

## VOLUME FIVE TERRORIST FINANCING

### CHAPTER VI: THE LINKS BETWEEN THE CHARITABLE SECTOR AND TERRORIST FINANCING

#### 6.1 Charities and Terrorist Financing Generally

Charities and not-for-profit organizations (NPOs)<sup>1</sup> around the world can be misused to facilitate TF, either with or without the knowledge of those operating or contributing to the organizations. Among the many ways that charities and NPOs can be misused are the following:

1. Their apparent legitimacy allows charities and NPOs to raise funds in many different areas of the world, especially those plagued by conflict;<sup>2</sup>
2. Transferring funds to other countries may make it easier for charities and NPOs to avoid accountability for the use of those funds;<sup>3</sup>
3. Charities and NPOs have a long history of important work and are seen as vital parts of society. Organizations interested in raising funds for terrorism can gain credibility simply by calling themselves charities or NPOs, or by becoming registered with government authorities as charities. This credibility helps these organizations to raise funds;<sup>4</sup>
4. Some charities and NPOs can reach large numbers of donors to raise funds;
5. The activities of charities and NPOs are often cash-intensive, making it difficult for authorities to track uses of the funds;<sup>5</sup>
6. Registered charities can issue tax receipts, thus allowing donors to reduce the cost to themselves of giving to the charity;<sup>6</sup>
7. Registered charities and NPOs may receive tax benefits<sup>7</sup> which leave them with additional funds to support terrorism; and
8. Charities and NPOs may be able to launder money to hide its intended improper uses.<sup>8</sup>

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<sup>1</sup> The differences in Canada between NPOs and registered charities are described below.

<sup>2</sup> Financial Action Task Force, *Terrorist Financing*, February 29, 2008, p. 8, online: Financial Action Task Force <<http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf>> (accessed February 12, 2009) [FATF Report on Terrorist Financing]; Testimony of Rick Reynolds, vol. 55, October 1, 2007, p. 6863.

<sup>3</sup> Testimony of Kenneth Dibble, vol. 59, October 9, 2007, p. 7297.

<sup>4</sup> Testimony of Maurice Klein, vol. 57, October 3, 2007, p. 7121.

<sup>5</sup> FATF Report on Terrorist Financing, p. 11.

<sup>6</sup> At the hearings, the Commissioner expressed doubt that an individual inclined to finance terrorist organizations would be deterred by the lack of a tax receipt: Transcripts, vol. 54, September 28, 2007, p. 6809.

<sup>7</sup> Testimony of Maurice Klein, vol. 57, October 3, 2007, p. 7122.

<sup>8</sup> Testimony of Nikos Passas, vol. 53, September 27, 2007, p. 6579.

The international community is well aware of the misuse of charitable or non-profit status for TF. When the Financial Action Task Force (FATF) expanded its mission in 2001 to include TF, it issued a special recommendation on NPOs (Special Recommendation VIII) as part of its “Nine Special Recommendations on Terrorist Financing.” Special Recommendation VIII spoke of non-profit organizations (which would include charities in the context of the recommendation) being “particularly vulnerable” to abuse:

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- by terrorist organisations posing as legitimate entities;
- to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.<sup>9</sup>

Some charitable organizations in Canada and elsewhere have long been suspected of helping terrorists<sup>10</sup> by raising and helping to move funds. However, as with the extent of TF in general, it is difficult to determine the extent of TF involving charities and NPOs.

Donna Walsh, Director of the Review and Analysis Division in the Charities Directorate of the Canada Revenue Agency (CRA), testified that it was not possible to state how many registered charities could be or are involved in TF.<sup>11</sup> However, some rough indications were available. In its 2006 Annual Report, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) reported that a third of its disclosures of “designated information” to law enforcement

<sup>9</sup> “9 Special Recommendations (SR) on Terrorist Financing (TF),” VIII: Non-profit organisations, online: Financial Action Task Force <[http://www.fatf-gafi.org/document/9/0,3343,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_1,00.html#VIIINonprofit](http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html#VIIINonprofit)> (accessed February 12, 2009) [FATF Special Recommendation VIII: Non-profit organisations].

<sup>10</sup> For example, see the discussion of fundraising in chapter 2 of Senate of Canada, Special Committee on Security and Intelligence, “The Report of the Special Senate Committee on Security and Intelligence” (January 1999), online: Parliament of Canada <<http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/secu-e/rep-e/repsecintjan99part2-e.htm#Fundraising>> (accessed March 3, 2009).

<sup>11</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7127. Similar remarks appear in Testimony of Kenneth Dibble, vol. 59, October 9, 2007, p. 7294. “Registered charities” are those charities that have been granted charitable status by the CRA.

and intelligence agencies related to a charity or NPO in some capacity.<sup>12</sup> RCMP Superintendent Rick Reynolds testified that “a significant number” of major TF investigations in Canada involved a charity or NPO “...in some context.... [p] erhaps not in fundraising but in some context...either wittingly or unwittingly ... and some of them may be very minor in nature....”<sup>13</sup>

Professor David Duff of the Faculty of Law at the University of Toronto testified that there were a number of allegations that money from some Canadian Sikh temples was improperly diverted during the 1990s for terrorist purposes.<sup>14</sup> The Babbar Khalsa, which both CSIS and the RCMP believed to be centrally implicated in the Narita and Air India bombings and terrorist acts and plots in both Canada and India, managed to obtain charitable status in the early 1990s, although its charitable status was revoked in 1996.<sup>15</sup>

Blake Bromley, a Canadian lawyer practising exclusively on charities issues, testified that concern long ago about funds from Canadian charities being used for political causes in India led that country to enact laws to restrict the flow of funds:

...Indian legislation aimed at restricting the flow of charitable funds to finance terrorism was passed a quarter century before the post 9/11 global war on terrorism, and it was aimed specifically at Canadian donors supporting the political cause espoused by the bombers of Air India flight 182. India was worried about donations coming from Canadian charities to fund the political struggle in Khalistan. Nine years before the bombing of Air India flight 182, India passed the *Foreign Contributions (Regulation) Act, 1976* to regulate the acceptance and utilization of charitable contributions from foreign countries.<sup>16</sup>

<sup>12</sup> Financial Transactions and Reports Analysis Centre of Canada, *FINTRAC 2006 Annual Report*, p. 19, online: Financial Transactions and Reports Analysis Centre of Canada <<http://www.fintrac.gc.ca/publications/ar/2006/AR-eng.pdf>> (accessed February 12, 2009). This assessment was based on a review of 120 disclosures of suspected terrorist activity financing and other threats to the security of Canada. Some 32 per cent of the NPOs were found to be registered Canadian charities, 7 per cent were Canadian NPOs not registered as charities and 61 per cent were foreign NPOs.

<sup>13</sup> Testimony of Rick Reynolds, vol. 55, October 1, 2007, pp. 6864-6865. The *Royal Canadian Mounted Police Departmental Performance Report for the period ending March 31, 2006* also stated at p. 62 that “Furthermore, it is important to note that the majority of terrorist financing involves registered charities”: online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/dpr-rmr/0506/RCMP-GRC/rcmp-grc-eng.pdf>> (accessed February 24, 2009) [2005-06 RCMP Departmental Performance Report].

<sup>14</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10890.

<sup>15</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10890; David G. Duff, “Charities and Terrorist Financing: A Review of Canada’s Legal Framework” in Vol. 2 of *Research Studies: Terrorism Financing Charities and Aviation Security*, p. 201 [Duff Paper on Charities and Terrorist Financing].

<sup>16</sup> Blake Bromley, “Funding Terrorism and Charities,” October 26, 2007, p. 3, online: Benefic Group <<http://www.beneficgroup.com/files/getPDF.php?id=120>> (accessed May 12, 2009) [Bromley Paper on Funding Terrorism and Charities].

Charitable organizations have been identified as supporting terrorism in some American TF prosecutions, notably those involving the Benevolence International Fund and the Holy Land Foundation.

The 9/11 Commission reported that, before the 9/11 attacks, Al Qaida relied on diversions of funds from Islamic charities and on financial facilitators who gathered money from witting and unwitting donors located primarily in the Arabian Gulf region.<sup>17</sup>

One witness from the UK, Kenneth Dibble of the England and Wales Charity Commission, stated that "...with over 190,000 registered charities [in the UK], the incidence of terrorist abuse for charities is very, very low."<sup>18</sup>

## 6.2 Overview of the Charitable Sector in Canada<sup>19</sup>

In Canada, the federal government encourages charitable giving by allowing registered charities to issue income tax receipts to donors and by exempting charities from the obligation to pay certain taxes. Because these measures reduce government revenues, the government has an interest in ensuring that benefits accrue only to organizations that truly qualify as charities under Canadian law. In a paper prepared for the Commission, Professor Duff concluded that the federal government had foregone \$2 billion in revenue in 2003 because of the tax benefits arising from donations to registered charities. He estimated that foregone revenues could increase to about \$2.5 billion in 2008.<sup>20</sup> The federal interest in charities also increasingly flows from another concern – that some charities may be involved in TF.

There are about 83,000 registered charities in Canada.<sup>21</sup> Their annual revenues total more than \$US5.5 billion.<sup>22</sup> The 2008 Financial Action Task Force (FATF) Mutual Evaluation of Canada reported that 95 per cent of the value of all donations made to the non-profit organization (NPO) sector in Canada goes to registered charities.<sup>23</sup>

<sup>17</sup> National Commission on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing*, pp. 19-21, online: National Commission on Terrorist Attacks Upon the United States <[http://govinfo.library.unt.edu/911/staff\\_statements](http://govinfo.library.unt.edu/911/staff_statements)> (accessed February 20, 2009).

<sup>18</sup> Testimony of Kenneth Dibble, vol. 59, October 9, 2007, p. 7300.

<sup>19</sup> For an in-depth review of Canada's regime as it relates to charitable organizations, see Duff Paper on Charities and Terrorist Financing.

<sup>20</sup> Duff Paper on Charities and Terrorist Financing, pp. 206-207. Duff quotes the Department of Finance, *Tax Expenditures and Evaluations* (Ottawa: Her Majesty the Queen in Right of Canada, 2006), pp. 17, 26 as the source of this information.

<sup>21</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7099; Testimony of David Duff, vol. 85, November 29, 2007, p. 10893.

<sup>22</sup> Financial Action Task Force, *Third Mutual Evaluation on Anti-Money Laundering and Combating the Financing of Terrorism*, Canada, February 29, 2008, para. 1412, online: Financial Action Task Force <<http://www.fatf-gafi.org/dataoecd/5/3/40323928.pdf>> (accessed March 2, 2009) [2008 FATF Mutual Evaluation of Canada].

<sup>23</sup> 2008 FATF Mutual Evaluation of Canada, para. 1412.

Registered charities in Canada range from large, often international, groups with Canadian operations, to smaller community charities. The majority have five or fewer employees, receive less than \$100,000 in annual revenues<sup>24</sup> and depend on volunteer work.<sup>25</sup> Most charities in Canada do not carry out international activities.

### 6.3 The Vulnerability of the Canadian Charitable Sector to Being Used for Terrorist Financing

Canada has made efforts to assess the vulnerability of the charitable sector to being used for TF.<sup>26</sup> Bromley told the Commission that he saw "...a potential problem with charities funding terrorism which needs to be brought out in the open and discussed with the communities that are most vulnerable."<sup>27</sup> Kenneth Dibble explained that there was a fine line between giving money to a charity for humanitarian purposes and giving for ideological purposes. Donors may give to a charity expecting it to alleviate poverty, only to have part of the funds go to terrorists. Some charities, he said, may be the only aid organizations in a particular part of the world, and terrorists themselves might benefit from the hospitals and other services that the charities provide. Dibble spoke of the need for clarity in the rules for charities to prevent terrorist groups from benefiting from the funds held by charities.<sup>28</sup>

### 6.4 Regulating the Charitable Sector in Canada

Canada relies heavily on the federal government to monitor charities. Historically, the provinces have done little to regulate charities despite their clear constitutional role. Under section 92(7) of the *Constitution Act, 1867*,<sup>29</sup> provinces may exclusively make laws for the establishment, maintenance and management of charities. However, very few have done so. Even among those that regulate charities in some way, there is no uniform approach.

