

## VOLUME FIVE TERRORIST FINANCING

### CHAPTER IV: EXTERNAL REVIEWS OF CANADA'S ANTI-TF PROGRAM

Diane Lafleur, Director of the Financial Sector Division at the Department of Finance, testified that Canada's Anti-Money Laundering/Anti-Terrorist Financing (AML/ATF) Initiative has been "heavily evaluated," including by international organizations.<sup>1</sup> These reviews have attempted to measure the effectiveness of Canada's anti-TF efforts and have not been restricted to reviewing only the propriety of governmental actions with respect to TF. This chapter examines the reviews completed to date.

#### 4.1 Domestic Reviews

##### 4.1.1 Auditor General of Canada

In a November 2004 report, the Auditor General reviewed the implementation of the National Initiative to Combat Money Laundering in relation to both money laundering and TF. Since work on TF was still in its early stages at that time, the report focused mainly on money laundering. As was typical with that type of review, it was a value-for-money audit.<sup>2</sup> It sought to determine whether the management framework for implementing the Initiative was "...designed appropriately to promote the detection and deterrence of money laundering and terrorist financing and [provided] accountability to Parliament for results achieved."<sup>3</sup>

The audit focused primarily on the operations<sup>4</sup> of the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), but also described the work of other agencies and their interactions with FINTRAC. The Auditor General concluded that "...Canada now has a comprehensive strategy against money laundering and terrorist financing that is generally consistent with international standards."<sup>5</sup> The report recognized that, since the anti-money laundering program was then

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<sup>1</sup> Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6764. Mark Potter, Assistant Director for Government Relationships at FINTRAC, made similar remarks: see Testimony of Mark Potter, vol. 56, October 2, 2007, pp. 6979-6980.

<sup>2</sup> Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6766; Exhibit P-227, Tab 3: Department of Finance Memorandum of Evidence on Terrorist Financing, February 28, 2007, para. 5.5 [Department of Finance Memorandum of Evidence on Terrorist Financing].

<sup>3</sup> *Report of the Auditor General of Canada to the House of Commons*, November 2004, Chapter 2: "Implementation of the National Initiative to Combat Money Laundering," para. 2.14, online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca/internet/docs/20041102ce.pdf>> (accessed January 16, 2009) [2004 Auditor General Report on Money Laundering].

<sup>4</sup> 2004 Auditor General Report on Money Laundering, para. 2.15.

<sup>5</sup> 2004 Auditor General Report on Money Laundering, paras. 2.1, 2.18.

relatively new, many problems could reflect “inevitable growing pains.”<sup>6</sup> It also mentioned that it takes time to establish effective networks for cooperation and to build trust.<sup>7</sup> The report nevertheless identified several deficiencies:

- Disclosures by FINTRAC did not contain enough information to be useful to law enforcement and security intelligence;<sup>8</sup>
- There were frictions at the operating level: notably, the reluctance of law enforcement to share information with FINTRAC, law enforcement’s hesitancy to give weight to FINTRAC’s unsolicited disclosures, connectivity problems between the information technology systems of FINTRAC and the Canada Border Services Agency (CBSA), and the burden on reporting entities;<sup>9</sup>
- There were difficulties in assessing the impact of FINTRAC’s disclosures as no prosecutions had yet been initiated as a result of FINTRAC information. Furthermore, follow-up on the disclosures by FINTRAC to receiving agencies was lacking;<sup>10</sup>
- There was no management framework to “...direct complementary actions in separate agencies” and it was said that “...more effective mechanisms and leadership are needed for co-ordinating efforts both within the federal government and among all stakeholders.” The report noted that, at the federal level, the interdepartmental working group chaired by Finance Canada lacked the “...scope and mandate for effective support of a co-ordinated campaign against money laundering and terrorist financing.”<sup>11</sup> Furthermore, “...[t]he Initiative would also benefit from mechanisms that would bring in provincial and private sector stakeholders;”<sup>12</sup>
- Feedback from FINTRAC to the reporting entities was limited;<sup>13</sup> and limited information was available about the effectiveness of the Initiative. This could be partly because FINTRAC was then still a fairly young agency.<sup>14</sup> The Initiative was also in its early stages. Accountability mechanisms were not yet all in place.<sup>15</sup> The report went on to state that “...[i]t is not possible to assess the Initiative’s effectiveness without information on the impact that FINTRAC disclosures have had on the investigation and prosecution of money-laundering and terrorist-financing offences. All partners in the Initiative thus have a shared interest in co-operating to establish mechanisms for tracking the use of

<sup>6</sup> 2004 Auditor General Report on Money Laundering, para. 2.26.

<sup>7</sup> 2004 Auditor General Report on Money Laundering, para. 2.26.

<sup>8</sup> 2004 Auditor General Report on Money Laundering, paras. 2.38-2.46, 2.94.

<sup>9</sup> 2004 Auditor General Report on Money Laundering, para. 2.25.

<sup>10</sup> 2004 Auditor General Report on Money Laundering, para. 2.22.

<sup>11</sup> 2004 Auditor General Report on Money Laundering, para. 2.27.

<sup>12</sup> 2004 Auditor General Report on Money Laundering, para. 2.28.

<sup>13</sup> 2004 Auditor General Report on Money Laundering, para. 2.56.

<sup>14</sup> 2004 Auditor General Report on Money Laundering, para. 2.88.

<sup>15</sup> 2004 Auditor General Report on Money Laundering, para. 2.93.

