

VOLUME FIVE TERRORIST FINANCING

CHAPTER V: CANADA'S RESPONSE TO REVIEWS OF ITS ANTI-TF PROGRAM

5.1 Legislative Changes

5.1.1 Department of Finance 2005 Consultation Paper

In June 2005, the Department of Finance published a consultation paper, *Enhancing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime*, setting out the Government of Canada's proposals to strengthen the AML/ATF Initiative.¹ The paper had several objectives: meeting FATF obligations² generally, preparing for the 2008 FATF Mutual Evaluation, addressing the recommendations of both the EKOS and Auditor General's reports of 2004,³ responding to the concerns of various stakeholders and, finally, preparing for the parliamentary reviews to be held in 2006-07.⁴

The paper contained proposals on substantive matters such as customer due diligence provisions, correspondent banking, electronic funds transfers, reporting of suspicious attempted transactions, sharing of information between agencies and a registration scheme for MSBs. It also proposed minor legal changes,⁵ including some technical amendments.⁶ The paper explained the basis for each of the proposals. For example, proposal 4.1, which recommended expanding the information contained in FINTRAC disclosures, cited both the Auditor General and the EKOS recommendations in support.⁷ Proposal 3.1 called for the creation of an MSB registration system, as required by FATF's

¹ The document can be found online: Department of Finance <http://www.fin.gc.ca/activity/pubs/enhancing_e.pdf> (accessed January 15, 2009) [Consultation Paper on AML/ATF Regime]. In the introductory paragraph, both ML and TF are mentioned. The Department states that "...[m]oney laundering is not only a serious threat to the integrity of the financial system, but it funds and creates incentives for further crime." However, it says nothing about the risks associated with TF.

² Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6778. The existing FATF obligations had been somewhat modified in 2003: see Consultation Paper on AML/ATF Regime, p. 6.

³ For example, the EKOS report stated: "However, the FATF recommendations were revised in June 2003 and Canada will now have to amend its legislative and regulatory framework to meet these new recommendations, particularly with respect to client due diligence and record keeping. This indicates a continued need for action on the part of Canada in this area." 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), p. 19, online: Department of Finance <http://www.fin.gc.ca/activity/pubs/nicml-incba_e.pdf> (accessed January 16, 2009) [EKOS Report on Money Laundering and Terrorist Financing].

⁴ Consultation Paper on AML/ATF Regime, p. 1.

⁵ Consultation Paper on AML/ATF Regime, pp. 39-49.

⁶ Consultation Paper on AML/ATF Regime, pp. 50-51.

⁷ Consultation Paper on AML/ATF Regime, p. 34.

Special Recommendation VI.⁸ Many submissions were made in response to the consultation paper.⁹

5.1.2 Bill C-25

On October 5, 2006, Bill C-25, *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*, was introduced in the House of Commons.¹⁰ The Bill received Royal Assent on December 14, 2006. Its provisions came into force in stages, over two years, and were all in force by December 2008. Officials told Commission counsel that Parliament adopted a staggered approach to bringing into force various provisions in Bill C-25 because stakeholders needed time to adapt to the changes.¹¹

Bill C-25 was designed to implement changes to Canada's AML/ATF Initiative and to prepare for upcoming reviews of the Initiative, including the FATF Mutual Evaluation.¹² For example, both the Auditor General and EKOS reports had recommended that FINTRAC be permitted to increase the detail of the information contained in its disclosures to law enforcement and security intelligence agencies. Bill C-25 amended sections 55(7) and 55.1(3) of the *PCMLTFA* to allow FINTRAC to accomplish this.

Although the report of the Senate committee examining the *PCMLTFA* was published after Bill C-25 received Royal Assent, the Bill reflected several of the committee's ideas. For example, the recommendation that a registration mechanism be created for MSBs,¹³ the inclusion of dealers in precious metals, stones and jewellery under the reporting requirements in the *PCMLTFA*¹⁴ and the amendment of the *PCMLTFA* to allow FINTRAC to make fuller disclosures to law enforcement and intelligence agencies¹⁵ – all measures eventually recommended by the Senate committee – were included in Bill C-25.

⁸ Consultation Paper on AML/ATF Regime, p. 29.