Professor Duff described the constitutional situation:

[P]rovincial legislatures in Canada are granted exclusive authority to make laws in relation to: "The Establishment, Maintenance, and Management of ... Charities, and Eleemosynary [pertaining to charity] Institutions in and for the Province." In addition, provinces have exclusive jurisdiction over "Property and Civil Rights in the Province" – allowing them

<sup>24</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10891.

<sup>25</sup> Duff Paper on Charities and Terrorist Financing, p. 207.

<sup>26</sup> See 2008 FATF Mutual Evaluation of Canada, paras. 1413-1414 for a brief summary of the efforts in this regard.

<sup>27</sup> Bromley Paper on Funding Terrorism and Charities, p. 24.

<sup>28</sup> Testimony of Kenneth Dibble, vol. 59, October 9, 2007, pp. 7293, 7297.

<sup>29</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

to regulate the transfer and use of property for charitable purposes. Federal jurisdiction over charities, on the other hand, is limited to the incidental powers that the Parliament of Canada derives from its taxation power. To the extent that the [*Income Tax Act*] confers special tax benefits on charities and their contributors, supervision and regulation of charities in order to ensure that they satisfy the terms on which these benefits are conferred constitutes a legitimate exercise of this federal power. While provincial governments have broad powers to regulate charities and charitable property, therefore, federal jurisdiction to supervise and regulate charities is limited to conferral of fiscal benefits under the *ITA*.<sup>30</sup> [References to footnotes omitted]

#### 6.4.1 The Federal Government as the De Facto Regulator

Because of constitutional limits on Parliament's powers, the CRA's regulatory jurisdiction over charities is more limited than that of the provinces.<sup>31</sup> Despite this, the federal government over time became the *de facto* primary regulator of charities.<sup>32</sup> The CRA has regulated charities in Canada since the process for registering as a charity was established in 1967.<sup>33</sup> It has done this through its taxation power,<sup>34</sup> in recent years sometimes denying or revoking charitable status in part due to suspicions that the organization was involved with TF.

The CRA has begun an initiative and established working groups on charity-related matters with the provinces, but TF is not being addressed.<sup>35</sup> One impediment to cooperation with the provinces arises from CRA's obligation to comply with confidentiality provisions, primarily those in the *Income Tax Act*<sup>36</sup> (*ITA*), that limit the disclosure of some types of information about charities.<sup>37</sup>

#### 6.4.2 The Provincial Role in Dealing with Charities

The provinces have the exclusive right under the *Constitution Act, 1867* to make laws to establish, maintain and manage charities. Professor Duff noted that only Ontario has enacted specific legislation:

Notwithstanding their constitutional authority to regulate charities and charitable donations, most provinces have either chosen not to exercise this jurisdiction, or have done

<sup>30</sup> Duff Paper on Charities and Terrorist Financing, p. 203. For more on the constitutional framework, see generally, Duff Paper on Charities and Terrorist Financing.

<sup>31</sup> Duff Paper on Charities and Terrorist Financing, pp. 203-204.

<sup>32</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10894.

<sup>33</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10895; Exhibit P-236, Tab 4: Canada Revenue Agency Presentation: "Canada's Charities and Anti-terrorism Measures," October 3, 2007 [CRA Presentation on Canada's Charities and Anti-terrorism Measures].

<sup>34</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(3).

<sup>35</sup> Testimony of Terry de March, vol. 57, October 3, 2007, pp. 7160-7161.

<sup>36</sup> R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.).

<sup>37</sup> Testimony of Terry de March, vol. 57, October 3, 2007, p. 7161.

so only sparingly.<sup>38</sup> Although a few provinces have enacted legislation regarding charitable fundraising, and provincial Attorneys-General have the right and duty to supervise and assist charities under their *parens patriae* jurisdiction as representatives of the Crown, only Ontario has enacted specific legislation regulating the operation of charitable organizations and the use of charitable property in the province.<sup>39</sup>

A recent Ontario government discussion paper explains the origins of Ontario's regulation of charities:

In Ontario the Attorney General's powers were codified and expanded with the enactment of the *Charities Accounting Act* in 1915. In 1919 with the enactment of the *Public Trustee Act*, the *Charities Accounting Act* was amended to give the statutory supervisory authority to the Public Trustee, renamed the Public Guardian and Trustee in 1995.<sup>40</sup> [References omitted.]

However, the Ontario Public Guardian and Trustee is not a regulator of charities. It has very little power to make decisions in this area. It has no registration listings and does not grant charitable status.<sup>41</sup> Still, it has authority over all charitable property, no matter who or what entity holds the property.<sup>42</sup>

The Ontario *Charities Accounting Act*<sup>43</sup> is primarily concerned with standing and procedure rather than with substantive legal standards for the proper administration of charitable property.<sup>44</sup> Unlike the UK system, where a charities commission operates as a quasi-judicial body, the Ontario model is "court-centred."<sup>45</sup>

The provincial Crown also has a *parens patriae* jurisdiction for supervising charitable property, but that power is seldom exercised. Thus, the provincial Crown has had a longstanding right and duty to supervise and come to the assistance of charities.<sup>46</sup> However, a 1996 Supreme Court decision held that

<sup>38</sup> Duff mentions the *Charitable Fund-raising Act*, R.S.A. 2000, c. C-9 (Alberta), *The Charities Endorsement Act*, C.C.S.M. c. C60 (Manitoba) and *The Charitable Fund-raising Businesses Act*, S.S. 2002, c. C-6.2 (Saskatchewan): Duff Paper on Charities and Terrorist Financing, p. 203, note 18.

<sup>39</sup> Duff Paper on Charities and Terrorist Financing, p. 203.

<sup>40</sup> Exhibit P-384, Tab N: Ken Goodman, "Discussion Paper: Mandate of the Public Guardian and Trustee" (Ontario), January 2004, p. 2 [Discussion Paper on Mandate of the Ontario Public Guardian and Trustee].

<sup>41</sup> Discussion Paper on Mandate of the Ontario Public Guardian and Trustee, pp. 3-4.

<sup>42</sup> Discussion Paper on Mandate of the Ontario Public Guardian and Trustee, p. 4.

<sup>43</sup> R.S.O. 1990, c. C.10.

<sup>44</sup> Discussion Paper on Mandate of the Ontario Public Guardian and Trustee, p. 10.

<sup>45</sup> Discussion Paper on Mandate of the Ontario Public Guardian and Trustee, pp. 2, 10. For a more thorough overview of the British, American and Australian regimes relating to the regulation and supervision of charities, see Mark Sidel, "Terrorist Financing and the Charitable Sector: Law and Policy in the United Kingdom, the United States, and Australia" in Vol. 2 of Research Studies: Terrorist Financing Charities and Aviation Security [Sidel Paper on Terrorist Financing and the Charitable Sector].

<sup>46</sup> Discussion Paper on Mandate of the Ontario Public Guardian and Trustee, pp. 1-2.

the *parens patriae* concept does not exist as such in Quebec, since the concept emanates from the common law.<sup>47</sup>

Corporate registries (provincial or federal) also exercise very limited control over the activities of incorporated charities. These registries do not investigate TF issues. For the most part, they receive annual returns and related forms from registered corporate bodies. These forms provide limited information.

## 6.5 Canada's Efforts to Curb the Misuse of Registered Charities for Terrorist Financing

### 6.5.1 The Charities Directorate of the Canada Revenue Agency

The CRA is the federal agency that oversees registered charities in Canada as part of its mandate to implement Canada's tax system. Its Charities Directorate was created to deal with registered charities, especially regarding the benefits and tax treatment they receive. Through the Directorate, CRA registers qualifying organizations as charities and provides technical advice on their operation. It also undertakes audit and compliance activities.<sup>48</sup>

The 2008 FATF Mutual Evaluation of Canada found that the compliance program of the Charities Directorate is largely based on information from annual returns from charities, internal analysis of trends in the charitable sector, complaints from the public and tips from informants.<sup>49</sup>

Before 9/11, there was no counterterrorism function in the Directorate or in the CRA as a whole.<sup>50</sup> In 2004, the Review and Analysis Division (RAD) was created within the Charities Directorate and charged mainly with TF issues.<sup>51</sup> A senior position was later added to the RAD to deal with terrorism issues – Senior Advisor, Anti-terrorism and Charities Directorate.

The Charities Directorate has made an effort to hire staff with diverse backgrounds, such as defence intelligence, law enforcement, security intelligence and law, and with experience from international agencies and FINTRAC.<sup>52</sup> Many employees also have credentials in forensic investigation and are able to speak other languages, including Farsi, Arabic, Spanish and Urdu.<sup>53</sup>

Maurice Klein, Senior Advisor, Anti-terrorism and Charities Directorate, testified about the challenges inherent in identifying TF done by charities:

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<sup>47</sup> *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 at para. 59.

<sup>48</sup> Canada Revenue Agency, "Charities and Giving," online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/tx/chrts/menu-eng.html>> (accessed March 3, 2009).

<sup>49</sup> 2008 FATF Mutual Evaluation of Canada, para. 1419.

<sup>50</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7109.

<sup>51</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7098.

<sup>52</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7115.

<sup>53</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7115.



[T]he enormous amounts of money that are donated to charities each year, combined with the fact that we have 83,000 registered charities currently operating in Canada, make the diversion of relatively smaller amounts of funds more difficult to detect.<sup>54</sup>

Charities in Canada can be monitored or investigated in at least three ways. First, individuals linked with charities, or the charities themselves, can be monitored by law enforcement and security intelligence agencies. Second, FINTRAC may receive reports of activities relating to charities. FINTRAC, in turn, might conclude that it must send designated information to law enforcement and security intelligence bodies or to the CRA, which may then conduct further monitoring or investigations. Finally, CRA might decide on its own that a registered charity or applicant for charitable status could have ties to terrorism.

### 6.5.2 The Legal Regime Governing Registered Charities

The CRA, in dealing with registered charities, is guided by three statutes: the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>55</sup> (*PCMLTFA*), the *Charities Registration (Security Information) Act*<sup>56</sup> (*CRSIA*) and the *ITA*.<sup>57</sup> CRA defines its approach in fighting TF as being to "...change the risk equation" and "...[take] away 'enabling conditions.'"<sup>58</sup> CRA considers that it has "...a responsibility to mitigate and manage the risk of terrorist involvement in the registration system."<sup>59</sup> A CRA briefing document explains several ways in which the CRA can help counterterrorism efforts and limit TF:

- identifying linkages between individuals and organizations;
- identifying charities operating in countries or regions of concern regarding terrorist activities;
- identifying "money trails";
- countering the ability of terrorist supporters to take over existing legitimate charities; and
- discovering predictive patterns and indicators of risk.<sup>60</sup>

In addition, the CRA's power to deny charitable status allows it (and government as a whole) to dissociate itself from, and denounce, charities that may be involved in TF. Denial of charitable status amounts at least to symbolic disapproval by

<sup>54</sup> Testimony of Maurice Klein, vol. 57, October 3, 2007, pp. 7121-7122.

<sup>55</sup> S.C. 2000, c. 17.

<sup>56</sup> S.C. 2001, c. 41, s. 113.

<sup>57</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7105.

<sup>58</sup> CRA Presentation on Canada's Charities and Anti-terrorism Measures, slides 9, 20.

<sup>59</sup> Exhibit P-236, Tab 9: Canada Revenue Agency, "Managing and Mitigating Risk of Terrorist Involvement," p. 1 [CRA Document on Managing and Mitigating Risk of Terrorist Involvement].

<sup>60</sup> CRA Presentation on Canada's Charities and Anti-terrorism Measures, slide 18.

government and can be a signal to potential supporters of a charity to distance themselves from it.<sup>61</sup>

#### **6.5.2.1 Limitations on Disclosure by CRA**

The CRA must obey stringent rules about the confidentiality of taxpayer information. It can disclose information only in limited cases. These limitations are set out in the *ITA* and *PCMLTFA* and have limited even the information available to this Commission.<sup>62</sup> These confidentiality rules do not, however, limit the ability of the CRA to *receive* information from intelligence and law enforcement agencies.