FINTRAC disclosures and measuring their effects, to the extent that is possible. For accountability purposes, summary information on these results needs to be reported to Parliament regularly.”<sup>16</sup>

The Auditor General made the following recommendations:

- The government should establish an effective management framework to provide direction and to co-ordinate anti-money laundering efforts at the federal level. It should consider establishing an anti-money laundering advisory committee with representatives from government, industry and law enforcement to discuss issues of common interest regularly and to develop approaches for dealing with emerging issues;<sup>17</sup>
- In cooperation with law enforcement and security agencies, FINTRAC should establish a set of written criteria to guide its analysts and its Disclosure Committee in determining which transactions should be disclosed to designated recipients;<sup>18</sup>
- The government should carry out a review to identify changes that would improve the value of FINTRAC disclosures and the means to bring about those changes;<sup>19</sup>
- FINTRAC should establish target turnaround times for voluntary information reports (VIRs) which it receives from law enforcement and security agencies, and should make those targets public;<sup>20</sup>
- In consultation with the Canada Revenue Agency (CRA), FINTRAC should establish criteria for disclosure to the CRA of cases involving possible tax evasion and should refer cases to the CRA that meet the criteria;<sup>21</sup> and
- The government should establish effective mechanisms to monitor the results of disclosures, including the extent to which disclosures are used and the impact they have on the investigation and prosecution of money laundering and TF offences. It should regularly provide summary information on these results to Parliament.<sup>22</sup>

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<sup>16</sup> 2004 Auditor General Report on Money Laundering, para. 2.91.

<sup>17</sup> 2004 Auditor General Report on Money Laundering, para. 2.29.

<sup>18</sup> 2004 Auditor General Report on Money Laundering, para. 2.37. FINTRAC mentioned that it had developed “indicators” with the assistance of the FATF and the Egmont Group, but stated that “... the analysis and disclosure processes will continue to rely heavily on judgment, as each suspected case of money laundering, terrorist activity financing, or threat to the security of Canada must be assessed on its own merit.”

<sup>19</sup> 2004 Auditor General Report on Money Laundering, para. 2.46.

<sup>20</sup> 2004 Auditor General Report on Money Laundering, para. 2.54.

<sup>21</sup> 2004 Auditor General Report on Money Laundering, para. 2.67.

<sup>22</sup> 2004 Auditor General Report on Money Laundering, para. 2.92.

#### 4.1.2 EKOS Research Associates Evaluation

Also in 2004, EKOS Research Associates published an evaluation of Canada's AML/ATF Initiative.<sup>23</sup> The Treasury Board of Canada had requested the evaluation. Diane Lafleur of the Department of Finance described the evaluation as follows:

The Treasury Board evaluation was to assess whether the initiative was broadly in line with Canada's overall stated objectives in international commitments and whether the initiative was actually going in the right direction and continued funding for the initiative was contingent on the successful completion of that evaluation.<sup>24</sup>

In 2002, EKOS had performed an interim evaluation only about money laundering matters. The November 2004 EKOS review was directed at both money laundering and TF.

Among other conclusions, the 2004 report found that:

- "...[t]he Initiative [was] well aligned with the federal government's concern with fighting organized crime and maintaining public security;"<sup>25</sup>
- the Initiative was effective;<sup>26</sup>
- the Initiative compared well internationally;<sup>27</sup> and
- "...[t]he relationship between the Initiative's activities (as a whole) and expected outcomes was logical and appropriate."<sup>28</sup>

The EKOS report made several additional observations:

- At that time, it would be difficult to measure the contribution of the Initiative, particularly since it had then been fully operational for less than two years;<sup>29</sup>
- In many cases, the impact on prosecutions would not be realized for a number of years;<sup>30</sup>

<sup>23</sup> EKOS Research Associates Inc., *Year Five Evaluation of the National Initiatives to Combat Money Laundering and Interim Evaluation of Measures to Combat Terrorist Financing* (November 30, 2004), online: Department of Finance <[http://www.fin.gc.ca/activty/pubs/nicml-incba\\_e.pdf](http://www.fin.gc.ca/activty/pubs/nicml-incba_e.pdf)> (accessed January 16, 2009) [EKOS Report on Money Laundering and Terrorist Financing].

<sup>24</sup> Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6766.

<sup>25</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 20.

<sup>26</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 55.

<sup>27</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 55.

<sup>28</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 21.

<sup>29</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 42.

<sup>30</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 52.

- The Initiative had "...contributed to investigations, seizures and prosecutions as intended;"<sup>31</sup> and
- "[T]he evidence indicates that the Initiative's measures are having some impact."<sup>32</sup>

The Department of Finance Memorandum of Evidence on Terrorist Financing noted that "...[m]any of the conclusions of [the EKOS] report echoed the findings of the Auditor General report."<sup>33</sup>

The EKOS report made the following recommendations to the Government of Canada:

