

Commission
of Inquiry into
the Investigation
of the Bombing of
Air India Flight 182



Commission d'enquête
relative aux mesures
d'investigation prises à
la suite de l'attentat à la
bombe commis contre
le vol 182 d'Air India

The opinions expressed in these academic studies are those of the authors;
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**Commission of Inquiry
into the Investigation of the
Bombing of Air India Flight 182
Research Studies – Volume 2**

Terrorism Financing, Charities, and Aviation Security

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Introduction

Kent Roach

The Commission's Research Program

Shortly after the appointment of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, a decision was made by the Commissioner, commission counsel and the research directors to commission a number of research papers on matters relevant to the Commission's broad mandate.

Research studies have long been an important part of the commission of inquiry process in Canada. For example, the McDonald Commission of Inquiry that examined certain activities of the Royal Canadian Mounted Police (RCMP) and made recommendations that led to the creation of the Canadian Security Intelligence Service (CSIS) in 1984 issued a number of research papers and monographs as part of its process.¹ Other commissions of inquiry at both the federal and provincial levels have followed suit with, at times, ambitious research agendas.²

Research allows commissions of inquiry to be exposed to and informed by expert commentary. Research papers can be independently prepared by academics and other experts. The parties and the public are free to comment on these papers and the Commissioner is free to reject or to accept any advice provided in the research papers. The traditional disclaimer that the research paper does not necessarily represent the views of the Commission or the Commissioner is true.

The Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 faced the challenge of a particularly broad mandate that spanned the issues of the adequacy of threat assessment of terrorism both in 1985 and today, co-operation between governmental departments including the RCMP and CSIS, the adequacy of restraints on

¹ For example, see the research studies published by the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. J. L. J. Edwards *Ministerial responsibility for national security as it relates to the offices of Prime Minister, Attorney General and Solicitor General of Canada* (Ottawa: Supply and Services Canada, 1980); C.E.S. Franks *Parliament and Security Matters* (Ottawa: Supply and Services Canada, 1980); M.L. Friedland *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980).

² The Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar published a series of background papers. *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works and Government Services, 2006).

terrorism financing including funding from charities, witness protection, aviation security and terrorism prosecutions. A broad range of expertise drawn from a variety of academic disciplines was needed to address this mandate.

A commission of inquiry's research program can help create or solidify a research foundation for continued thought and policy development in the area being examined. Canadian research into terrorism-related issues has generally been relatively sparse.³ There is no dedicated governmental funding for research related to the study of terrorism and optimal counter-terrorism measures as there is in other fields such as military studies. One of my hopes is that the research program of this Commission will stimulate further investment in independent research related to terrorism and counter-terrorism.

The Commission of Inquiry was fortunate to be able to retain the majority of Canada's leading experts in many of these areas. The Commission was also able to retain a number of leading international experts to provide research of a more comparative nature. The comparative research was undertaken to determine if Canada could learn from the best practices of other democracies in many of the areas related to its mandate.

Researchers who conduct studies for a Commission of Inquiry do not have the luxury that an academic researcher normally has in conducting research and publishing his or her work. They must work under tight deadlines and strive to produce analysis and recommendations that are of use to the Commission of Inquiry.

A decision was made to ask our researchers to write using information from public sources only, and indeed to write and complete papers long before the Commission's hearing process was completed. This means that the researchers may not always have had the full range of information and evidence that was available to the Commission. That said, the research papers, combined with the dossiers issued by commission counsel, provided the commissioner, the parties and the public with an efficient snapshot of the existing knowledge base.

³ On some of the challenges see Martin Rudner "Towards a Proactive All-of-Government Approach to Intelligence-Led Counter-Terrorism" and Wesley Wark "The Intelligence-Law Enforcement Nexus" in Vol 1 of the Research Studies.

Because of the importance of public and party participation in this Commission of Inquiry, a decision was made early on that the researchers retained by the Commission would, whenever possible, present and defend the results of their research in the Commission's hearings. A deliberate decision was made to reject the dichotomy of part one hearings focused on the past and part two processes aimed at the future. This decision reflected the fact that much of the Commission's mandate required an examination of both the past and the future. There was also a concern that the Commissioner should be able to see the research produced for him challenged and defended in a public forum.