Some information held by CRA can be disclosed publicly, such as information regarding applications for registered status, annual returns of charities, directors' names, financial statements and letters revoking charitable status.<sup>63</sup> This information may relate to current or former registered charities and is accessible either on the CRA's website or, for financial information about a specific charity, on request to CRA.<sup>64</sup>

#### **6.5.2.2 Becoming a Registered Charity: Application and Registration Processes**

A major part of the CRA's work to counter TF occurs during the review of applications for registered charity status. Ms. Walsh told the Commission that the CRA had committed additional resources to ensure "...early detection through specialized screening and analysis."<sup>65</sup> She said, however, that the CRA was not the first defence against terrorism, but that its work does help to support other agencies such as the RCMP and CSIS.<sup>66</sup>

Section 248(1) of the *ITA* defines "registered charity" as follows:

(a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or

(b) a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf,

<sup>61</sup> See p. 166 of the Sidel Paper on Terrorist Financing and the Charitable Sector for a discussion of how the UK Charity Commission was able to remove Abu Hamza from the Finsbury Park Mosque.

<sup>62</sup> The matter was discussed before the Commission on October 3, 2007. However, CRA officials prepared several "sanitized" cases for the Commission to help it understand CRA's work.

<sup>63</sup> CRA Presentation on Canada's Charities and Anti-terrorism Measures, slide 8.

<sup>64</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7102-7103. Exceptions are the home addresses, telephone numbers and dates of birth of the charity's directors.

<sup>65</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7114.

<sup>66</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7187.

that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation.

The Act requires that charitable organizations and charitable foundations be exclusively charitable and that their resources be used for charitable activities or for charitable purposes.<sup>67</sup> Professor Duff wrote that Canadian courts have generally sought guidance in the common law of trusts to interpret the terms “charitable activities” and “charitable purposes.” Specifically, the purposes of the organization must fall within one or more of the following categories, known as the “Pemsel” categories (from a 19<sup>th</sup> century House of Lords case of that name<sup>68</sup>):

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- other purposes beneficial to the community in a way the law regards as charitable.<sup>69</sup>

Seeking to achieve political purposes generally renders an applicant ineligible for charitable registration. A CRA document explains this more fully:

The courts have decided that organizations seeking to achieve political purposes, in whole or in part, cannot be recognized as a registered charity. Political purposes include:

- furthering the aims of a political party;
- promoting a political doctrine;
- persuading the public to adopt a particular view on a broad social question; and
- attempting to bring about or oppose changes in the law or government policy.

Purposes that are so broad as to allow for unlimited political activity, or organizations with unspecified political purposes, will not qualify for charitable registration. In addition, the Act specifically prohibits a registered charity from engaging in any

<sup>67</sup> Duff Paper on Charities and Terrorist Financing, pp. 207-212.

<sup>68</sup> *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531.

<sup>69</sup> Canada Revenue Agency, “Summary Policy,” Ref. No. CSP-C01, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-c01-eng.html>> (accessed March 3, 2009). See Canada Revenue Agency, “Registering a Charity for Income Tax Purposes,” T4063(E) Rev. 08, p. 8, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/E/pub/tg/t4063/t4063-08e.pdf>> (accessed March 3, 2009) [“Registering a Charity for Income Tax Purposes,” T4063(E) Rev. 08] for a description of each category.

partisan political activity. A partisan political activity is one that involves direct or indirect support of, or opposition to, any political party or candidate for public office.<sup>70</sup>

Although the CRA document sets out this general prohibition on engaging in political activities, it also states that organizations can engage in limited, non-partisan, political activity in some circumstances:

Under the [Income Tax Act], a registered charity that is established exclusively for charitable purposes can engage, to a limited extent, in **non-partisan political "activities"** that directly help accomplish the charity's purposes.

For example, a registered charity with a charitable purpose to provide for the welfare of children can engage in activities that take a public position about certain legislation in the field of child welfare, provided the activities are within [the limits described above]. However, an organization established solely for purposes of pressuring for a change in the legislation affecting the welfare of children cannot be registered as a charity.<sup>71</sup>

To be registered as a charity, an organization must also pass a public benefit test. The organization must show that its "...activities and purposes provide a tangible benefit to the public" and that "...those people who are eligible for benefits are either the public as a whole, or a significant section of it, in that they are not a restricted group or one where members share a private connection, such as social clubs or professional associations with specific membership."<sup>72</sup>

Applicants complete form T2050 to apply as a registered charity.<sup>73</sup> The 14-page form includes questions about the name of the organization and its directors, its structure, financial information and information about its activities. Ms. Walsh stated that, once the form is submitted, "...[e]ach application is subject to a risk-based evaluation which takes into account the potential risk that the organization could be used to support terrorist activities."<sup>74</sup>

With the substantial changes introduced by Bill C-25,<sup>75</sup> the CRA can disclose new classes of information to other agencies. In addition, information that was

<sup>70</sup> "Registering a Charity for Income Tax Purposes," T4063(E) Rev. 08, p. 5. See also Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7168; Duff Paper on Charities and Terrorist Financing, pp. 211-212; *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), ss. 149.1(6.1)-(6.2) [*Income Tax Act*].

<sup>71</sup> "Registering a Charity for Income Tax Purposes," T4063(E) Rev. 08, p. 5.

<sup>72</sup> "Registering a Charity for Income Tax Purposes," T4063(E) Rev. 08, p. 7.

<sup>73</sup> A blank form was entered into evidence: see Exhibit P-236, Tab 6: Application to Register a Charity under the *Income Tax Act*.

<sup>74</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7101.

<sup>75</sup> *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*, S.C. 2006, c. 12 [Bill C-25].

already shared for the administration and enforcement of the *CRSIA* can now be used for investigations. Walsh testified that "...the impediments [for sharing information with other agencies] were too high"<sup>76</sup> before these changes:

[E]ven with the passage of the *CRSIA* there were still significant restrictions upon information sharing between the CRA and other agencies mandated to counter terrorist financing. For one thing, there was still no legislative authority for the CRA to give or receive information from FINTRAC or to FINTRAC. For another, information that the CRA provided to CSIS and the RCMP could not be used in their own investigations. Its use was restricted to the administration and enforcement of the *CRSIA*.<sup>77</sup>

Bill C-25 added a new subsection to section 241 of the *ITA* to accomplish this improved flow of information. Section 241(9) allows the CRA to do the following:

... provide, to an official of the Canadian Security Intelligence Service, of the Royal Canadian Mounted Police or of the Financial Transactions and Reports Analysis Centre of Canada,

(a) publicly accessible charity information;

(b) designated taxpayer information, if there are reasonable grounds to suspect that the information would be relevant to

(i) an investigation by the Canadian Security Intelligence Service of whether the activity of any person may constitute threats to the security of Canada, as defined in section 2 of the *Canadian Security Intelligence Service Act*,

(ii) an investigation of whether an offence may have been committed under

(A) Part II.1 of the *Criminal Code*, or

(B) section 462.31 of the *Criminal Code*, if that investigation is related to an offence under Part II.1 of that *Act*, or

(iii) the prosecution of an offence referred to in subparagraph (ii); and

<sup>76</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7165.

<sup>77</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7110.

- (c) information setting out the reasonable grounds referred to in paragraph (b), to the extent that any such grounds rely on information referred to in paragraph (a) or (b).<sup>78</sup>

Only CSIS, the RCMP and FINTRAC can receive publicly accessible charity information and designated taxpayer information.

Designated taxpayer information consists of a wider range of information than publicly accessible charity information.<sup>79</sup> Designated taxpayer information is defined as taxpayer information — other than designated donor information — of a registered charity, or of a person who has at any time made an application for registration as a registered charity, that is:

- (a) in respect of a financial transaction
- (i) relating to the importation or exportation of currency or monetary instruments by the charity or applicant, or
  - (ii) in which the charity or applicant has engaged a person to whom section 5 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* applies,
- (b) information provided to the Minister by the Canadian Security Intelligence Service, the Royal Canadian Mounted Police or the Financial Transactions and Reports Analysis Centre of Canada,
- (c) the name, address, date of birth and citizenship of any current or former director, trustee or like official, or of any agent, mandatory or employee, of the charity or applicant,
- (d) information submitted by the charity or applicant in support of an application for registration as a registered charity that is not publicly accessible charity information,
- (e) publicly available, including commercially available databases, or

<sup>78</sup> The amendment was introduced by s. 45(2) of Bill C-25.

<sup>79</sup> The *Income Tax Act* defines “taxpayer information” in s. 241(10). It provides in s. 241(3.2) that “An official may provide to *any person* the following taxpayer information relating to another person *that was at any time a registered charity* (in this subsection referred to as the “charity”).” The phrases “publicly accessible charity information” and “designated taxpayer information” are used in s. 241(9). “Publicly accessible charity information” is defined in s. 241(10) as “taxpayer information that is (a) described in subsection (3.2), or that would be described in that subsection if the words ‘that was at any time a registered charity’ were read as ‘that has at any time made an application for registration as a registered charity’, (b) information — other than designated donor information — submitted to the Minister with, or required to be contained in, any public information return filed or required to be filed under subsection 149.1(14), or (c) information prepared from information referred to in paragraph (a) or (b).” [Emphasis added.]

(f) information prepared from publicly accessible charity information and information referred to in paragraphs (a) to (e)....<sup>80</sup>

As a result of the Bill C-25 amendments, the CRA can now provide the basic information – publicly accessible charity information – to CSIS, the RCMP and FINTRAC about an application, and can also provide designated taxpayer information if further conditions set out in section 241(9)(b) are met.

During each of fiscal years 2005-06 and 2006-07, the CRA received approximately 4,000 applications for registration.<sup>81</sup> In 2006-07, registrations for welfare and religious purposes were the most popular, each representing 29 per cent of overall new registrations. Applications for education and benefit to the community purposes stood at 19 and 15 per cent respectively. These proportions appear to have been consistent over the last five years.<sup>82</sup>

The CRA registration process is explained in a document submitted to the Commission as an exhibit, “Managing and Mitigating Risk of Terrorist Involvement.”<sup>83</sup> The risk assessment comes into play when the initial screening of an application raises concerns about terrorist involvement. The CRA may then request further information from the applicant through a Request for Information (RFI). Ms. Walsh testified that the CRA often has a “very highly developed case” already if it is requesting more information.<sup>84</sup>

Professor Duff observed that the Federal Court of Appeal has characterized the registration of charities as a “strictly administrative function,” and that the Court has found no obligation on the Minister to notify the applicant and invite representations or conduct a hearing before refusing its application for charitable status.<sup>85</sup> Nonetheless, the CRA currently does allow representations. After assessing an application, CRA will send an Administrative Fairness Letter (AFL) to the applicant explaining the reasons for denying charitable status. The AFL gives the applicant 90 days to respond.<sup>86</sup> The CRA can refuse the application by way of a Final Determination (FD), also described as a Final Turn Down (FTD),<sup>87</sup> or it may decide to register the applicant (REG).

In response to registration applications received in 2006-07, the CRA issued 326 FDs, compared to 52 in 2005-06. CRA attributes this to the implementation of

<sup>80</sup> *Income Tax Act*, s. 241(10).

<sup>81</sup> Exhibit P-236, Tab 10: Assessment, Determinations & Monitoring (ADM) Division, Year End Report 2006/2007, Charities Directorate, Legislative Policy and Regulatory Affairs Branch, p. 4 [ADM 2006/2007 Report].

<sup>82</sup> ADM 2006/2007 Report, p. 8.

<sup>83</sup> CRA Document on Managing and Mitigating Risk of Terrorist Involvement.

<sup>84</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7133.

<sup>85</sup> Duff Paper on Charities and Terrorist Financing, pp. 212-213.

<sup>86</sup> Duff Paper on Charities and Terrorist Financing, p. 212, citing Canada Revenue Agency, *Registered Charities Newsletter*, No. 25 (Fall 2005), p.3, online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-25/charitiesnews25-e.pdf>> (accessed March 3, 2009).