- Continue to conduct consultations with representatives of the financial services sector, including organizations at the national and other jurisdictional levels, to help representatives see the value of their contributions. Before implementing any future changes to regulations or compliance activities, ensure that timely input is obtained from these organizations and that the potential for compliance fatigue in the financial services sector is taken into account.<sup>34</sup>
- At a minimum, consider maintaining current funding allocations to the Initiative's partners. In addition, consider responding over the short term to certain funding pressures, including: (i) funding needed to finance IT renewal needs at FINTRAC; (ii) funding increases identified by the CBSA to expand the CBCR [Cross-Border Currency Reporting] Teams and Currency Detector Dog Teams; to collect, develop, and to coordinate the dissemination of tactical and operation intelligence (CBSA Intelligence) and to deal with the high volume of appeals of currency seizures (CBSA Adjudication); (iii) increased funding identified by the RCMP to enhance its capacity for investigation of money laundering and terrorist financing intelligence, leads and tips provided by all sources; capacity to analyse and measure the impact of intelligence received; and delivery of educational programs for the private sector; and (iv) future funding pressures associated with the planning and conduct of the next full evaluation of the Initiative.<sup>35</sup>
- Assess the feasibility of increasing the amount of information that may be included in FINTRAC disclosures in order to improve their value to recipients.<sup>36</sup>

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31 EKOS Report on Money Laundering and Terrorist Financing, p. 46.

32 EKOS Report on Money Laundering and Terrorist Financing, p. 50.

33 Department of Finance Memorandum of Evidence on Terrorist Financing, para. 5.6.

34 EKOS Report on Money Laundering and Terrorist Financing, p. 35.

35 EKOS Report on Money Laundering and Terrorist Financing, pp. 41-42.

36 EKOS Report on Money Laundering and Terrorist Financing, p. 44.

- Devote efforts to assessing the capacity of the existing evaluation model in demonstrating the outcomes and cost effectiveness of the Initiative. Efforts needed to occur at several levels:
  - a. The existing logic model had not been revisited since its development several years earlier. As logic models are not intended to be static, it should be revisited and updated to accurately reflect activities and intended outcomes of the Initiative;
  - b. The evaluation framework for the Initiative would need to be updated to establish clear expectations around how to measure the future success of the Initiative;
  - c. There was a need for special studies to identify appropriate measurement tools and models to further assess current difficulties in determining outcomes, or at least to understand the degree to which such tools and models could best be used; and
  - d. A continued focus on performance measurement was needed across partners to ensure ongoing data collection tied to the revised evaluation framework.<sup>37</sup>
- Since the evaluation occurred when the measures had been implemented for only a short time, and given the measurement difficulties, a full evaluation of the Initiative should be conducted again before 2009.<sup>38</sup>
- Canada should maintain its current strong level of commitment to combat money laundering and terrorist financing through the continued active support of the Initiative.<sup>39</sup>

#### **4.1.3 Senate Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act***

Section 72(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>40</sup> (PCMLTFA) requires a review of the administration and operation of the Act every five years. In October 2006, the Standing Senate Committee on Banking, Trade and Commerce published its interim report on the review of the PCMLTFA:

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<sup>37</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 55.

<sup>38</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 55.

<sup>39</sup> EKOS Report on Money Laundering and Terrorist Financing, p. 56.

<sup>40</sup> S.C. 2007, c. 17.

*Stemming the Flow of Illicit Money: A Priority for Canada.*<sup>41</sup> The interim report recommended that:

1. the federal government develop a registration system for money services businesses;<sup>42</sup>
2. the federal government amend the *PCMLTFA* to require dealers in precious metals, stones and jewellery to report suspicious cash transactions above \$10,000 to FINTRAC. The Act's customer due-diligence and record-keeping requirements should also apply to these dealers when they are involved in cash transactions exceeding \$10,000;<sup>43</sup>
3. the federal government, within the context of the *PCMLTFA*, ensure that customer-identification requirements as they relate to non-face-to-face transactions are appropriate to the risks associated with these transactions. To the extent practicable, these requirements should be consistent with the practices used by other industrialized countries regarding similar transactions;<sup>44</sup>
4. the federal government, in considering amendments to the *PCMLTFA*, employ a risk-based approach in determining the level of client-identification, record-keeping and reporting requirements for entities and individuals that are required to report under the Act;<sup>45</sup>
5. the federal government complete its negotiations with the Federation of Law Societies regarding the client-identification, record-keeping and reporting requirements imposed on solicitors under the *PCMLTFA*. These requirements should respect solicitor-client privilege, the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*;<sup>46</sup>
6. the federal government amend the *PCMLTFA* to permit FINTRAC to disclose to law enforcement and intelligence agencies its rationale for disclosing information, as well as additional publicly available information;<sup>47</sup>
7. the federal government meet with representatives from FINTRAC, law enforcement and intelligence agencies, and the entities and individuals required to report under the *PCMLTFA*, to develop an information-sharing protocol with respect to how reports and disclosures under the Act might be modified to be more useful;<sup>48</sup>

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<sup>41</sup> Online: Parliament of Canada <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/bank-e/rep-e/rep09oct06-e.pdf>> (accessed January 16, 2009) [Senate Review of the *PCMLTFA*]. Hearings were held in May and June 2006: Senate Review of the *PCMLTFA*, p. 1.

<sup>42</sup> Senate Review of the *PCMLTFA*, p. 10.

<sup>43</sup> Senate Review of the *PCMLTFA*, p. 10.

<sup>44</sup> Senate Review of the *PCMLTFA*, p. 11.

<sup>45</sup> Senate Review of the *PCMLTFA*, p. 12.

<sup>46</sup> Senate Review of the *PCMLTFA*, p. 14.

<sup>47</sup> Senate Review of the *PCMLTFA*, p. 16.

<sup>48</sup> Senate Review of the *PCMLTFA*, p. 16.



