
OVERVIEW OF THE AIR INDIA REPORT CONCERNING TERRORIST FINANCING

*By Terrance S. Carter and Nancy E. Claridge**

A. INTRODUCTION

On June 17, 2010, the long-awaited *Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* (the “Report”) was released.¹ The Report, authored by the Honourable John C. Major (“Commissioner Major”), deals with the bombing of Air India Flight 182 that killed three hundred and twenty-nine persons. Commissioner Major, a former Justice of the Supreme Court of Canada who oversaw the inquiry, identified within the Report’s findings a series of errors made by authorities and Government agencies. These findings are split into five volumes, with the fifth volume dealing with terrorist financing.² Terrorist financing legislation is obviously a concern for charities and not-for-profits (“NPOs”) as such organizations can be caught under the anti-terrorism legislative provisions. For more details see the various articles and newsletters on how anti-terrorism law impacts Canadian charities at www.antiterrorismlaw.ca.

The purpose of the following Alert is to provide only a brief overview of the key findings and recommendations of the Report that affect the charity or not-for-profit sector with regard to terrorist

* Terrance S. Carter, B.A., LL.B., Trade-Mark Agent, is the managing partner with Carters Professional Corporation, and Counsel to Fasken Martineau DuMoulin LLP on charitable matters. Nancy E. Claridge is an Associate with Carters Professional Corporation. The authors would like to thank Heather Geertsma, Student-at-Law, for her assistance in the preparation of this Alert.

¹ 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.

² 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.

financing. As such, this Alert does not provide a comprehensive examination of the Report in this regard. However, an in-depth analysis will be provided in the future.

B. OVERVIEW

Volume 5's purpose is to determine whether Canada's current legal system provides adequate restraints on terrorist financing, including the misuse of funds from charitable organizations. The Commission's key findings relevant to charities and NPOs can be divided into three categories: (1) a background on Canada's efforts to eliminate terrorist financing, (2) the relationship between terrorist financing and non-profits, and (3) recommendations to resolve terrorist financing.

1. Background on Canada's Fight against Terrorist Financing

Prior to 2001, Canada had no specific legislation addressing terrorist financing; today Canada has the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA"), the *Anti-Terrorism Act*, and certain sections of the *Criminal Code* with specific terrorist financing offences. The *Anti-Terrorism Act* also created the *Charities Registration (Security Information) Act* ("CRSIA"). The CRSIA permits the Minister of Public Safety and the Minister of National Revenue to issue a certificate stating in their opinion that the charity being examined may have committed an offence related to terrorist financing. The certificate is then processed by a federal court judge who can rely on any evidence the judge feels is appropriate. The Commission found that the CRSIA certificate procedure has not been used as of January 2009. Canada's anti-terrorist financing efforts are largely based on the money laundering model, in spite of the fact that terrorist activities are often below \$10,000 and money laundering transactions focus on funds of \$10,000 or more.

The Report acknowledged that since 2001, Canada has added to the Financial Transactions and Reports Analysis Centre ("FINTRAC") the task of combating terrorist financing. Yet, the Commission found that neither FINTRAC nor the Canada Revenue Agency ("CRA") is sufficiently incorporated into the flow of intelligence to maximize their attempts at detecting terrorist financing. In fact, there has been only one terrorist financing conviction – the Khawaja case – and that was not a product of the anti-terrorist financing program. The Commission found this lack of prosecutions indicates a possible lack of "significant success."

However, the Report acknowledged Canada's involvement in the international arena dealing with terrorist financing. In this regard, it is a founder of the Financial Action Task Force on Money Laundering ("FATF"), and is an active member of several international groups, including the Asia/Pacific Group, the Caribbean Financial Action Task Force, the Egmont Group, the Five Eyes Group, the World Bank and the IMF.³

2. Relationship between Terrorist Financing, Charities and Not-for-Profits

The Report suggested charitable organizations can become entangled in the fight against terrorist financing. Terrorists can use charities and NPOs as a way to fundraise and transfer funds, as such organizations provide an apparent legitimacy to terrorist financing. In addition, the tax benefits associated with charitable organizations allow for terrorists to accumulate additional funds.

The Commission found that it was not possible to state how many registered Canadian charities are or have been involved in terrorist financing. Registered charities in Canada range in size from international groups to small community charities. The majority of Canadian charities have fewer than 5 employees and receive annual donations less than \$100,000. The issue becomes, terrorist attacks may involve minimal amounts of money, much of which is difficult or impossible to track. This difficulty would result in terrorist activity going unnoticed and could in theory involve the smallest of charities.

The CRA has reported that a significant number of charities related to terrorism have been denied registration. It is important to note that these denials are based on traditional CRA powers, not new powers from the anti-terrorism legislation. Upon receiving an application CRA will review whether or not the charity intends to function for charitable purposes and may review the directors' and trustees' background as an indication of where the funds will be used. The CRA has been given the ability to share more information about the applicants with other agencies under the CRSIA, but is still limited by the *Income Tax Act*.