It is my hope that the research program will help inform the deliberations of the commission and also provide a solid academic foundation for the continued study in Canada of terrorism and the many policy instruments that are necessary to prevent and prosecute terrorism.

The Research Studies in this Volume

The research studies in this volume address that part of the Commission's terms of reference which direct it that determine "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 A final research study addresses some of the aviation security issues in the Commission's terms of reference including issues relating to the screening of passengers and their baggage.⁵

Nikos Passas "Understanding Terrorism Financing"

Professor Nikos Passas, a leading expert on terrorism financing from Northeastern University in Boston, has prepared a comprehensive overview of the financing of terrorism as well as the international experience with the suppression of terrorism financing and in particular the influence of the 1999 International Convention for the Suppression of the Financing of Terrorism and Resolution 1373 of the United Nations Security Council. He argues that the financing of terrorism is difficult to understand and control in part because of the small amounts of money required to fund a deadly act of terrorism and in part because of the great variety of fund raising methods and sources.

⁴ Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 *Terms of Reference* b (iv).

⁵ *Ibid* b(vii)

Professor Passas details how the American 9/11 Commission dispelled a number of myths about the financing of 9/11 including the role of conflict diamonds, Somali hawala or informal value transfer systems and other terrorist groups. The 9/11 hijackers transferred the less than \$500,000 that was required to finance 9/11 by unexceptional means such as wire transfers, hand carry cash and the use of debit and credit cards. No financial institution filed a suspicious activity report. He argues that there are dangers that some forms of policing terrorism financing may be counterproductive by, for example, unnecessarily alienating ethnic communities, by adopting superficial compliance and by imposing costs that are greater than the benefits of increased regulation. He calls for an evidence based approach to counter terrorism financing that is informed by accurate intelligence about both terrorist groups and their funding and clear priorities including the use of targeted and well founded financing prosecutions against those groups judged to be of the greatest threat. He notes that such an approach will require integration between intelligence agencies and law enforcers, raising another theme that runs through many of the research studies.

Anita Indira Anand “An Assessment of the Legal Regime Governing the Financing of Terrorist Activities in Canada”

Professor Anita Anand of the University of Toronto provides an overview of the various laws in Canada that govern the financing of terrorism. She notes that most of the post 9/11 law in Canada aimed at terrorism financing is designed to comply with Canada’s various international obligations. She describes how the 2001 *Anti-Terrorism Act* added various offences related to terrorism financing to the *Criminal Code* as well as provisions for the freezing and forfeiture of property owned or controlled by a terrorist group and the reporting of suspicious transactions. She notes that there are areas of overlap with the *Proceeds of Crime Act* raising the issue of the need for co-ordination of enforcement efforts among police, intelligence agencies and the Financial Transactions and Reports Analysis Centre (FINTRAC).

Professor Anand proposes the need for both co-ordination and review of the efficacy of Canada’s efforts to regulate terrorist financing. She discusses the need for an oversight body that would monitor both the propriety and efficacy of FINTRAC’s operations. She argues that assumptions that the present regime is effective may not be warranted.

In particular she notes the danger that the present enforcement regime may impose greater costs than benefits. For example, there are broad reporting requirements that impose significant costs on third parties such as financial institutions with uncertain benefits in terms of successful terrorism financing prosecutions or other actions designed to disrupt terrorist groups and prevent terrorism. Professor Anand notes that Canada lacks the equivalent of the United States Office of Terrorism and Financial Intelligence which serves as a coordinating body in this area. She also argues that the broad brush approach to reporting can have adverse effects on privacy.

Mark Sidel “Terrorist Financing and the Charitable Sector: Law and Policy in the United Kingdom, the United States and Australia”

Professor Mark Sidel of the University of Iowa and a leading authority on the law relating to charities provides a comparison of the laws in the United Kingdom, the United States and Australia as they relate to charities that may be involved in terrorism financing. He argues that states have a legitimate interest in stopping charities from being one of the funding sources for terrorism, but that they also should pursue these measures in a way that ensures the vibrancy of the charitable sector including the contributions that charities can make to human security.