8. the federal government, following the development of very clear guidelines about the identification of suspicious attempted transactions and, after thorough consideration of the international experience with the identification and reporting of such transactions, amend the *PCMLTFA* to require the reporting of suspicious attempted transactions;<sup>49</sup>
9. the federal government meet with FINTRAC, the RCMP and other relevant stakeholders in an effort to determine the likelihood, nature and extent of money laundering and terrorist activity financing using such emerging methods of financial services delivery as white label ATMs and internet banking. Appropriate legislative and other actions should be taken once the likelihood, nature and extent of these activities is determined;<sup>50</sup>
10. the federal government examine the extent to which the objective reporting threshold of \$10,000 contained in the *PCMLTFA* is appropriate for Canada and consistent with other countries. Should the threshold be found to be inappropriate, the Act should be amended to establish an appropriate objective reporting threshold;<sup>51</sup>
11. the federal government ensure that FINTRAC is adequately funded to fulfill its responsibilities under the *PCMLTFA*. As well, the government should examine the role, if any, that the Office of the Superintendent of Financial Institutions could play in providing FINTRAC with information that would assist it in meeting its compliance obligations under the Act;<sup>52</sup>
12. the federal government collaborate with the Office of the Privacy Commissioner in the development of legislation to amend the *PCMLTFA*, with a view to ensuring that the proposed amendments meet domestic and international requirements without unduly compromising the privacy of Canadians;<sup>53</sup>
13. the federal government amend the *PCMLTFA* to permit FINTRAC to provide information to foreign financial intelligence units only in countries which have privacy legislation consistent with Canada's *Privacy Act*;<sup>54</sup>
14. the federal government amend the *PCMLTFA* to require periodic review of the operations of FINTRAC, with an annual report to Parliament. This review should be undertaken by the Security Intelligence Review Committee (SIRC), which should receive adequate resources to enable it to fulfill this broader mandate;<sup>55</sup>

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49 Senate Review of the *PCMLTFA*, p. 17.

50 Senate Review of the *PCMLTFA*, p. 18.

51 Senate Review of the *PCMLTFA*, p. 19.

52 Senate Review of the *PCMLTFA*, p. 20.

53 Senate Review of the *PCMLTFA*, p. 21.

54 Senate Review of the *PCMLTFA*, p. 22.

55 Senate Review of the *PCMLTFA*, p. 22.



15. the RCMP make publicly available its rules and regulations regarding information retention and disposal. The rationale underlying the periods of time articulated in any rules and regulations that do not reflect legislated obligations should be justified to the Minister of Public Safety;<sup>56</sup> and that
16. the federal government provide the Royal Canadian Mounted Police with the additional resources needed to pursue investigation of the money laundering and terrorist activity financing cases that it believes are necessary to protect Canadians.<sup>57</sup>

#### 4.1.4 House of Commons Review of the *Anti-terrorism Act*

Section 145 of the *Anti-terrorism Act*<sup>58</sup> (ATA) required a comprehensive review of its provisions and operation within three years of Royal Assent.<sup>59</sup>

In March 2007, the House of Commons Standing Committee on Public Safety and National Security<sup>60</sup> published its final report on the review of the ATA: *Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues*.<sup>61</sup> The report also examined issues relating to all legislation amended or created by the ATA, including TF matters covered by the *PCMLTFA* and the *Charities Registration (Security Information) Act*<sup>62</sup> (CRSIA). However, TF was not the main issue discussed in that report. Money laundering issues were not considered.

- On topics related to TF, the Commons Committee review recommended that:

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<sup>56</sup> Senate Review of the *PCMLTFA*, p. 23.

<sup>57</sup> Senate Review of the *PCMLTFA*, p. 24.

<sup>58</sup> S.C. 2001, c. 41.

<sup>59</sup> In this case, both chose to conduct a review. The House of Commons recommended that the *Anti-terrorist Act* be amended so that another review would be conducted in 2010-11: House of Commons Canada, Final Report of the Standing Committee on Public Safety and National Security, Subcommittee on the *Review of the Anti-terrorism Act, Rights, Limits, Security: A Comprehensive Review of the Anti-terrorism Act and Related Issues*, March 2007, p. 84, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/Committee/391/SECU/Reports/RP2798914/sterrp07/sterrp07-e.pdf>> (accessed May 25, 2009) [House of Commons Report on the ATA].

<sup>60</sup> Subcommittee on the Review of the *Anti-terrorism Act*.

<sup>61</sup> House of Commons Report on the ATA.

<sup>62</sup> S.C. 2001, c. 41, s. 113.

- [16]<sup>63</sup> section 83.1 of the *Criminal Code* be amended to exempt legal counsel or law firms when they are providing legal services and not acting as financial intermediaries;<sup>64</sup>
- [17] section 83.08 of the *Criminal Code* be amended to allow for a due diligence defence;<sup>65</sup>
- [18-22] several inconsistencies in the wording of the *Criminal Code* be fixed;<sup>66</sup>
- [23] consideration be given to further integrating the terrorist entity listing regimes established under the *Criminal Code*, the *Regulations Implementing the United Nations Resolution on the Suppression of Terrorism*, and the *United Nations Al Qaida and Taliban Regulations* insofar as the departmental administration, applicable test for inclusion, and legal consequences of listing are concerned;<sup>67</sup>
- [24] section 83.05 of the *Criminal Code* be amended so that, when a listed entity wishes to have an initial decision to list reviewed, it is not required to make an application to the Minister of Public Safety, but may instead apply directly to a court;<sup>68</sup>
- [25] section 83.05 of the *Criminal Code* be amended so that, when a listed entity applies to no longer be a listed entity in accordance with subsections (2) or (8), the Minister of Public Safety and Emergency Preparedness must make a recommendation within 60 days, failing which he or she is deemed to have recommended that the applicant be removed from the list. Furthermore, any recommendation or deemed recommendation on the part of the Minister should expressly be referred to the Governor in Council, which is to make a final decision within 120 days of the entity's application, failing which the entity is deemed to be removed from the list;<sup>69</sup> and

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<sup>63</sup> The numbers in the square brackets are the recommendation numbers.