The Report noted that once the charity is registered with CRA, the CRA can monitor the organization through audits. The charities themselves must also submit annual reports with any changes to the

³ Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, "Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182" (June 12, 2010), online: <http://www.majorcomm.ca/en/reports/finalreport/volume5/vol5-chapt7.pdf> at pg 22-23.

charity, but it is only through audits that the CRA confirms this information. Yet, the Commission found that only one percent of charities are actually audited each year.

The Commission did find that the CRA has been making use of its intermediate sanctions, which are helpful tools to the CRA if deregistration is too drastic. The sanctions include monetary penalties or suspension of registration and can be used to alert charities, donors and government of the status of the charity.

The Commission concluded that charity status is more difficult to obtain due to the new terrorist financing requirements and examined whether Canada would be better suited with a regulator specific to charities. CRA, the current regulator, is a fiscal regulator, as its mandate arises from the taxation system.

About 95% of donations given to the charitable and non-profit sector go to charities, the rest goes to NPOs. These NPOs lack the supervision and regulation of charities with varying degrees among the provinces and territories. The absence of a regulator makes it hard to identify if terrorist financing is occurring within the NPO network.

3. Recommendations related to Terrorist Financing

In Volume 5, the Commission makes several suggestions related to terrorist financing, including the following recommendations:

- The Report noted that there is a shortage of evidence that the anti-terrorist financing program has produced concrete results. In this regard, federal government officials stressed the difficulty of doing performance assessments about activities that involve preventing some future event or deterring crime and the Report recognized that accurately evaluating a system to combat a covert phenomenon is invariably difficult. Nonetheless, the Report suggested that more comprehensive statistics would give a better understanding of the anti-terrorist financing program and facilitate regular international and domestic assessments of its performance.⁴

⁴ *Ibid.* at 239.

- On the issue of terrorist financing prosecutions, the Report noted that such prosecutions can be expensive and time-consuming. Because of this, the Report recommended that they should be used strategically to disrupt groups that pose the greatest risk.⁵
- The Report noted that federal and provincial governments must recognize their shared responsibility for the regulation of charities. Although constitutional obstacles preclude a regulated system similar to that of the England and Wales Charity Commission, the Report suggested that the ideal would be federal-provincial agreements on the monitoring and regulation of charities. The Report concluded that “If there is no agreement, federal and provincial governments must individually assume their responsibilities to deal with the possible use of charities for terrorist financing.”⁶
- Further investigation by CSIS or the RCMP was recommended, in appropriate cases, following the denial of charitable status, suggesting there should be a “whole-of-government effort.”⁷ Further, it was recommended that the CRA should continue to work closely with other agencies to identify charities that may be involved in terrorist financing. The Report suggested the CRA should be included in the overall network of agencies that are concerned with terrorist financing, and it should have access to appropriate information from domestic and foreign agencies. “It would be almost impossible for any regulator to find the indicia of terrorist financing by sifting through information about all charities. Intelligence must be shared to help identify targets. This will require the RCMP, and especially CSIS, to work closely with the CRA and to provide it with the best possible intelligence.”⁸
- The Report noted that it would be helpful to have statistics indicating the role that terrorism or terrorist financing issues play in decisions to revoke charitable registrations or to use intermediate sanctions.⁹

⁵ *Ibid.* at 241.

⁶ *Ibid.* at 259.

⁷ *Ibid.* at 259.

⁸ *Ibid.* at 260.

⁹ *Ibid.* at 261.

- Noting that it is difficult to assess the need for a due diligence defence when no CRSIA certificate proceedings have yet occurred, the Report suggested it would be helpful to have a track record of CRSIA certificate proceedings so that claims about deficiencies in the CRSIA could then be examined as real, rather than speculative, issues.¹⁰
- It was recommended that organizations should be prohibited from using the description “charity,” “non-profit organization,” “not-for-profit organization,” or similar descriptions, unless registered as such with the CRA or the appropriate provincial agency.¹¹
- The Report stated it is essential that measures to defeat the use of charities or NPOs for terrorist financing not unnecessarily impede the valuable activities of legitimate organizations. As such, it was recommended that any new guidelines or best practices that the CRA may contemplate to help it address terrorist financing 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.”¹²
- Finally, the Report noted that an effective approach to terrorist financing will require both an increase in the sharing of information and increased investment in human capital. One way to achieve the latter goal is to facilitate increased secondments among agencies working on terrorist financing issues.¹³

¹⁰ *Ibid.* at 262.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.* at 270.

C. CONCLUSION

The Report has come after much anticipation and gives a comprehensive examination of terrorist financing issues within Canada. As previously mentioned, a more detailed analysis will follow concerning the impact of the Report on charities and not-for-profits in Canada.