online: United Nations <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.
[26] The most recent list of the 1267 Committee is available online: United Nations <http://www.un.org/sc/committees/1267/consolist.shtml>.
[27] FATF, *The Forty Recommendations* (France: FATF, 2003).
[28] FATF, *Nine Special Recommendations on Terrorist Financing* (France: FATF, 2004).

evaluation was the third of its kind, but the first to look at FATF's *Nine Special Recommendations on Terrorist Financing*. The FATF report considered Canada largely compliant, including regulations affecting the charitable sector, but found that Canada lacked a consistent procedure for determining the risk of financial activity sectors. Canada responded to FATF's report by passing Bill C-25 that expanded reporting entities in order to watch all transmissions of funds with reports being made to FINTRAC.

The international community has also been struggling with defining terrorism. The Commission found that there still is no universally accepted definition, resulting in the international community responding to only very specific and defined actions when they occur and impact the world.[29] This makes it difficult to invoke international cooperation, as it leads to inconsistencies of what constitutes terrorism.

Yet, the Commission highlighted the importance of international cooperation, noting that the very nature of terrorism is international. As a result the Commission again recommended that Canada integrate anti-terrorist financing efforts into CSIS, CSE, DND and DFAIT.[30] The Report also found that trade was a weak link due to minimal surveillance in most countries. The Commission noted that FATF will likely release trade recommendations in the near future.

As aforementioned, the increase in shared information and additional cooperation could result in information being collected about charities which could lead to any of the previously mentioned consequences: de-registering, listing, investigations or criminal charges. Unfortunately, the Commission did not connect this expansion to the potentially disastrous consequence that such reports could have on charities. The Commission justified its analysis by stating that it has yet to be seen the effects of Bill C-25 and Canada's anti-terrorism legislation, as both are relatively new.

E. CONCLUSION

The Report in no way disregarded the concerns of the charitable sector as irrelevant, but the lack of specific recommendations relating to the *Criminal Code* and the CRSIA process was an opportunity loss. The Report also lacks adequate guidance concerning how the CRA may develop additional guidelines and policies relating to anti-terrorism efforts. The good news though is that the charitable sector has been recognized as

[29] *Supra* note 8 at 24.
[30] *Supra* note 8 at 263.

an important participant that needs to be consulted when considering Canada's role in suppressing Terrorist Financing in the future.

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