<sup>64</sup> House of Commons Report on the *ATA*, p. 24. [This is not the same requirement as the requirement in the *PCMLTFA* to report suspicious transactions, which is dealt with in a separate section as "the legal profession issue." In the case of the *PCMLTFA*, lawyers would be required to report suspicious transactions. With regard to what is mentioned here in the House of Commons report, there is already a requirement in the *Criminal Code* that "...every person" shall disclose the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist group. This includes lawyers and the House Review proposes to change that. The Senate Review of the *ATA*, on the other hand, disagreed, stating that "The Committee has concluded that no special exemptions need to be created for lawyers when providing legal services to or representing those accused of terrorist offences. Solicitor-client privilege does not appear to be placed in jeopardy by section 83.1 of the *Criminal Code*, and the Crown would be required to prove subjective intent, on the part a lawyer, before he or she could be convicted under sections 83.03 or 83.18": at p. 56.]

<sup>65</sup> House of Commons Report on the *ATA*, p. 24.

<sup>66</sup> House of Commons Report on the *ATA*, pp. 25-26.

<sup>67</sup> House of Commons Report on the *ATA*, p. 29.

<sup>68</sup> House of Commons Report on the *ATA*, p. 30.

<sup>69</sup> House of Commons Report on the *ATA*, pp. 31-32.

- [26] section 83.05 of the *Criminal Code* be amended so that, during each two-year review of the list of entities under subsection (9), it be made clear that the Governor in Council has the final decision as to whether or not an entity should remain a listed entity. Furthermore, the decision should be made within 120 days of the commencement of the review, failing which the entity is deemed to be removed from the list.<sup>70</sup>

The Commons committee also made recommendations relating to the *CRSIA*. These are discussed in Chapter VI.

The 2007 Commons Committee report asked the government to table a comprehensive response,<sup>71</sup> which it did in July 2007.<sup>72</sup>

#### 4.1.5 Senate Review of the *Anti-terrorism Act*

In February 2007, the Special Senate Committee on the *Anti-terrorism Act* published its report, *Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*.<sup>73</sup> That report examined issues relating to all legislation amended or created by the *ATA*, including TF matters related to the application of the *PCMLTFA* and the *CRSIA*. However, TF matters were not the main issue reviewed. The Commons Committee report described above and the Senate Committee report arrived at opposite conclusions on some issues, especially due diligence matters and the listing process.

The Senate Committee recommended that:

- [2] the government legislate a single definition of terrorism;<sup>74</sup>
- [10] the government provide written justification for listing each terrorist entity under its three listing regimes;<sup>75</sup>
- [11] the Department of Justice be required to review, and provide an independent evaluation of, the information that security and intelligence agencies provide to the Minister of Public Safety before he or she recommends to Cabinet the addition, retention or removal of a terrorist entity from a list of such entities;<sup>76</sup>
- [25] the government put information-sharing arrangements in relation to national security investigations in writing; ensure that Canadian law enforcement and security agencies attach written caveats regarding the use of shared information; require Canadian

<sup>70</sup> House of Commons Report on the *ATA*, p. 32.

<sup>71</sup> House of Commons Report on the *ATA*, p. 113.

<sup>72</sup> The government's response is examined in section 5.3.

<sup>73</sup> Online: Parliament of Canada: <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.pdf>> (accessed January 16, 2009) [Senate Report on the *ATA*].

<sup>74</sup> Senate Report on the *ATA*, p. 17.

<sup>75</sup> Senate Report on the *ATA*, p. 46. But only when the listing differs from the UN list.

<sup>76</sup> Senate Report on the *ATA*, p. 49.

agencies to make formal complaints to foreign agencies regarding the misuse of shared information; and produce annual reports assessing the human rights records of various countries;<sup>77</sup>

- [38] the government implement more effective oversight of the RCMP, akin to the level and nature of oversight that SIRC performs in relation to CSIS, particularly in terms of access to information and the capacity to audit day-to-day national security functions;<sup>78</sup> and that
- [39] a standing committee of the Senate, with dedicated staff and resources, be established to monitor, examine and periodically report on matters relating to Canada's anti-terrorism legislation and national security framework.<sup>79</sup>

No recommendations were made about TF. The Committee saw the need for a special advocate in charitable status cases under the *CRSIA*.<sup>80</sup> As well, the Committee concluded that a "due diligence" defence was not necessary to protect individuals who donated to charities or transferred money by way of the informal value transfer system known as "hawala."<sup>81</sup>

#### 4.1.6 Commission of Inquiry Concerning Maher Arar

The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("O'Connor Commission"), in its policy report, *A New Review Mechanism for the RCMP's National Security Activities*,<sup>82</sup> explored not only RCMP activities in national security matters, but also those of other parties, such as CSIS, the Integrated Threat Assessment Centre (ITAC), CSE and the Department of National Defence (DND). The O'Connor Commission also briefly considered TF issues. It recommended a revised review mechanism for the RCMP and also called for independent review of the activities of several other agencies:

There should be independent review, including complaint investigation and self-initiated review, for the national security activities of the Canada Border Services Agency, Citizenship and Immigration Canada, Transport Canada, the Financial Transactions and Reports Analysis Centre of Canada and Foreign Affairs and International Trade Canada.<sup>83</sup>

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<sup>77</sup> Senate Report on the *ATA*, p. 92.