<sup>87</sup> The CRA Document on Managing and Mitigating Risk of Terrorist Involvement uses the acronym “FD”; the ADM 2006/2007 Report uses “FTD.”

new procedures.<sup>88</sup> The principal categories of reasons for denials of registration, in 2006-07, were: (i) broad/vague objects, (ii) lack of information and (iii) non-charitable activities.<sup>89</sup> The chart below shows the results of the CRA's "risk mitigation effort" over several years for cases originally evaluated as having some element of risk for support for terrorism:

<b>Fiscal Period</b>	<b>RFI</b>	<b>AFL</b>	<b>FD</b>	<b>REG</b>	<b>Total</b>
April 1, 2007 - Sept 21, 2007	8	12	2	2	24
April 1, 2006 - March 31, 2007	12	12	6	3	33
April 1, 2005 - March 31, 2006	4	13	1	2	20
April 1, 2004 - March 31, 2005	4	5	0	7	16
April 1, 2003 - March 31, 2004	10	6	0	3	19
April 1, 2002 - March 31, 2003	17	15	5	1	38
April 1, 2001 - March 31, 2002	7	7	0	2	16
<b>Total</b>	<b>62</b>	<b>70</b>	<b>14</b>	<b>20</b>	

Exhibit P-236, Tab 9

Ms. Walsh testified that some registration applications had been denied in part because of terrorist involvement, including TF.<sup>90</sup> However, she could not identify the exact number of organizations denied charitable status for this reason, since a given organization might make several applications. In addition, CRA may have several reasons (including those not related to terrorism) to deny registration. In some cases it may be impossible for CRA to attribute a denial of registration solely to terrorism or TF factors, although statistics on when concerns about TF were one of the grounds for denying charitable status would obviously be valuable.<sup>91</sup> The above chart shows that from 2001 until the time of the Commission's hearings on this subject, the CRA denied registration in 14 cases that had some terrorism connection.<sup>92</sup> In addition, the RCMP reported that in 2005-06, three organizations were denied charitable registration because they had links to terrorist activities or groups.<sup>93</sup>

<sup>88</sup> ADM 2006/2007 Report, p. 5.

<sup>89</sup> ADM 2006/2007 Report, p. 9.

<sup>90</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7171-7172.

<sup>91</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7170-7171; ADM 2006/2007 Report, p. 9.

<sup>92</sup> CRA Document on Managing and Mitigating Risk of Terrorist Involvement, p. 2; Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7172-7173.

<sup>93</sup> RCMP 2005-06 Departmental Performance Report, p. 62.



Ms. Walsh stated that CRA “probably” examines the background of directors and trustees listed on an application for charitable status to determine whether the organization is going to be operated wholly for charitable purposes and activities: “information of any sort that is relevant to making that determination is information that we could look at.”<sup>94</sup> Furthermore, the names of directors and trustees can now be shared with CSIS and the RCMP.<sup>95</sup>

For confidentiality reasons, no specific examples of registration applications were provided to the Commission, but the CRA did offer several “sanitized” real examples to illustrate the work done in assessing applications:

[Example 1] A Canada-based organization applied for registered charitable status. Research revealed that the organization provided propaganda and financial support to promote the ideology and the agenda of a proscribed terrorist organization abroad that was seeking to undermine the stability of another country. The applicant’s political activities in Canada and its support for a terrorist entity overseas disqualified it from obtaining Canadian registration as a charity. The application was denied.<sup>96</sup>

[Example 2] An organization’s application to CRA for registered charitable status did not provide sufficient information to allow the federal government to understand how it intended to conduct or protect its activities in an active combat zone overseas. The onus is on the applicant to substantiate that its purposes and activities are charitable in the legal sense. In addition, the organization proposed to conduct its work in areas under the control of groups listed by Canada and the United Nations as terrorist entities. The documents provided by the organization indicated that it intended to work with these groups. The application was denied.<sup>97</sup>

[Example 3] This application for registration was seen to be problematic because of the wide span of the applicant organization’s objects, which would not restrict it to pursuing exclusively charitable goals. Of major concern was that the organization was not responsible for running the programs that it supported. Instead, the organization’s financial and material resources were provided to non-qualified recipients who operated in conflict zones controlled by groups listed by Canada as terrorist entities. The information provided by the applicant organization indicated that it did not have adequate mechanisms in place to prevent its resources from being made

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<sup>94</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7169.

<sup>95</sup> See para. (c) of the definition of “designated taxpayer information” in the *Income Tax Act*, s. 241(10).

<sup>96</sup> Exhibit P-236, Tab 8: “CRA Case Summaries,” Case 5 [CRA Case Studies].

<sup>97</sup> CRA Case Summaries, Case 8.

available to those terrorist entities. In addition, the applicant operated under the auspices of another organization whose objects and activities were political in nature and were aimed at providing benefits to a specific segment of the community.<sup>98</sup>

These examples show that denials of registration occur because of various deficiencies, possibly including TF.

Professor Duff suggested that a more demanding regulatory regime in recent years may have reduced the number of organizations that would otherwise have obtained registered status. He described a sizeable decrease in the number of applications approved for registered charity status – from 90 per cent of applications in 1995-96 to about 65 per cent in 1996-97 – after the revocation of the charitable status of Babbar Khalsa in 1996.<sup>99</sup> He also described the decrease in applications for charitable status between 1999 and 2002 following the attacks of September 11, 2001, and the enactment of the *CRSIA* later that year. He concluded:

Although the explanation for these shifts is not clear, they suggest that the CRA may have become more rigorous in its assessment of applications for registered status after the Babbar Khalsa Society's charitable status was revoked, which – together with the subsequent enactment of the *CRSIA* – may have led to fewer applications for registered status. If so, a more demanding regulatory regime may have reduced the number of organizations that would otherwise have obtained charitable status.<sup>100</sup>

Duff suggested that current provisions for the exchange of information would have made it doubtful that the Babbar Khalsa could register as a charity today.<sup>101</sup> The CRA can be more thorough in reviewing registration applications, given its increased investigative powers and the resulting decrease in registrations.

### **6.5.2.3 The Monitoring and Audit Processes**

The CRA's powers include the power to inspect, audit and examine the books, records and property of a taxpayer (including a registered charity), as well as the power to enter premises and to be given reasonable assistance in such cases.<sup>102</sup>

Once a charity is registered with CRA, it is subject to regular monitoring. Monitoring is part of the ongoing audit process, which occurs on both a random

<sup>98</sup> CRA Case Summaries, Case 12.

<sup>99</sup> Duff Paper on Charities and Terrorist Financing, pp. 213-214.

<sup>100</sup> Duff Paper on Charities and Terrorist Financing, p. 214.

<sup>101</sup> Duff Paper on Charities and Terrorist Financing, p. 238.

<sup>102</sup> *Income Tax Act*, s. 231.1(1); Duff Paper on Charities and Terrorist Financing, pp. 227-229.

and a targeted basis.<sup>103</sup> This audit process is separate from the audit program for regular taxpayers.<sup>104</sup> The charities audit process is risk-based, and the risk indicators are constantly evolving.<sup>105</sup> Terry de March, Acting Director General of the Charities Directorate, testified that "...at different times the money leaving the country for foreign activities has been a focus of our audit program."<sup>106</sup>

An audit can occur even before registration.<sup>107</sup> CRA conducts field audits of about 800 registered charities each year – about one per cent of all registered charities.<sup>108</sup>

Registered charities are subject to multiple requirements to maintain their charitable status. These include the following:

- filing an annual information return and a public information return within six months of the end of their taxation year;<sup>109</sup>
- maintaining books and records in Canada;<sup>110</sup> and
- not becoming involved in commercial activities.<sup>111</sup>

A registered charity must file an annual Registered Charity Information Return (form T3010). This form requires information such as a summary of the year's activities, changes to governing documents, directors' names and personal information, information on international activities, information about sources and uses of funds, financial statements and the charity's web site address.<sup>112</sup>

There is no automatic mechanism or process for CRA to be advised of changes in the annual return information between annual filings. The only tools at CRA's disposal to deal with such changes are the audit process (but only about one per cent of charities are audited every year), information supplied to CRA by other agencies and publicly available information.

A survey of the information collected in 2005 from these forms appears in the CRA document "Assessment, Determinations & Monitoring (ADM) Division."<sup>113</sup> It shows that 13,326 charities reported charitable activities outside Canada (17 per cent of all charities) and that 44,108 charities reported annual revenue of \$100,000 or less (56 per cent of all charities). The document surveyed the top reporting "flags" – cases where charities had not provided all the requested

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<sup>103</sup> Testimony of Terry de March, vol. 57, October 3, 2007, p. 7125.

<sup>104</sup> Testimony of Terry de March, vol. 57, October 3, 2007, pp. 7125-7126.

<sup>105</sup> Testimony of Terry de March, vol. 57, October 3, 2007, p. 7126.

<sup>106</sup> Testimony of Terry de March, vol. 57, October 3, 2007, p. 7125.

<sup>107</sup> Testimony of Terry de March, vol. 57, October 3, 2007, p. 7126.

<sup>108</sup> 2008 FATF Mutual Evaluation of Canada, para. 1425.

<sup>109</sup> *Income Tax Act*, s. 149.1(14).

<sup>110</sup> *Income Tax Act*, s. 230(2); CRA Presentation on Canada's Charities and Anti-terrorism Measures, slide 4.

<sup>111</sup> The prohibition is on an unrelated business: *Income Tax Act*, s. 149.1(2)(a); Duff Paper on Charities and Terrorist Financing, p. 215, note 73.

<sup>112</sup> CRA Presentation on Canada's Charities and Anti-terrorism Measures, slide 6.

<sup>113</sup> ADM 2006/2007 Report, pp. 10-13.

information – and found 28,640 charities (36 per cent)<sup>114</sup> did not provide a Basic Information Sheet as part of their annual return.

#### **6.5.2.4 Intermediate Sanctions**

Before 2005, the only option available to the CRA in the case of a non-compliant charity was to revoke the charity's registration. Since then, several intermediate measures have been introduced to provide greater flexibility in enforcement.<sup>115</sup> These include monetary penalties and the suspension of a charity's power to issue tax receipts for donations. The penalties can be appealed.<sup>116</sup>

Professor Duff testified that intermediate measures let a charity know that it has to "shape up," and let the public know that a charity is having difficulty complying with its legal obligations.<sup>117</sup> Such measures might also help those who seek to regain control of charities which are experiencing governance problems<sup>118</sup>:

To the extent that existing and potential supporters are given notice of the charity's failings through [suspension of power to issue tax-receipts], they may be in a position to persuade the charity to take remedial measures including the removal and replacement of directors or trustees, which the federal government could not accomplish directly given the constitutional limits of its jurisdictional authority.<sup>119</sup>

The CRA does not have a power like that of the Charity Commission of England and Wales to suspend or remove trustees and take measures to protect charities in difficulty. In his paper prepared for the Commission, Professor Mark Sidel detailed how this power was used in the UK to remove Abu Hamza from the Finsbury Park Mosque in London even before he was convicted of inciting murder and hatred in the United Kingdom and indicted on terrorism support charges in the United States.<sup>120</sup> In Canada, direct interventions to remove directors or trustees would fall under provincial jurisdiction. However, the creative use of intermediate sanctions by the CRA could indirectly produce some of the same results. For example, it might be possible to suspend an organization's charitable status temporarily. This would alert trustees, directors and donors to problems in the organization. They might themselves then take remedial actions that are not open to federal authorities because of a lack of federal jurisdiction.

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<sup>114</sup> ADM 2006/2007 Report, p. 11.

<sup>115</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10896. See pp. 238-239 of Duff Paper on Charities and Terrorist Financing for more on intermediate penalties.

<sup>116</sup> See Duff Paper on Charities and Terrorist Financing, pp. 219-221.

<sup>117</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10896.

<sup>118</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10903.

<sup>119</sup> Duff Paper on Charities and Terrorist Financing, p. 220.

<sup>120</sup> Sidel Paper on Terrorist Financing and the Charitable Sector, p. 166.

Since these intermediate sanctions have been allowed only since 2005, empirical evidence about their value is scarce. However, as Professor Duff argues, it must surely be a factor in the decrease in the number of revocations since 2005.

#### 6.5.2.5 Revocation of Charitable Status

A charity has 90 days to file an objection after the CRA issues a revocation notice, and appeals may also be involved.<sup>121</sup> Even after revoking a charity's registration, the CRA continues to collect information about the charity.<sup>122</sup>

Year	Revocations by Request	Revocations for Failure to File Information Return	Revocations for Cause	Total Revocations
2002	800	1,599	5	2,404
2003	788	1,127	6	1,921
2004	709	1,261	8	1,978
2005	438	963	11	1,412

The above chart<sup>123</sup> shows that most revocations are due to a request by a charity or failure to file an information return. There have been very few revocations for cause – ranging from 5 to 11 annually – between 2002 and 2005. Professor Duff testified that the small number might mean either that the charitable sector is healthy or that improper activities are not being caught, but that it was impossible to know which reason applied.<sup>124</sup>

The 2008 FATF Mutual Evaluation of Canada described several types of conduct that have caused registrations to be revoked:

Recent experience suggests that, on average, about 10 charities a year lose their registrations as a result of serious non-compliance issues, including dubious fund-raising schemes, political activities, lack of proper books and records, and improper personal benefit. In addition, registered charities that have failed to demonstrate sufficient control over their foreign operations have been de-registered.<sup>125</sup>

In the end, it is difficult to determine from justifications for revoking registrations if the revocations occurred partly or wholly because of links with terrorism or TF.