⁹ More than 25 submissions can be found online: Department of Finance <http://www.fin.gc.ca/activty/consult/regime_e.html> (accessed January 15, 2009). It appears that a majority of the submissions were concerned with ML issues.

¹⁰ 1st Sess., 39th Parl. See online: Parliament of Canada <<http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=14&Type=0&Scope=l&query=4832&List=stat>> (accessed January 16, 2009).

¹¹ Exhibit P-443: Summary of Meeting between Commission Counsel and Department of Finance, April 10, 2008, p. 6.

¹² See, for example, Testimony of Diane Lafleur, vol. 54, September 28, 2007, pp. 6778-6779.

¹³ Senate of Canada, Interim Report of the Standing Senate Committee on Banking, Trade and Commerce, *Stemming the Flow of Illicit Money: A Priority for Canada, Parliamentary Review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, October 2006, p. 10, 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*].

¹⁴ Senate Review of the *PCMLTFA*, p. 10.

¹⁵ Senate Review of the *PCMLTFA*, p. 16. Sections 55(7) and 55.1(7) of the *PCMLTFA* now allow FINTRAC to disclose more information, such as indicators (ss. 55(7)(n), 55.1(3)(n)), the relationships suspected by the Centre on reasonable grounds to exist between any persons or entities referred to in paragraph (a) and any other persons or entities (ss. 55(7)(h), 55.1(3)(h)) and other details.

5.2 Non-legislative Changes

The federal government responded to the Auditor General and EKOS reports through measures other than legislation as well. For instance, the Auditor General's recommendation that an anti-money laundering advisory committee be created was implemented without the need for legislative change.

The EKOS Report had recommended that a "Logic Model" for the Initiative be revisited and updated, and that an evaluation framework be updated to "... establish clear expectations around how the future success of the Initiative will be measured."¹⁶ Diane Lafleur of the Department of Finance testified that officials had been "...working diligently in the wake of the recommendations from the Auditor General, among others, to develop a better performance framework for the initiative and that is ongoing work right now."¹⁷ A document on the topic, *Evaluation Framework for the AML/ATF Regime*, was prepared for the Department of Finance at the end of 2007. It attempted to create a model to evaluate the Initiative.

5.3 Government Response to the *Anti-terrorism Act* Review

The Government of Canada responded to the House of Commons report, *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues*.¹⁸ The response was in part as follows:¹⁹

[16]²⁰ The solicitor-client privilege should not be used to conceal property and, accordingly, the Government rejected Committee's proposal to exempt the legal profession from the requirements of section 83.1 of the *Criminal Code*;²¹

[17] The *mens rea* element as required by section 83.12 of the *Criminal Code* was sufficient and a due diligence defence was not necessary;²²

¹⁶ EKOS Report on Money Laundering and Terrorist Financing, p. 55.

¹⁷ Testimony of Diane Lafleur, vol. 54, September 28, 2007, p. 6765.

¹⁸ The 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, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/Committee/391/SECU/Reports/RP2798914/sterrp07/sterrp07-e.pdf>> (accessed May 25, 2009) is discussed in section 4.1.4. The request for response is found at p. 113 of the report. The *Response of the Government of Canada to the 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* is found online: Parliament of Canada <http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/govresponse/rp3066235/391_SECU_Rpt07_GR/391_SECU_Rpt07_GR-e.pdf> (accessed May 25, 2009) [Canada Response to House of Commons Report on the *ATA*].

¹⁹ These are the responses which are most relevant to TF matters. Some technical changes, such as the House of Commons Recommendation 32, were accepted by the government and were not reproduced in that listing.

²⁰ The numbers in the square brackets are the recommendation numbers.

²¹ Canada Response to House of Commons Report on the *ATA*, p. 8.

²² Canada Response to House of Commons Report on the *ATA*, p. 9.