<sup>78</sup> Senate Report on the *ATA*, p. 118.

<sup>79</sup> Senate Report on the *ATA*, pp. 122.

<sup>80</sup> Senate Report on the *ATA*, pp. 30-31.

<sup>81</sup> Senate Report on the *ATA*, pp. 60-61.

<sup>82</sup> (Ottawa: Public Works and Government Services Canada, 2006) [*A New Review Mechanism for the RCMP's National Security Activities*].

<sup>83</sup> *A New Review Mechanism for the RCMP's National Security Activities*, p. 558.

The report spoke specifically about the impact of the activities of FINTRAC:

FINTRAC's activities have the potential to significantly affect the lives of individuals. Much of the information it deals with is highly confidential. To the extent that suspected threats to national security or criminal activity are identified and information passed on to the RCMP, CSIS or a foreign agency, there could be further impacts on individual rights and interests. When creating FINTRAC, the government recognized the significant nature of these potential impacts and put in place a number of restrictions on when, to whom and how FINTRAC may disclose information. The sensitive nature of the information that FINTRAC deals with has, for good reason, resulted in an agency whose activities lack transparency. FINTRAC works in co-operation with other national security actors, such as the RCMP, CSIS and the CBSA. In my view, FINTRAC is a prime candidate for independent review.<sup>84</sup>

Justice O'Connor proposed that SIRC be put in charge of the review mechanism for FINTRAC.<sup>85</sup> He also recommended that SIRC's powers be enhanced<sup>86</sup> and that all review mechanisms be able to provide for the "...exchange of information, referral of investigations, conduct of joint investigations and coordination in the preparation of reports."<sup>87</sup> The focus of that recommendation was on an independent review mechanism to examine the propriety of FINTRAC's actions with respect to values such as lawful protections for privacy rather than on its efficacy in terms of contributing to counterterrorism.

#### 4.1.7 2004 SIRC Review of CSIS Terrorist Financing Program

The activities of CSIS are subject to review by the Security Intelligence Review Committee (SIRC) and the Inspector General of CSIS. The SIRC mandate is focused on a review of past operations and does not involve current matters. Reviews of past activities are designed to help Parliament determine if CSIS has complied with the law and whether its activities involved any unreasonable or unnecessary exercise of its powers.<sup>88</sup> The *Canadian Security Intelligence Service Act*<sup>89</sup> (CSIS Act) gives SIRC broad access to CSIS information.<sup>90</sup>

84 *A New Review Mechanism for the RCMP's National Security Activities*, pp. 567-568. Commissioner O'Connor makes additional comments at pp. 569-573 as to why he recommended independent review for FINTRAC and other agencies.

85 *A New Review Mechanism for the RCMP's National Security Activities*, p. 573.

86 *A New Review Mechanism for the RCMP's National Security Activities*, p. 578.

87 *A New Review Mechanism for the RCMP's National Security Activities*, pp. 580-590.

88 Online: Security Intelligence Review Committee <<http://www.sirc-csars.gc.ca/rvwetd/index-eng.html>> (accessed April 21, 2009).

89 R.S.C 1985, c. C-23.

90 *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 39.

In 2004, SIRC conducted a study of the investigation of TF in Canada by CSIS.<sup>91</sup> The conclusion to the study stated that, "...[i]n our review of [a CSIS] terrorist financing investigation, we found that the Service had reasonable grounds to suspect that the activities of targeted individuals and groups posed a threat to the security of Canada."<sup>92</sup>

## 4.2 International Reviews

According to the EKOS report mentioned above, monitoring the implementation of the AML/ATF Initiative overall is partly done through FATF self- and mutual assessments.<sup>93</sup> Many government officials who testified before the Commission, especially those from the Department of Finance, saw preparation for the 2008 FATF Mutual Evaluation as an important part of their international activities regarding TF. They had no doubt about the importance of the FATF review in providing oversight of Canada's anti-TF program.

### 4.2.1 The 2008 FATF Mutual Evaluation of Canada

#### 4.2.1.1 Setting

In February 2008, the FATF published its *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism of Canada*.<sup>94</sup> This evaluation was a review by peers – other member countries of the FATF – to which Canada and all member countries are subject as a condition of joining the FATF.<sup>95</sup>

This evaluation was the third for Canada since joining the FATF, but the first to deal with the FATF's revised 2003 anti-money laundering recommendations and the Nine Special Recommendations on Terrorist Financing.<sup>96</sup> The evaluation itself was conducted mostly during 2007, starting with a questionnaire.<sup>97</sup> An on-site visit to Canada by FATF officials took place in March 2007.<sup>98</sup> The assessment team consisted of individuals with competence in areas such as finance, law enforcement and law,<sup>99</sup> and involved FATF secretariat staff and volunteers from member countries.<sup>100</sup> The assessment team met with many Government of Canada officials responsible for implementing the FATF recommendations, as

91 Exhibit P-232, Tab 2: Security Intelligence Review Committee, *Review of the CSIS Investigation of Terrorist Financing Activities in Canada* (SIRC Study 2004-10), August 5, 2005 [SIRC Study 2004-10].