#### 6.5.2.6 The Charities Registration (Security Information) Act (CRSIA) Process

Following 9/11, the role of the Charities Directorate changed substantially. This was, in large part, a result of the enactment of the *Charities Registration (Security*

<sup>121</sup> See p. 217 of Duff Paper on Charities and Terrorist Financing for further details.

<sup>122</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7103.

<sup>123</sup> Duff Paper on Charities and Terrorist Financing, p. 218.

<sup>124</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10901.

<sup>125</sup> 2008 FATF Mutual Evaluation of Canada, para. 1425.

*Information) Act (CRSIA)*. The Department of Justice summarizes the purpose of *CRSIA* as follows:

*CRSIA* makes possible the use of classified information in determining whether organizations can register as charities under the *Income Tax Act* or whether, previously having been registered, they can retain this status. Before the passage of *CRSIA*, all decisions on charitable registration were subject to appeal in an open court, and thus only information that could be disclosed publicly could be used in reaching these decisions.<sup>126</sup>

A CRA document similarly spoke of the importance of being able to rely on classified information in making the case for denying or revoking registration:

Regular rules and procedures under the *Income Tax Act* are used to deny or revoke registration where publicly available information combined with information an organization is required to provide to the CRA is sufficient to make the case that an organization is not exclusively dedicated to charitable purposes. But the option to undertake the certificate process authorized by the [*CRSIA*] also is an important tool for cases where it is necessary to rely on classified information to substantiate an organization's ties to terrorism.<sup>127</sup>

The Government of Canada described the *CRSIA* as an administrative process which includes an administrative measure with an administrative remedy.<sup>128</sup>

Section 2(1) of the *CRSIA* explains the Act's formal purpose:

The purpose of this Act is to demonstrate Canada's commitment to participating in concerted international efforts to deny support to those who engage in terrorist activities, to protect the integrity of the registration system for charities under the *Income Tax Act* and to maintain the confidence of Canadian taxpayers that the benefits of charitable registration

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<sup>126</sup> Department of Justice, Fact Sheet, "Outline of the *Charities Registration (Security Information) Act*," online: Department of Justice <<http://www.justice.gc.ca/eng/antiter/sheet-fiche/CRSIA-LEOBRS.HTML>> (accessed April 17, 2009).

<sup>127</sup> CRA Document on Managing and Mitigating Risk of Terrorist Involvement, p. 1.

<sup>128</sup> *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*, p. 14, 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](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*].

are made available only to organizations that operate exclusively for charitable purposes.<sup>129</sup>

Section 2(2) requires the Act to be carried out “in recognition of, and in accordance with,” the following principles:

(a) maintaining the confidence of taxpayers may require reliance on information that, if disclosed, would injure national security or endanger the safety of persons; and

(b) the process for relying on the information referred to in paragraph (a) in determining eligibility to become or remain a registered charity must be as fair and transparent as possible having regard to national security and the safety of persons.

Professor Duff testified that the spirit of the *CRSIA* predated 9/11 since its provisions existed in draft form before then. After 9/11, the draft provisions were integrated with the bill that became the *ATA*.<sup>130</sup> Ms. Walsh stated that the enactment of the *CRSIA* was important “...because it created the foundation for an intelligence-assisted compliance effort that we did not have previously.”<sup>131</sup>

The *CRSIA* permits the Minister of Public Safety and the Minister of National Revenue to issue a certificate stating that it is their opinion, based on information, that there are reasonable grounds to believe<sup>132</sup>:

that an applicant or registered charity has made, makes or will make available any resources, directly or indirectly, to an entity that is a listed entity as defined in subsection 83.01(1) of the *Criminal Code*;

that an applicant or registered charity made available any resources, directly or indirectly, to an entity as defined in subsection 83.01(1) of the *Criminal Code* and the entity was at that time, and continues to be, engaged in terrorist activities as defined in that subsection or activities in support of them; or

that an applicant or registered charity makes or will make available any resources, directly or indirectly, to an entity as defined in subsection 83.01(1) of the *Criminal Code* and the entity engages or will engage in terrorist activities as defined in that subsection or activities in support of them.<sup>133</sup>

<sup>129</sup> See also Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7106; CRA Presentation on Canada's Charities and Anti-terrorism Measures, slide 11.

<sup>130</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10897.

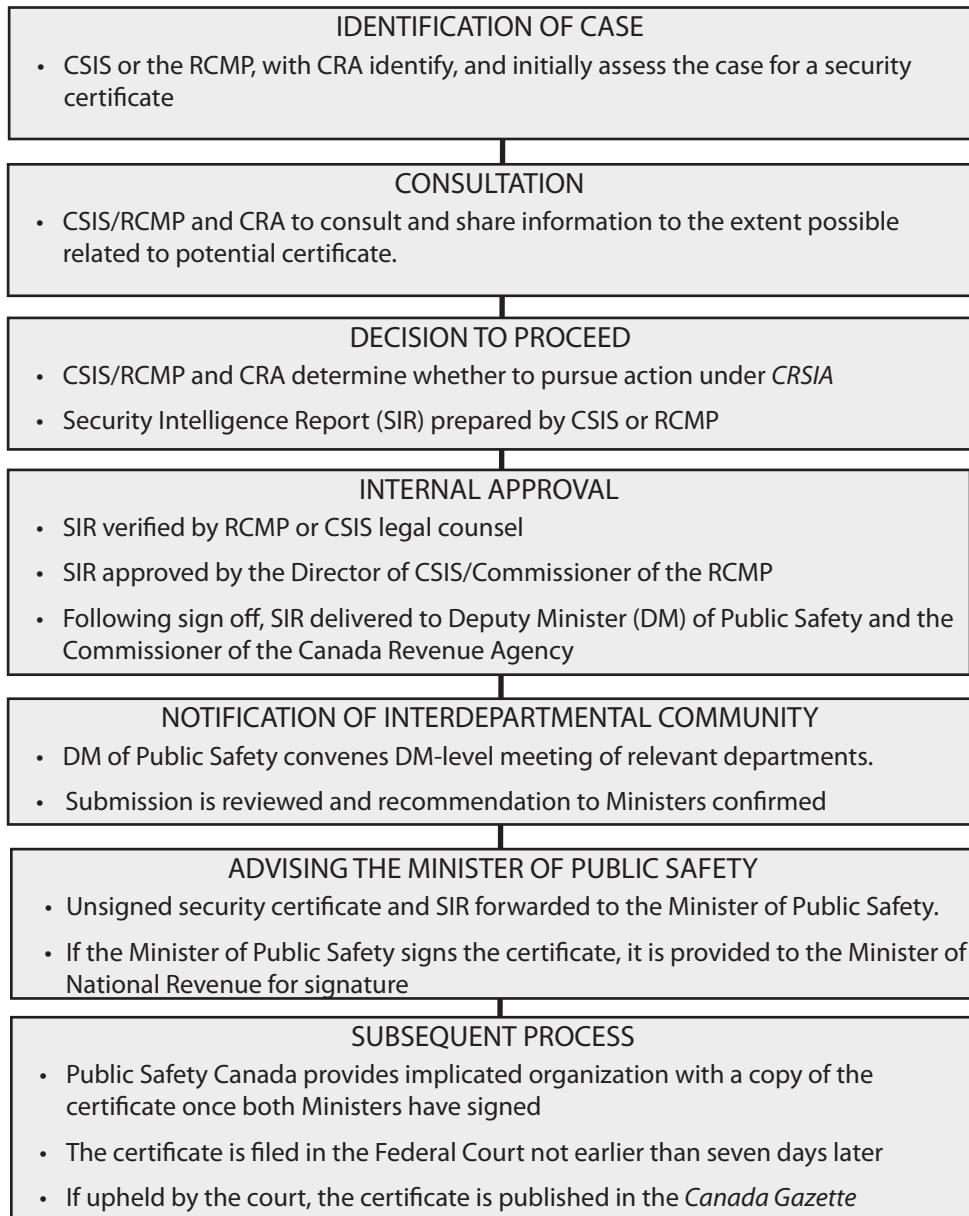
<sup>131</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7109.

<sup>132</sup> The *Charities Registration (Security Information) Act*, S.C. 2001, c. 41, s. 113 [*CRSIA*] uses the “reasonable grounds to believe” standard rather than the criminal law standard of proof. See Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7110.

<sup>133</sup> *CRSIA*, s. 4(1).

Both ministers assess the available intelligence before signing a certificate. To facilitate this, the RCMP and CSIS analyze relevant information and provide their recommendation to the Minister of Public Safety. The CRA performs a similar assessment and provides advice to the Minister of Revenue.

The following chart summarizes the CRSIA certificate process:<sup>134</sup>



<sup>134</sup> Exhibit P-383, Tab 11: Public Safety Canada's Submission to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, October 24, 2007, p. 3.



If the certificate is issued, it is then sent to the charity or applicant for charitable status with a notice that the certificate will be referred to the Federal Court.

A Federal Court judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is probably inadmissible as evidence in a court of law, and may base the decision on that information.<sup>135</sup> The judge must hear all or part of the information or evidence in the absence of the applicant or registered charity named in the certificate and their counsel if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person.<sup>136</sup> The judge must then provide a summary of that evidence to the applicant or registered charity to enable it to be reasonably informed of the circumstances giving rise to the certificate. This summary must not include anything that the judge concludes would be injurious to national security or endanger a person if disclosed.<sup>137</sup> The judge must also give an opportunity for the applicant or registered charity to be heard.<sup>138</sup> After completing this process, the judge must determine whether the certificate is reasonable, and must quash it if of the opinion that it is unreasonable.<sup>139</sup>

A determination by the judge that the certificate of review is reasonable is conclusive proof that the applicant is ineligible to become a registered charity or, in the case of a registered charity, that it does not comply with the requirements to continue to be a registered charity.<sup>140</sup> The judge's determination is final and is not subject to appeal or judicial review.<sup>141</sup> That determination can be reviewed only through an application to the Minister of Public Safety on the basis of a "material change in circumstances" since the determination was made.<sup>142</sup> Unless cancelled sooner, the certificate is valid for seven years.<sup>143</sup>

No certificate had been issued under the *CRSIA* as of January 2009.<sup>144</sup> This may be in part because support for terrorist activities would also violate *ITA* requirements for charitable status. It is likely simpler for the CRA to revoke or deny charitable status because of a failure to satisfy the *ITA* than it is to undertake the *CRSIA* certificate process to achieve the same result. The CRA continues to operate on

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135 *CRSIA*, s. 6(j).

136 *CRSIA*, s. 6(e).

137 *CRSIA*, s. 6(h).

138 *CRSIA*, s. 6(i).

139 *CRSIA*, s. 7.

140 *CRSIA*, s. 8(1).

141 *CRSIA*, s. 8(2).

142 *CRSIA*, s. 10(1).

143 *CRSIA*, s. 13.

144 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. 34, online: Parliament of Canada <<http://www2.parl.gc.ca/content/hoc/Committee/391/SECU/Reports/RP2798914/sterrp07/sterrp07-e.pdf>> (accessed March 3, 2009) [House of Commons Report on the ATA]; The Senate of Canada, Special Senate Committee on the *Anti-terrorism Act, Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the Anti-terrorism Act*, February 2007, p. 60, online: Parliament of Canada <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/anti-e/rep-e/rep02feb07-e.pdf>> (accessed March 3, 2009) [Senate Report on the ATA].

the premise that it is preferable to deal with TF issues under the *ITA* because the process under the *ITA* is more transparent.<sup>145</sup>

If a registered charity or an organization applying for registration is included in either of the UN terrorist entity lists or in the *Criminal Code* list, the CRA evaluates the organization and takes action under either the *CRSIA* or the *ITA*.<sup>146</sup>

In his paper, Professor Duff suggested that the onus of proof under the *ITA* may make it a more attractive vehicle than the *CRSIA* in revoking charitable status:

[S]ince the onus of proof under an ordinary revocation proceeding falls on the charity to disprove the assumptions of fact on which the decision to revoke is based, it may be easier to revoke registered status on this basis than under the *CRSIA*, notwithstanding the “reasonable belief” standard on which revocation under the *CRSIA* may be based.<sup>147</sup>

Although no certificate has yet been issued under the *CRSIA*, Ms. Walsh, Director of the Review and Analysis Division in the Charities Directorate of the Canada Revenue Agency (CRA), stated that the certificate process constitutes a prudent reserve power.