Professor Sidel argues that the British approach has relied on regulation by the United Kingdom’s Charities Commission while the American approach has relied on criminal prosecutions of charities for material support of terrorism even though both countries have criminalized the financing of terrorism and also regulate charities. He provides a number of case studies of the engagement of the Charities Commission with charities suspected of supporting terrorism including its interventions in the Finsbury Park Mosque in London. He argues that the British regulatory approach is superior to the American approach in part because it can rely on a broad range of interventions including measures designed to increase transparency and accountability within the charity. The American approach has been to rely on several high profile criminal prosecutions and for the US Treasury Department to impose voluntary guidelines that have been criticized by many in the charitable sector as unrealistic. Australia’s more nascent approach lies somewhere in between the British and American responses and has so far involved the enactment of broad and often controversial new offences, but without much enforcement.

David G. Duff “Charities and Terrorist Financing: A Review of Canada’s Legal Framework”

Professor David Duff of the University of Toronto provides an overview of the complex array of federal and provincial laws that govern charitable status of Canada in light of the fact that the Babbar Khalsa Society enjoyed charitable status until 1996. He starts with a discussion of how the provinces under section 92(7) of the *Constitution Act, 1867* have jurisdiction to regulate charities. Most provinces have, however, refused to exercise this jurisdiction vigorously with only Ontario enacting legislation that provides for powers for the removal of trustees and executors. The result has been that the federal government is the dominant regulatory presence even though it only has incidental powers in relation to the taxation of charities.

Professor Duff focuses on the federal regulation of charities including the tests under the *Income Tax Act* for a registered charity. He examines the process that is used for denial of charitable status and decreases in the number of applications for charitable status and actual registrations after both the 1996 revocation of the Babbar Khalsa’s charitable status and the events of 9/11. He also examines the *Charities Registration (Security Information) Act* which was enacted as part of the 2001 *Anti-Terrorism Act* and which allows charitable status to be revoked on the basis of information not necessarily disclosed to the charity. He suggests that the legislation could be made more proportionate by introduction of fault requirements or a due diligence defence. That said, he notes that no certificates have been issued under this new legislation and that a charity with links to terrorism could be decertified on other grounds. He also examines the process for information exchange about charities that may be involved with terrorism and calls for federal/provincial and international co-operation not only with respect to registered charities but also non-registered non-profit organizations that may provide funds for terrorism.

Kathleen Sweet “Canadian Airport Security Review”

Kathleen Sweet who is the author of a number of books on aviation security and a leading expert in that field addresses the issues of aviation security in light of a detailed discussion of the flaws in aviation security that led to the bombing of Air India Flight 182 and the bombing three years later of Pan Am Flight 103 over Lockerbie Scotland. She notes how

after the Air India bombing, Canada was the first country to require passenger baggage reconciliation on international flights, a security measure that was later extended to domestic flights.

Ms. Sweet examines a range of aviation security measures. She stresses the problems of poor operator performance with respect to the screening of baggage and suggests that there should be a renewed emphasis on attracting the best people, training them and monitoring their job performance. She points out that the use of standard x ray screening is highly dependent on the performance of human monitors. She also examines a range of more expensive technology that can be used to screen baggage as well as the use of trained dogs which are the least expensive but often effective means of detecting explosives. She also examines passenger screening by machines designed to detect traces of explosives and the use of walk through and hand-held metal detectors. Finally, she examines a range of best practices in controlling access to airports. Ms. Sweet warns that improvement in some aspects of aviation security may make other aspects a more likely target for terrorists. In addition, existing aviation security procedures remain vulnerable to circumvention often because of a desire to ensure the efficient movement of planes, passengers and their baggage.

Conclusion

The first four essays in this volume provide a valuable introduction to the many modes of funding of terrorism as well as the range of interventions that can be taken against such funding including funding that may be provided by registered charities. The essays provide important cautionary tales about how deadly acts of terrorism such as the bombing of Air India Flight 182 can be financed through small sums that can be obtained and transferred through a great variety of means. They suggest that laws against the financing of terrorism including laws that would apply to charities that finance terrorism are required, but that their administration should be proportionate, cost effective and informed by accurate information and co-ordinated with other anti-terrorism measures. The final essay in this volume examines some of the aviation security breaches that led to the bombing of Air India Flight 182 as well the range of contemporary measures that can be taken to achieve better aviation security.