[23] The Government wished to maintain the current listing system, with multiple lists, because each listing complements the others and because several other countries, such as Australia, the US and the UK, maintain separate listing systems;²³

[24] Enabling an entity to make a direct application for judicial review to challenge a listing under the *Criminal Code* listing process without first applying to the Minister of Public Safety would run counter to the goal of effective and timely decision-making;²⁴ and

[26] The creation of an automatic “delisting” system that would de-list individuals or entities after a set period of time could result in Canada failing to comply fully with its international obligations.²⁵

5.4 Government Response to the 2008 FATF Mutual Evaluation of Canada

On February 29, 2008, the Minister of Finance issued a news release stating that “...[w]hen the actions the Government has taken recently are fully implemented, Canada will be compliant with virtually all of the FATF’s Recommendations.”²⁶

After the FATF’s on-site visits to various Canadian agencies in the course of conducting its evaluation, Canadian officials were shown a copy of the draft of the FATF Mutual Evaluation for comment. A series of discussions followed between Canadian and FATF officials, leading up to the FATF plenary meeting in February 2008, where the Evaluation was adopted. During these discussions, Canadian officials made their case about several of the FATF’s proposed ratings, a common practice. Representatives from the Canadian agencies responsible for Canada’s response to the FATF Mutual Evaluation, including law enforcement and FINTRAC officials, attended the February plenary.

Some descriptions of the anti-TF program that Canadian stakeholders gave to FATF during its on-site visits were outdated by the time of the FATF plenary meeting, since legislative and other changes had been made to the Canadian program in the interval. This was one reason for the concern of Canadian officials about the criticisms. For example, the FATF Evaluation stated that, “... [a]t the time of the on-site visit, the feedback provided by some organizations that receive FINTRAC disclosures was generally negative (unsatisfactory timelines for disclosures, relatively limited added value of FINTRAC disclosures

²³ Canada Response to House of Commons Report on the *ATA*, p. 12.

²⁴ Canada Response to House of Commons Report on the *ATA*, p. 12.

²⁵ Canada Response to House of Commons Report on the *ATA*, p. 12.

²⁶ “Canada Makes Progress in Combatting Money Laundering and Terrorist Financing” (February 29, 2008), online: Department of Finance <<http://www.fin.gc.ca/news08/08-023e.html>> (accessed January 15, 2009) [“Canada Makes Progress in Combatting Money Laundering and Terrorist Financing”].

in law enforcement investigations, FINTRAC disclosures positively contributed to existing investigations but rarely generated new ones).²⁷ The FATF did not appear to take into account the implementation of provisions from Bill C-25, which increased the amount of information that FINTRAC must disclose to law enforcement and security intelligence agencies.²⁸

Table 3 of the FATF Mutual Evaluation, "Authorities' Response to the Evaluation,"²⁹ summarizes Canada's response. Canada commented on each recommendation for which Canada received a rating of Non-Compliant (NC), and on almost all recommendations for which Canada received a Partially Compliant (PC) rating. Canada's response was often to cite upcoming legislative changes and their date of coming into force and contained the following general statement:

Legislative amendments to the *PCMLTFA* passed in December 2006 and associated regulations enacted in June 2007 and December 2007 will address a substantial number of deficiencies identified in this report. Please see Annex 1 for a detailed list of legislative and regulatory amendments to Canada's AML/CFT regime that came into force after June 2007 and have not been considered in this evaluation. Canada's regulations allow a period of time between enactment and coming into force to provide an opportunity for businesses and sectors to modify systems.³⁰

The Annex referred to in Canada's response is reproduced immediately below.

²⁷ Financial Action Task Force, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism, Canada*, February 29, 2008, para. 21, online: Financial Action Task Force <<http://www.fatf-gafi.org/dataoecd/5/3/40323928.pdf>> (accessed April 1, 2009) [2008 FATF Mutual Evaluation of Canada].

²⁸ "Canada Makes Progress in Combatting Money Laundering and Terrorist Financing."

²⁹ 2008 FATF Mutual Evaluation of Canada, pp. 308-310.

³⁰ 2008 FATF Mutual Evaluation of Canada, p. 308.