92 SIRC Study 2004-10, p. 23.

93 EKOS Report on Money Laundering and Terrorist Financing, p. 36.

94 The summary was made public on February 29, 2008, and the complete document was made available a few weeks later. The summary is available online also available online: Financial Action Task Force <<http://www.fatf-gafi.org/dataoecd/5/3/40323928.pdf>> (accessed January 16, 2009) [2008 FATF Mutual Evaluation of Canada].

95 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6779.

96 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6779.

97 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6779.

98 2008 FATF Mutual Evaluation of Canada, para. 1.

99 2008 FATF Mutual Evaluation of Canada, para. 2.

100 Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6780.

well as with representatives from the provinces and private sector bodies.<sup>101</sup> A first draft of the evaluation report was prepared and submitted to Canada for comment, leading to further discussions between the FATF and Canada.<sup>102</sup>

A few weeks prior to the FATF plenary session where evaluations are adopted, they are circulated among FATF member countries.<sup>103</sup> There can be discussions about the evaluation before its adoption at the plenary session.<sup>104</sup>

The 2008 FATF Mutual Evaluation of Canada summarized the AML/ATF measures adopted by Canada.<sup>105</sup> More significantly, it provided an assessment of Canada's compliance with the FATF "40 + 9 Recommendations" aimed at money laundering and TF. The report was lengthy and highly technical. It provided a detailed assessment of Canada's level of compliance with all FATF recommendations.

#### **4.2.1.2 Results**

The 2008 FATF Mutual Evaluation was critical of Canada's AML/ATF Initiative and of Canada's implementation of the FATF Recommendations.<sup>106</sup> The executive summary stated that, "...[w]ith regard to legal measures (money laundering and TF offences, confiscation, freezing mechanisms), the legal framework is generally in line with the FATF standards; however further steps could be taken to enhance effective implementation."<sup>107</sup> The Evaluation was more severe in the ratings it gave to Canada's performance in meeting each FATF recommendation.

The FATF rates compliance using the following ratings: Compliant (C), Largely Compliant (LC), Partially Compliant (PC) and Non-Compliant (NC). While the FATF explains in detail the reason underlying the ratings for each recommendation,<sup>108</sup> the difference between the ratings can be small. Canadian officials stated that there is not much difference between the two passing ratings (C and LC), but there is between the two failing grades (PC and NC).<sup>109</sup>

In total, the 2008 FATF Mutual Evaluation gave Canada seven Compliant Ratings,<sup>110</sup> twenty-three Largely Compliant Ratings,<sup>111</sup> eight Partially Compliant Ratings<sup>112</sup>

<sup>101</sup> Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6780.

<sup>102</sup> Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6780.

<sup>103</sup> Testimony of Diane Lafleur, vol. 54, September 28, 2007, pp. 6780-6781.

<sup>104</sup> Testimony Diane Lafleur, vol. 54, September 28, 2007, p. 6781.

<sup>105</sup> 2008 FATF Mutual Evaluation of Canada, para. 3.

<sup>106</sup> For Canada's response, see section 5.4.

<sup>107</sup> 2008 FATF Mutual Evaluation of Canada, para. 5.

<sup>108</sup> See Table 1 of the 2008 FATF Mutual Evaluation of Canada for a summary of the ratings. They are also scattered throughout the document with their respective explanations.

<sup>109</sup> Exhibit P-443: Summary of Meeting between Commission Counsel and Department of Finance, April 10, 2008, p. 1.

<sup>110</sup> Of the 7 Compliant ratings, 6 related to the 40 Recommendations and 1 to the 9 Special Recommendations.

<sup>111</sup> Of the 23 Largely Compliant ratings, 17 related to the 40 Recommendations and 6 to the 9 Special Recommendations.

<sup>112</sup> All related to the 40 Recommendations.



and eleven Non-Compliant Ratings.<sup>113</sup> Although the FATF “40 Recommendations” are generally considered to be directed at money laundering, they can also be considered to apply to TF. As such, the 40 Recommendations are included in the TF assessment process, in addition to the 9 Special Recommendations which deal specifically with TF.

The rating for compliance with Recommendation 26 was of particular interest because the recommendation related to the importance and role of FIUs – in Canada’s case, FINTRAC. In the 2008 FATF Mutual Evaluation, FINTRAC received a rating of PC (Partially Compliant).<sup>114</sup> The FATF explained this rating as follows:

1. FINTRAC has insufficient access to intelligence information from administrative and other authorities (especially from CRA, CSIS and Customs);
2. FINTRAC is not allowed by the *PCMLTFA* to gather additional financial information from reporting entities;
3. Effectiveness:
  - a. The number of staff dedicated to the analysis of potential money laundering/TF cases is low, especially in comparison with the number of reports coming in, which may have an impact on the number of cases that FINTRAC generates;
  - b. Feedback from law enforcement authorities outlines the relatively limited added value of FINTRAC disclosures in law enforcement investigations;
  - c. The timeliness of FINTRAC disclosures to law enforcement authorities was raised as an issue at the time of the FATF’s visit to Canada;
  - d. Eighty per cent of the disclosures made by FINTRAC result from voluntary information received from law enforcement; only 20% result from Suspicious Transaction Reports (STRs), which raises serious concerns with respect to the capability of FINTRAC to generate money laundering/TF cases on the basis of STRs or other reports it receives from the private sector; and
  - e. So far, very few, if any, convictions for money laundering or TF have resulted from a FINTRAC disclosure, a fact to be considered in any assessment of the usefulness of FINTRAC’s intelligence in criminal investigations and prosecutions.<sup>115</sup>

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<sup>113</sup> Of the 11 Non-Compliant ratings, 9 related to the 40 Recommendations and 2 related to the 9 Special Recommendations.