The Commission heard concerns that the *CRSIA* might deter legitimate charities from doing good works abroad. In his paper, Terrance Carter, a lawyer specializing in charities law, argued that “the immediate practical concern for charities is not that they will be prosecuted ... but that they may be vulnerable to de-registration under [*CRSIA*].”<sup>148</sup> As well, he described several possible deficiencies in the *CRSIA* procedure for obtaining a certificate denying or revoking charitable registration.<sup>149</sup> Professor Duff also suggested that there were several deficiencies in the *CRSIA*:

- The grounds on which charitable status may be denied or revoked are extremely broad;
- There is no due diligence defence or, in the alternative, a requirement of intent;
- The level of secrecy surrounding the proceedings is very high, such that it may create insurmountable hurdles for a registered charity or applicant that wants to mount an adequate defence; and

<sup>145</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7157.

<sup>146</sup> 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 Canada, 2006), p. 190.

<sup>147</sup> Duff Paper on Charities and Terrorist Financing, p. 227.

<sup>148</sup> Terrance S. Carter, “The Impact of Anti-terrorism Legislation on Charities in Canada: The Need For an Appropriate Balance,” October 26, 2007, p. 18, online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2007/tsc1026.pdf>> (accessed May 12, 2009) [Carter Paper on Impact of Anti-terrorism Legislation on Charities in Canada].

<sup>149</sup> Carter Paper on Impact of Anti-terrorism Legislation on Charities in Canada, pp. 38-39.

- There is a lack of provision for intermediate penalties (as an alternative to the outright revocation of status or denial of an application) in *CRSIA* certificate proceedings.<sup>150</sup>

In March 2007, the House of Commons Standing Committee on Public Safety and National Security<sup>151</sup> made several recommendations relating to the *CRSIA*, among them that:

- [27] the *CRSIA* be amended so that a Federal Court judge to whom a certificate is referred shall not find the certificate to be reasonable where an applicant or registered charity has established that it has exercised due diligence to avoid the improper use of its resources under section 4(1);<sup>152</sup>
- [28] in consultation with the charitable sector, the Canada Revenue Agency develop and put into effect best practice guidelines to provide assistance to applicants for charitable status and registered charities in their due diligence assessment of donees;<sup>153</sup>
- [29] section 8(2) of the *CRSIA* be amended to allow for an appeal to the Federal Court of Appeal of a decision by a Federal Court judge that a referred certificate is reasonable;<sup>154</sup> and
- [33] subsections 5(3) and (4) of the *CRSIA* be repealed and the Act be amended so that, beginning from the time that an applicant or registered charity is being investigated for allegedly making resources available to a terrorist entity, its identity cannot be published or broadcast, and all documents filed with the Federal Court in connection with the reference of the certificate must be treated as confidential, unless and until the certificate is found to be reasonable and published under section 8.<sup>155</sup>

The Government of Canada responded to the aspects of the House of Commons report dealing with charities as follows:<sup>156</sup>

- [27-28] The Government wished to maintain the *status quo* in the system under the *ITA* and *CRSIA* for the registration of charities and the revocation of registration because doing otherwise would mean that organizations with links

150 Duff Paper on Charities and Terrorist Financing, pp. 240-241.

151 Subcommittee on the Review of the *Anti-terrorism Act*.

152 House of Commons Report on the *ATA*, p. 36.

153 House of Commons Report on the *ATA*, p. 36.

154 House of Commons Report on the *ATA*, p. 37.

155 House of Commons Report on the *ATA*, p. 40.

156 Canada Response to House of Commons Report on the *ATA*, pp. 14-15. The numbers in square brackets refer to the recommendations in the House of Commons Report on the *ATA*.

to terrorism could possibly learn about Canadian counter-terrorism measures and structure their affairs to create a defence against *CRSIA* measures. The changes to the law proposed by the Commons report would also weaken Canada's conformity with its international obligations;<sup>157</sup>

- [29] In considering the possible value of judicial appeals under the *CRSIA*, further study was necessary to assess the implications of the judicial consideration of provisions governing access to appeals under the *Immigration and Refugee Protection Act* security certificate scheme;<sup>158</sup> and
- [33] Adding to the *CRSIA* a provision prohibiting the publication of information in relation to a charity that was under investigation, and a general confidentiality ban on documents filed in Federal Court, would depart from the principle of openness in court proceedings and would run a serious risk of contravening the *Charter*.<sup>159</sup>

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>160</sup> The report contained a general recommendation about the need for a special advocate in charitable status cases.<sup>161</sup>

The Commons and Senate reports both addressed the due diligence and *mens rea* issues, but came to different conclusions. The Commons report recommended adding a due diligence defence to the certificate proceedings triggered by section 4(1) of the *CRSIA*.<sup>162</sup> The Senate report concluded that adding a due diligence defence to the *CRSIA* "...could have the unintended effect of making

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<sup>157</sup> Canada Response to House of Commons Report on the *ATA*, p. 14. Furthermore, the government stated that "...[t]o require in the *CRSIA* that an organization 'knew or ought to have known' could, in some circumstances, effectively result in the Government of Canada providing a tax subsidy for resources tied to terrorism."

<sup>158</sup> Canada Response to House of Commons Report on the *ATA*, p. 15.

<sup>159</sup> Canada Response to House of Commons Report on the *ATA*, p. 15.

<sup>160</sup> Senate Report on the *ATA*.

<sup>161</sup> Senate Report on the *ATA*, p. 60: "The Committee is also satisfied that the appointment of a special advocate, by specifically addressing problems inherent in the judicial review process, would help to address witness anxiety about the 'chill' effect of the *CRSIA* on charitable giving or work. The special advocate would test the evidence raised against charitable organizations in security and intelligence reports, and better enable them to respond to allegations that they have made, made or will make resources available to terrorist groups or in support of terrorist activities. The availability of a special advocate during judicial review would therefore restore balance to the processes under the *CRSIA*, helping to ensure that charities are treated fairly."

<sup>162</sup> See Recommendation 27 in House of Commons Report on the *ATA*, p. 36.

charities more vulnerable to being used as front organizations for terrorists.”<sup>163</sup> Carter also called for a due diligence defence and for a *mens rea* element in *CRSIA* certificate proceedings.<sup>164</sup> Duff argued that the current broad provisions for denial or revocation of registration under the *CRSIA*, along with the absence of a due diligence defence or requirement of intent, might create uncertainty that could deter well-meaning charities from pursuing activities abroad, especially in conflict zones.<sup>165</sup> Duff recommended that a *mens rea* requirement of “intent” be included in section 4(1) of the *CRSIA*<sup>166</sup> for the certificate proceedings permitted by the Act to come into play. He also recommended a due diligence defence. The due diligence defence could be explained in a “made-in-Canada” best practices paper that would guide charities.<sup>167</sup>

### 6.5.2.7 Collection and Use of Information from Various Sources

The *PCMLTFA* requires FINTRAC to disclose “designated information” to the CRA in some situations. If FINTRAC has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence, it must disclose information to the CRA:

if [FINTRAC] also determines that the information is relevant to an offence of obtaining or attempting to obtain a rebate, refund or credit to which a person or entity is not entitled, or of evading or attempting to evade paying [certain taxes or duties],<sup>168</sup> or

if [FINTRAC] also has reasonable grounds to suspect that the information is relevant to determining (i) whether a registered charity... has ceased to comply with the requirements of [the *ITA*] for its registration as such, or (ii) whether a person or

<sup>163</sup> Senate Report on the *ATA*, p. 60. The report also stated: “The Committee is also satisfied that the appointment of a special advocate, by specifically addressing problems inherent in the judicial review process, would help to address witness anxiety about the ‘chill’ effect of the *CRSIA* on charitable giving or work. The special advocate would test the evidence raised against charitable organizations in security and intelligence reports, and better enable them to respond to allegations that they have made, made or will make resources available to terrorist groups or in support of terrorist activities. The availability of a special advocate during judicial review would therefore restore balance to the processes under the *CRSIA*, helping to ensure that charities are treated fairly. Having said this, however, the Committee urges the government to use its powers to deny or revoke charitable status under the *CRSIA* with caution, in order to ensure that charities are not penalized for legitimate aid activities that might occasionally tangentially benefit terrorist organizations or groups”: pp. 60-61.

<sup>164</sup> Carter Paper on Impact of Anti-terrorism Legislation on Charities in Canada, p. 55.

<sup>165</sup> Duff Paper on Charities and Terrorist Financing, p. 241.

<sup>166</sup> This is the provision allowing the Minister of Public Safety and Minister of National Revenue to sign a certificate stating that it is their opinion that there are reasonable grounds to believe that an applicant or charity has made, is making or will make resources available to a listed entity as defined in s. 83.01(1) of the *Criminal Code*.

<sup>167</sup> Duff Paper on Charities and Terrorist Financing, p. 241.

<sup>168</sup> *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, s. 55(3)(b) [*PCMLTFA*].

entity that [FINTRAC] has reasonable grounds to suspect has applied to be a registered charity...is eligible to be registered as such.<sup>169</sup>

CRA may use this information from FINTRAC to start a new enforcement action or support an ongoing action.<sup>170</sup>

As well, the *PCMLTFA* allows the CRA to apply for a judge's order requiring FINTRAC to provide additional information about an investigation of an offence that was the subject of a FINTRAC disclosure made under section 55(3)(b) (which deals with improper refunds or evading taxes).<sup>171</sup>

The CRA receives intelligence reports from, and has liaison arrangements with, both the RCMP and CSIS.<sup>172</sup> The Charities Directorate also has its own pool of information. In particular, the CRA has considerable investigative powers under the *ITA*.<sup>173</sup> As well, the CRA actively monitors the media and the Internet and it reviews case law, academic papers and texts.<sup>174</sup> Two staff members are dedicated to the collection of information.<sup>175</sup> As well, "...[r]esources are ... devoted to the collection and analysis of program-derived and publicly available information specifically relating to the use of social, community, religious, and humanitarian organizations to provide cover and legitimacy for international terrorism."<sup>176</sup>

#### **6.5.2.8 Information Sharing Between CRA and Other Agencies**

As noted earlier, Bill C-25 amended the *ITA* to allow the CRA to disclose information to CSIS, the RCMP and FINTRAC.<sup>177</sup>

The CRA has the discretion to decide whether or not to share information with the RCMP or CSIS. Ms. Walsh testified that the CRA usually discloses information to both agencies.<sup>178</sup> However, there was no set procedure for those agencies to report back to CRA on whether the information had led to a successful prosecution. Ms. Walsh said that this information would be useful and that CRA was seeking such information from other agencies as part of CRA's performance evaluation framework.<sup>179</sup>

The system is now focused on a more extensive sharing of information about registered charities. Still, as Ms. Walsh testified, the new information-sharing

<sup>169</sup> *PCMLTFA*, s. 55(3)(c).

<sup>170</sup> Exhibit P-227, Tab 3: Department of Finance Memorandum of Evidence on Terrorist Financing, February 28, 2007, p. 37 [Department of Finance Memorandum of Evidence on Terrorist Financing].

<sup>171</sup> *PCMLTFA*, s. 60.3.

<sup>172</sup> CRA Document on Managing and Mitigating Risk of Terrorist Involvement, p. 1.

<sup>173</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10898.

<sup>174</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7127-7129.

<sup>175</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7128.

<sup>176</sup> CRA Document on Managing and Mitigating Risk of Terrorist Involvement, p. 1.

<sup>177</sup> Department of Finance Memorandum of Evidence on Terrorist Financing, p. 38.

<sup>178</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7116.