ANNEX 1**Legislative and regulatory Changes to the Canadian AML/CFT regime**

| Amendment | Legislation Enacted | Regulations Enacted | Measure Fully In Force |
|---|---------------------|---------------------|------------------------|
| Extending record retention time period for FINTRAC | Dec 14, 2006 | n/a | Feb 10, 2007 |
| Enhanced information sharing on non-profit organisations | Dec 14, 2006 | n/a | June 30, 2007 |
| Enhanced FINTRAC disclosure information | Dec 14, 2006 | June 27, 2007 | June 30, 2007 |
| Prohibition against correspondent relationships with shell banks | Dec 14, 2006 | June 27, 2007 | June 30, 2007 |
| Correspondent banking due diligence requirements | Dec 14, 2006 | June 27, 2007 | June 30, 2007 |
| Explicit prohibition on opening accounts for unidentified customers | Dec 14, 2006 | n/a | June 23, 2008 |
| Application to foreign branches or subsidiaries | Dec 14, 2006 | n/a | June 23, 2008 |
| Non-face-to-face CDD measures | n/a | June 27, 2007 | June 23, 2008 |
| Use of an agent or mandatary for customer identification (clarifying provision) | n/a | June 27, 2007 | June 23, 2008 |
| Beneficial owner requirements | n/a | June 27, 2007 | June 23, 2008 |
| Enhancing CDD and Record Keeping | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| PEPs requirement for financial institutions | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| Special attention to complex and unusual transactions (<i>i.e.</i> risk assessment) | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| Reporting suspicious attempted transactions | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| Special attention to business from countries of risk (<i>i.e.</i> risk assessment) | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| MSB registration | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| Wire transfers travel rule | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| Enhancing measures for casinos, accountants and real estate, including: <ul style="list-style-type: none"> Enhanced CDD and record-keeping. Non face to face measures. Use of agent and mandatary. Special attention to transactions. | Dec 14, 2006 | June 27, 2007 | June 23, 2008 |
| Inclusion of Lawyers, BC Notaries and Jewellers, including measures on: <ul style="list-style-type: none"> CDD and record-keeping. Non face to face measures. Use of agent and mandatary. Special attention to transactions. Triggers for STR reporting (except lawyers). Coverage by FINTRAC to ensure compliance. | Dec 14, 2006 | Dec 2007 | Dec 2008 |
| Administrative Monetary Penalties provisions | Dec 14, 2006 | Dec 2007 | Dec 2008 |
| Application to businesses and professions at risk (real estate developers) | n/a | Feb 2008 | Feb 2009 |

As an example, the FATF gave Canada a Non-Compliant rating for its failure to comply with Special Recommendations dealing with money services businesses (MSBs) and wire transfers. The Annex showed that MSB registration regulations would come into force in June 2008 (to comply with Special Recommendation VI)³¹ as would regulations concerning wire transfers (to comply with Special Recommendation VII).³²

Many FATF recommendations were similar to those flowing from domestic reviews of the anti-TF program. Several recommendations took an approach similar to the following: "Canada should ensure that the new provisions enacted in June 2007 are fully in line with the FATF requirements and ensure that reporting entities implement measures that meet the FATF standards."³³ This showed the FATF's awareness that several deficiencies had been remedied by more recent legislative changes.

After the plenary meeting adopted the Mutual Evaluation of Canada in February 2008, Canada requested one year to show that it was in fact complying with many of the obligations about which it had received criticism. Since the last of Bill C-25's changes to the anti-TF program came into force in December 2008, Canada will be able to state clearly the extent to which it complies in practice, and not merely theoretically, with FATF recommendations. Even so, the NC and PC ratings given in the 2008 Evaluation will not change since the FATF does not have a procedure for modifying these ratings.

5.5 Conclusion

International and domestic reviews of Canada's anti-TF program have led to improvements in the program. These reviews have shown the government and Canadian agencies, with the Department of Finance in the lead, to be willing to correct deficiencies. However, the length of time required to restructure the anti-TF program remains a significant concern. The process that led to the introduction of Bill C-25 in October 2006 began after EKOS and the Auditor General identified deficiencies in late 2004. In 2005, the Department of Finance issued a consultation paper about the AML/ATF Initiative, albeit with more emphasis on money laundering issues. Consultations with various stakeholders occurred during 2005 and 2006. Bill C-25 received Royal Assent in December 2006. Its provisions came into force over a two-year period, with the last provisions coming into effect in December 2008, more than four years after the EKOS and Auditor General reports.

³¹ 2008 FATF Mutual Evaluation of Canada, p. 309.

³² 2008 FATF Mutual Evaluation of Canada, p. 309.

³³ 2008 FATF Mutual Evaluation of Canada, p. 302.