<sup>114</sup> The FATF recently revised the rating on Recommendation 26 to “Compliant.”

<sup>115</sup> 2008 FATF Mutual Evaluation of Canada 2008, Table 1, Recommendation 26.

Canada was given an NC rating concerning FATF's Special Recommendation VI, about money/value transfer services, as well as concerning Special Recommendation VII, about wire transfer rules.

The 2008 FATF Mutual Evaluation criticized Canada for its risk assessment of financial activity sectors.<sup>116</sup> The Evaluation stated that Canada's approach to risk did not reflect FATF's approach. The FATF noted that Canada's approach was to cover an activity sector *only if* there was a proven risk of money laundering or TF. The FATF argued that entities in any area of activity must be covered *unless* there was "a proven low risk" of money laundering or TF. The FATF report also stated that Canada did not have a consistent methodology for evaluating the risk of TF through financial activity sectors.

#### 4.2.2 The 1997 FATF Mutual Evaluation of Canada

The 1997 FATF Mutual Evaluation of Canada occurred before the FATF was assigned responsibility for TF matters and before the enactment of Canada's provisions on TF. The 1997 Evaluation appears to have been largely responsible for the creation of FINTRAC, since Canada did not have an FIU at the time and was criticized on that account. FINTRAC was created in 2000 and the National Initiative to Combat Money Laundering was set in motion.<sup>117</sup>

#### 4.2.3 UN Counter-Terrorism Committee Reviews

UN Resolution 1373 (2001) created the United Nations Counter-Terrorism Committee (UN CTC) and required UN member states, among other things, to prevent and suppress TF, criminalize TF and freeze funds used to support terrorism.<sup>118</sup> All member states have an obligation to report on progress to implement that resolution (as well as on implementation of Resolution 1624 (2005), dealing with prohibition of incitement to commit terrorist acts).<sup>119</sup> The report is in the form of a questionnaire which is completed by member countries.

Canada has provided all the required reports. The Commission examined the 2006 report. The questionnaire for that report dealt with several terrorism-related topics, including TF. The UN CTC was interested in learning about the status of

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<sup>116</sup> 2008 FATF Mutual Evaluation of Canada, paras. 630-640.

<sup>117</sup> 2004 Auditor General Report on Money Laundering, para. 2.8; EKOS Report on Money Laundering and Terrorist Financing, p. 2.

<sup>118</sup> See the discussion of Resolution 1373 in Chapter I.

<sup>119</sup> The reports submitted by the various member states can be read on the United Nations Security Council Counter-Terrorism Committee website, online: <<http://www.un.org/sc/ctc/countryreports/Creports.shtml>> (accessed January 15, 2009).

a registry for money services businesses (MSBs),<sup>120</sup> and how alternative money transfer agencies (such as hawalas) and the financial activities of charitable organizations were being monitored.<sup>121</sup> The questionnaire also asked about the lack of prosecutions for terrorist activities.<sup>122</sup>

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<sup>120</sup> UN CTC Report Submitted by Canada pursuant to Security Council resolution 1373 (2001) and resolution 1624 (2005), S/2006/185, Question 1.1: "The Committee acknowledges laws and regulations adopted by Canada in suppressing terrorist financing in accordance with resolution 1373 (2001). The Committee is aware that Canada has mentioned in its fourth report that it is looking at options to establish a registration or licensing system for MSBs. The Committee would be glad to know whether a licensing/registration system has been established. If so, please give the Committee an update as to its functions and legal authority": online: United Nations Security Council Counter-Terrorism Committee <<http://daccessdds.un.org/doc/UNDOC/GEN/NO6/297/90/PDF/NO629790.pdf?OpenElement>> (accessed January 15, 2009) [UN CTC 2006 Report by Canada].

<sup>121</sup> UN CTC 2006 Report by Canada, Question 1.2: "The Committee may wish to know how Canada monitors alternative money transfer agencies, such as the 'Hawala' which do not work at all through the banking system. How many such informal money transfer agencies do you believe exist? How do the Canadian authorities intend to make sure that these entities would not serve for terrorist purposes?"; Question 1.3: "The Committee is aware also that with respect to the money laundering, Canada has put in place administrative control on the financial institutions: However, the Committee would be grateful to have further clarification on the measures that Canada is employing in order to monitor the financial activities of charitable organizations. How, for example, does Canada make sure that these charitable organizations report their financial activities (donations and disbursements)? How does Canada prevent charities from being a source for misuse of funds that could be diverted to terrorist activities?"

<sup>122</sup> UN CTC 2006 Report by Canada, Question 1.4: "Canada has also mentioned in its fourth report that since September 2001, no entities or persons have been prosecuted by the Canadian authorities in relation to terrorist activities. Could Canada please provide the Committee with an updated data relating to persons, entities, non-profit organizations being prosecuted for terrorist activities since September 2001?"