<sup>179</sup> Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7120-7121.

powers were so recent that CRA officials did not yet know how well they were working and what shortcomings might appear.<sup>180</sup>

### 6.5.2.9 Oversight and Review

The CRA's work is subject to several forms of oversight – by the Auditor General, the Treasury Board, the Office of the Privacy Commissioner of Canada (under the *Privacy Act*<sup>181</sup>), the Office of the Information Commissioner of Canada (under the *Access to Information Act*<sup>182</sup>) and the courts. The CRA's annual public report<sup>183</sup> also contains an evaluation of the work of the CRA. As well, CRA activities are examined during parliamentary reviews of the *ATA*, which can touch on the *CRSIA*, and during the FATF mutual evaluation process.

Still, there is no equivalent for the CRA to the review performed by the Security Intelligence Review Committee (SIRC) of CSIS activities. CRA's stringent protection of taxpayer information could make such a review difficult. Unless the law were changed, only taxpayer information such as defined in section 241(3.2) of the *ITA* (information relating to registered charities) would be available for review. Such restrictions applied when the CRA was reviewed by the FATF in 2007-2008, as well as during parliamentary and other reviews of the anti-TF program.

Commissioner O'Connor did not recommend oversight of the CRA in his report of the Arar Inquiry.<sup>184</sup> Commissioner O'Connor focused on the review of the propriety of conduct, including the effect that actions could have on privacy values.

## 6.6 Not-for-profit Organizations (NPOs)

There may be confusion among members of the public about the distinction between registered charities and not-for-profit organizations (NPOs).<sup>185</sup> Terrance Carter, a lawyer specializing in charities law, testified that even "...the FATF and the international best practice refers to both as well, both non-profit organizations and charities are all in the same document."<sup>186</sup>

NPOs are defined in the *ITA*. In essence, they are clubs, societies and similar organizations:

- (i) that can be created for any purpose except profit;

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180 Testimony of Donna Walsh, vol. 57, October 3, 2007, p. 7165.

181 R.S.C. 1985, c. P-21.

182 R.S.C. 1985, c. A-1.

183 Final Submissions of the Attorney General of Canada, Vol. III, February 29, 2008, para. 173; Testimony of Maurice Klein, vol. 57, October 3, 2007, p. 7155.

184 Testimony of Maurice Klein, vol. 57, October 3, 2007, pp. 7155-7156.

185 Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7174-7175.

186 Testimony of Terrance Carter, vol. 67, October 26, 2007, p. 8375.

(ii) with no distribution of any profits to members or shareholders (that means that all profits, if any, are kept within the organization for its purposes); and

(iii) which are not charities in the opinion of the minister.<sup>187</sup>

Like registered charities, NPOs pay no income tax.<sup>188</sup> Unlike charities, NPOs cannot issue tax receipts for donations. Most NPOs are registered with a provincial corporate or other registry.

Terry de March, Acting Director General of the Charities Directorate, told the Commission that there are about 80,000 NPOs in Canada and 83,000 registered charities.<sup>189</sup>

A not-for-profit organization that does not seek to become a registered charity can nonetheless qualify for tax-exempt status with the CRA as an NPO. An NPO's lack of authority to issue a tax receipt may not deter donors who are committed to the NPO's cause. In his paper, Blake Bromley gave the following example, based on his experience with Sikh charities, of a situation where charitable tax receipts are not important to donors:

Sikhs generally give anonymously by placing their offerings in a large locked box so that no one knows how much is given and by whom. Tax receipts are not generally issued, because many worshippers are recent immigrants who are not used to receiving tax benefits for religious donations. However, if a gurdwara receives most of its donations from donors who are not claiming tax benefits, then the gurdwara suffers no disadvantage from being an NPO rather than a charitable organization. In fact, given the problems that gurdwaras face in obtaining charitable status if they carry on cultural and language programs, we advise some of these organizations that it would be a waste of money to apply for registered charity status.<sup>190</sup>

Many organizations that may be prepared to support TF may not see issuing tax receipts as a priority. Creating a "legitimate" vehicle to raise funds and move them abroad is the main objective. Incorporation provides legitimacy to terrorist organizations that need a respectable public face.<sup>191</sup> Furthermore, an NPO can call itself a charity, even if it is not a registered charity. Professor Duff testified that an NPO "...can certainly obtain funds and present [itself] and gain

<sup>187</sup> *Income Tax Act*, s. 149.1(1). See also Testimony of Donna Walsh, vol. 57, October 3, 2007, pp. 7174-7175 and Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7196.

<sup>188</sup> Bromley Paper on Funding Terrorism and Charities, p. 13.

<sup>189</sup> Testimony of Terry de March, vol. 57, October 3, 2007, pp. 7161-7162.

<sup>190</sup> Bromley Paper on Funding Terrorism and Charities, p. 14.

<sup>191</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, pp. 7197, 7208.



the legitimacy of being a charity by passing [itself] off as such.”<sup>192</sup> Even if an NPO does not call itself a charity, simply being an NPO can give it legitimacy in the mind of the public.

Ron Townshend, Registrar with BC Registry Services, testified that legislation regulating NPOs in most provinces is similar.<sup>193</sup> He also spoke about the almost complete lack of oversight of NPOs:

...I questioned my fellow Registrars across the country on this because I was interested in finding out how much time they spend working with their non-profit organizations. Some spend some time but most of them spend very little time, actually. They basically say it’s not their mandate and they let the [NPOs] work internally or go to court or whatever.<sup>194</sup>

The role of a provincial registrar includes ensuring that NPOs comply with relevant provincial legislation and providing registration assistance.<sup>195</sup> Townshend explained that his office has four full-time staff members responsible for handling NPOs.<sup>196</sup> As Registrar, he reviews the applications and constitutions, but not the bylaws, of NPOs seeking registration in the provincial corporate registry.

Not all provinces require NPOs to submit their bylaws to their registrar.<sup>197</sup> Townshend did not believe that it was his role to become involved in an NPO’s internal affairs.<sup>198</sup> The BC Registrar has very limited authority to investigate NPOs.<sup>199</sup> The Registrar can issue a certificate confirming that an NPO is in good standing in meeting its filing requirements, although this does not necessarily mean that the NPO is in good standing in respect of its conduct.<sup>200</sup> Responses from all jurisdictions to a questionnaire about oversight showed no evidence of greater scrutiny or control of NPOs in other provinces and territories.

Townshend explained that there is “...a fair amount of confusion” in BC in the discussion of NPOs,<sup>201</sup> which might be unincorporated or incorporated, provincial or extra-provincial:

I have to say that there is a fair amount, at times, of confusion that goes on with the public and others around the role of the

<sup>192</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10910.

<sup>193</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7205.

<sup>194</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7199.

<sup>195</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7197.

<sup>196</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7195.

<sup>197</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, pp. 7198-7199.

<sup>198</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7199.

<sup>199</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7199. Townshend believed that he was going further than his predecessors in this regard.

<sup>200</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7197.

<sup>201</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7200.

Registrar and what all these different kinds of societies and charitable status really mean.<sup>202</sup>

The confusion arises in part because there is no single department or government source in BC for complete information about NPOs.<sup>203</sup> Provincial governments in general are content simply to confirm registration.

Townshend testified that some 658 extra-provincial NPOs were operating in BC, of which 375 were federally registered and 150 were registered in other provinces. The remaining NPOs originated abroad.<sup>204</sup> Generally speaking, foreign NPOs can choose whether to register in BC. For example, a charity or NPO from Japan can operate in BC without registering there. Townshend said that, as Registrar, he had the power to force extra-provincial NPOs to register, but had never done so.<sup>205</sup>

Townshend described NPOs as a “maze.”<sup>206</sup> He said that when an NPO wants to register as a charity, it is referred to the CRA. That same NPO may later register with the BC Corporate Registry as a provincial NPO.<sup>207</sup> Even if the CRA revokes the charitable registration of the NPO, it can remain registered as a provincial NPO<sup>208</sup> and can still call itself a charity (although it cannot issue tax receipts).

There is no single common identifier for NPOs in Canada that would allow a cross-Canada search to identify existing NPOs. However, some provinces were using the federal business identifier numbering system (for federally incorporated bodies) for NPOs. Such an approach will apparently be considered for use on a wider scale.<sup>209</sup> Townshend noted that the Charities Directorate has approached BC Registry officials to explore a joint filing process for NPOs that are seeking registered charity status.<sup>210</sup> That would alleviate at least some of the confusion surrounding the status and registration of NPOs.

Townshend said he was vaguely familiar with the processes for listing of terrorist entities but had not worked with the lists.<sup>211</sup> He testified that this Commission was the first body to ask him, as Registrar, about TF issues.<sup>212</sup> He said that “... for the most part it’s not something we get involved in, or have at least at this point.”<sup>213</sup> He also stated that corporate registrars across the country were part of

<sup>202</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, pp. 7197-7198.

<sup>203</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7198.

<sup>204</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, pp. 7200-7201.

<sup>205</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7201.

<sup>206</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7201.

<sup>207</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7204.

<sup>208</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7216.

<sup>209</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7203.

<sup>210</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7206.

<sup>211</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7212.

<sup>212</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7207.

<sup>213</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7208.

a close-knit group which met annually but that, to that point, TF had not been discussed.<sup>214</sup>

Townshend had assisted RCMP investigators with inquiries about particular NPOs.<sup>215</sup> He expressed a clear willingness to become involved in TF issues if asked by the province.

Remaining an NPO reduces government oversight of the organization's activities and also reduces controls on how the funds obtained by the NPO can be disbursed. For example, NPOs can have political or other purposes that are not permitted of registered charities. Bromley made similar points in his testimony:

...[When] there is no tax receipt given, there is much less regulatory supervision on how the funds are then distributed out of the non-profit and I don't think that's unreasonable but the reality is that they then can make unrestricted grants by simply writing a cheque to any non-proprietary organization internationally and they don't have to worry about agency agreements. They don't have to worry about the same accountability for those funds and there aren't the limitations on them actually being charitable. Anything that is [a] public good in the broadest sense, you know, qualifies.<sup>216</sup>

In his paper prepared for the Commission, Bromley expressed concerns about the lack of attention to NPOs in anti-TF efforts:

In my opinion, the collective discussion on how Canada's legal framework might facilitate terrorist financing has put too much emphasis on the favoured tax position of registered charities and not enough emphasis on the position of the non-profit organizations.<sup>217</sup>

Professor Duff called for more extensive federal-provincial cooperation in regulating both NPOs and charities:

Since federal regulation applies only to charities that seek or obtain registered status, moreover, not charities that do not apply for registered status, nor other nonprofit and voluntary organizations, federal and provincial governments should also consider what joint initiatives might be taken to establish a more extensive regulatory regime for charities and other

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<sup>214</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, p. 7209.

<sup>215</sup> Testimony of Ron Townshend, vol. 57, October 3, 2007, pp. 7207-7208.

<sup>216</sup> Testimony of Blake Bromley, vol. 67, October 26, 2007, pp. 8431-8432.

<sup>217</sup> Bromley Paper on Funding Terrorism and Charities, p. 13.

nonprofit and voluntary organizations, irrespective of their registered status under the *ITA*.<sup>218</sup>

Several months after Townshend testified, a report in *The Globe and Mail* said that his office had begun to vet organizations to check for links to terrorism: "We're starting to monitor organizations that are getting incorporated over whether or not they have been identified by the United Nations or the federal government as a terrorist organization."<sup>219</sup>

### 6.7 The Findings of the 2008 FATF Mutual Evaluation of Canada about the Charitable Sector

The FATF's 2004 Special Recommendations on Terrorist Financing called for countries to review the adequacy of laws and regulations that relate to entities that can be used for TF.<sup>220</sup> The 2008 FATF Mutual Evaluation of Canada reviewed Canada's regulation of the charitable sector<sup>221</sup> and gave Canada a rating of "Largely Compliant." The FATF explained how the Canadian regime functions, identified the treatment of NPOs as a potential gap, and made the following recommendations:

Canada has taken considerable steps to implement SR VIII [the FATF's Special Recommendation VIII on non-profit organizations] in relation to registered charities, which it considers to be the sector most at risk, based on the risk assessment studies it has done. A large segment of the NPO population is not covered by the current measures using the risk based approach, but Canada should continue to monitor the risks in these other sectors. Canada should improve the existing co-ordination mechanisms between competent authorities, especially between the CRA and the parties responsible for listing and freezing applications. Again, Canada should review the capacity of CRA and FINTRAC to share information with law enforcement authorities related to the non-profit sector.<sup>222</sup>

<sup>218</sup> Duff Paper on Charities and Terrorist Financing, p. 239.

<sup>219</sup> Robert Matas, "Provinces to watch charities for links to terror groups," *The Globe and Mail* (February 5, 2008), online: The Globe and Mail <[http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user\\_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20080205.BCREGISTRY05%2FTPStory%2FNational&ord=3350358&brand=theglobeandmail&force\\_login=true](http://www.theglobeandmail.com/servlet/Page/document/v5/content/subscribe?user_URL=http://www.theglobeandmail.com%2Fservlet%2Fstory%2FLAC.20080205.BCREGISTRY05%2FTPStory%2FNational&ord=3350358&brand=theglobeandmail&force_login=true)> (accessed March 3, 2009).

<sup>220</sup> FATF Special Recommendation VIII: Non-profit organisations.

<sup>221</sup> 2008 FATF Mutual Evaluation of Canada, paras. 1411-1441.

<sup>222</sup> 2008 FATF Mutual Evaluation of Canada, para. 1442. See also p. 306 of the same document.

## 6.8 Criticisms and Challenges Relating to Canada’s Approach to Fighting Terrorist Financing in the Charitable Sector

### 6.8.1 The System May Overreach

Bromley and Carter both testified that charitable registrations are more difficult to obtain now, due to new requirements imposed by the CRA.

Carter testified about the interpretive notes to FATF’s Special Recommendation VIII, noting the provision that anti-TF legislation should not disrupt or discourage legitimate charitable activities.<sup>223</sup> In his paper prepared for the Commission, he made similar comments:

[W]hile Canada’s anti-terrorism legislation is very much a product of a complex array of international initiatives, conventions and multilateral agreements that establish daunting requirements for charities, these same international requirements at least acknowledge the need to strike a balance between efforts to thwart terrorist financing and ensuring that legitimate charitable programs can continue to operate. Specifically, the Financial Action Task Force (“FATF”), in a key policy document concerning the oversight of the non-profit organizations sector internationally, reminds its member countries to ensure that “(m) easures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage legitimate charitable activities” and also that those measures “should to the extent reasonably possible avoid any negative impact on innocent and legitimate beneficiaries of charitable activity.”<sup>224</sup>

### 6.8.2 The Status and Legal Framework of the CRA Itself

The Commission heard a range of views, both in testimony and in papers, about the suitability of having charities regulated by the CRA. Bromley criticized having the CRA as regulator of charities. The CRA is, at its core, the regulator of Canada’s taxation system. This model can be described as the “fiscal regulator” model. In contrast, the Charity Commission of England and Wales is set up expressly to regulate charities. The Charity Commission has more extensive powers than the CRA to regulate, monitor and impose sanctions on charities that breach the law. The Canadian fiscal regulator (tax-based) model has other deficiencies as well:

<sup>223</sup> Testimony of Terrance Carter, vol. 67, October 26, 2007, p. 8376.

<sup>224</sup> Carter Paper on Impact of Anti-terrorism Legislation on Charities in Canada, pp. 2-3.

- It may allow fiscal considerations to trump the charities' best interests and may create distrust of government; and
- The need for confidentiality can impede the work of the regulator and reduce the effectiveness of measures to reduce TF.

However, Kenneth Dibble of the England and Wales Charity Commission testified that a tax-based model that provides fiscal relief (such as Canada's) had some advantages over the Charity Commission model, including the ability to revoke registration and removing tax benefits.<sup>225</sup>

The Charities Directorate, as part of the CRA, has no choice but to operate under the general rules and approaches of that fiscal regulator. Bromley, in his paper, not only expressed doubts that CRA was the appropriate regulator of charities<sup>226</sup> but noted that this could weaken relationships with charities:

CRA also has difficulty building strong relationships with charities because it is a tax collection agency, which understands that in regulating the charitable sector its 'mandate is to protect the tax base.'<sup>227</sup>

The Commission's hearings explored the differing functions of regulators. Professor Duff testified about the considerable trust that exists between the UK charitable sector and the UK Charity Commission:

I think the UK Charity Commission generally is regarded as having a fair bit of trust from the charitable sector, and I don't blame anyone at the CRA, but they're kind of the gatekeepers on the fiscal benefits.... they're going to always have a more adversarial relationship...[with the charitable sector.]<sup>228</sup>

Mark Sidel made similar points in a paper prepared for the Commission. The paper contains an extensive analysis of the positive experience that the United Kingdom has had with its Charity Commission.<sup>229</sup>

Duff's paper went on to elaborate on the limited role that the CRA can play because of the federal division of powers:

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<sup>225</sup> Testimony of Kenneth Dibble, vol. 59, October 9, 2007, p. 7328. Dibble stated that "...[o]ne significant difference is one you touched on before about the removal of registration or the removal of status as a compliance remedy, and ... many people have said to me why can't the commission remove this charity from the register because of what it's done. And you can argue this is a weakness in our system. And the North American model, where there is a sort of an ability to remove the tax advantages or perhaps even de-registration of a non-compliant organization, is a shorter more effective and more resource-effective way of actually dealing with the problem."

<sup>226</sup> Bromley Paper on Funding Terrorism and Charities, p. 7.

<sup>227</sup> Bromley Paper on Funding Terrorism and Charities, p. 19.

<sup>228</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10908.

<sup>229</sup> Sidel Paper on Terrorist Financing and the Charitable Sector, pp. 162-175.

[B]ecause federal jurisdiction over charities is incidental to its taxing power, federal regulatory efforts in this area have tended to emphasize monitoring and investigation in order to assess eligibility for tax benefits, rather than advice and support in order to assist charities to carry out their activities in a manner consistent with their legal obligations and charitable purposes.<sup>230</sup>

Professor Duff argued that there has been a growing emphasis in recent years on federal initiatives to provide advice and support to charities, such as the Charities Partnership and Outreach Program.<sup>231</sup> Nonetheless, the risk remained that the CRA could lean towards enforcing its fiscal rules rather than towards assisting charities.

However, Terry de March, the Acting Director General of CRA's Charities Directorate, denied that the CRA had been pressured to recoup fiscal benefits rather than allowed to help charities comply with the legislation.<sup>232</sup> For example, the amounts identified by Statistics Canada as "foregone revenue" from tax deductions were never used as a benchmark by the Charities Directorate in its work.

### **6.8.2.1 The Fiscal Regulator Model and Confidentiality**

Bromley argued in his paper that the confidentiality provisions binding a fiscal regulator such as the CRA can make its fight against TF, less effective.<sup>233</sup>

Despite the expanded disclosure now allowed under the *ITA* because of amendments introduced by Bill C-25, the *ITA* still prevents the CRA from disclosing some information that may be relevant to fighting TF. In contrast, the Charity Commission of England and Wales discloses on its website examples of cases where the Commission has investigated registered charities for various matters, including alleged involvement in terrorism. There were 20 reports on the Commission's website as of June 2008. In a 2008 report about one investigation, the Charity Commission released information that included the name and general description of the charity, the source of the Commission's concern, when the Commission initiated its inquiry, the issues at stake, the time scale of the inquiry, the findings, the regulatory action taken, the impact of the Commission's intervention, the resources applied to the investigation, the action required of the charity's trustees and, finally, "lessons for other charities."<sup>234</sup>

<sup>230</sup> Duff Paper on Charities and Terrorist Financing, p. 204.

<sup>231</sup> Duff Paper on Charities and Terrorist Financing, p. 204.

<sup>232</sup> Testimony of Terry de March, vol. 57, October 3, 2007, p. 7182.

<sup>233</sup> Bromley Paper on Funding Terrorism and Charities, p. 16.

<sup>234</sup> As an example, see the Newham Foursquare Church, online: United Kingdom Charity Commission <<http://www.charity-commission.gov.uk/investigations/inquiryreports/newham4.asp>> (accessed June 6, 2008).

The *ITA* limits the information that can be disclosed to any person about a charity to the following:

- (a) a copy of the charity's governing documents, including its statement of purpose;
- (b) any information provided in prescribed form to the Minister by the charity on applying for registration under [the *ITA*];
- (c) the names of the persons who at any time were the charity's directors and the periods during which they were its directors;
- (d) a copy of the notification of the charity's registration, including any conditions and warnings;
- (e) if the registration of the charity has been revoked or annulled, a copy of the entirety of or any part of any letter sent by or on behalf of the Minister to the charity relating to the grounds for the revocation or annulment;
- (f) financial statements required to be filed with an information return referred to in subsection 149.1(14);
- (g) a copy of the entirety of or any part of any letter or notice by the Minister to the charity relating to a suspension under section 188.2 or an assessment of tax or penalty under [the *ITA*] (other than the amount of a liability under subsection 188(1.1)); and
- (h) an application by the charity, and information filed in support of the application, for a designation, determination or decision by the Minister under subsection 149.1(6.3), (7), (8) or (13).<sup>235</sup>

#### **6.8.2.2 Fewer Sanctions or Means of Redress are Available to the CRA**

Because charities in many respects fall under provincial jurisdiction, the CRA cannot remove a charity's trustees or appoint managers. In this respect, it has fewer powers than the England and Wales Charity Commission. However, the CRA now has more sanctions available to it than before. Several intermediate sanctions were introduced in 2005, giving the CRA more flexibility in dealing with charities thought to be delinquent, including those found to be involved in terrorism or TF.

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<sup>235</sup> *Income Tax Act*, s. 241(3.2).



### 6.8.2.3 A New Charities Regulator

Some parties before the Commission called for a new charities regulator in Canada. The Air India Victims' Families Association recommended that Canada should consider adopting the Charity Commission model:

The federal government should work cooperatively with the provinces and territories, to consider reforming the Canadian regulatory framework for charitable and non-profit sectors, in order to adopt where possible, the jurisdiction, structure, powers, and modus operandi of the Charity Commission of England and Wales.<sup>236</sup>

Professor Sidel summarized the advantages of the UK model when he wrote about how "...the Charities Commission employs a broad range of investigative and regulatory responses to concerns that charities have links with terrorism."<sup>237</sup> As well, the IN-AICCA<sup>238</sup> submitted that the federal government, "...in conjunction with the provincial regulatory authorities, adopt the approach of the Charities Commission of the U.K. with respect to charities in order to provide a broad range of investigative and regulatory responses."<sup>239</sup>

Professor Duff addressed the constitutional problems associated with regulating charities in Canada in his paper for the Commission, arguing that the federal government and the provinces could jointly delegate their powers to a regulatory agency and thereby avoid a bedeviling division of responsibility:

[F]ederal and provincial governments should consider alternative arrangements to facilitate a more robust regulatory regime for charities, involving at the very least the exchange of information about charities and more ambitiously the possible delegation of federal and provincial authority over charities to an administrative agency that could exercise broad supervisory and regulatory powers.<sup>240</sup>

Professor Duff also called for measures that will treat charities and NPOs as allies against terrorism:

[T]he other policy objective, I think, is to provide support to charities and other voluntary organizations so that they can

<sup>236</sup> *Where is Justice?*, AIVFA Final Written Submission to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, February 29, 2008, p. 159.

<sup>237</sup> Sidel Paper on Terrorist Financing and the Charitable Sector, p. 196.

<sup>238</sup> Submissions of the Family Members of the Crew Victims of Air India Flight 182 and Indian Nationals, Air India Cabin Crew Association, Sanjay Lazar and Aleen Quraishi [IN-AICCA Submission].

<sup>239</sup> IN-AICCA Submission, p. 46.

<sup>240</sup> Duff Paper on Charities and Terrorist Financing, p. 239.

function appropriately and I think that they should be viewed ... as allies in the struggle against terrorism for the most part rather than potential enemies or suspects in the struggle against terrorism; allies in many respects that they build social solidarity.<sup>241</sup>

The CRA has explored reform of the charity sector as part of CRA's Voluntary Sector Initiative (VSI) process,<sup>242</sup> which included a brief consideration of the UK model.

### 6.8.3 The Need for Charities to Receive Practical Guidance

Some Canadian charities believe that they are being left to fend for themselves in an environment which they do not always fully understand.

In his paper, Carter argued that registered charities could unwittingly be affected by new legislation aimed at fighting terrorism and TF. He described the *Criminal Code* provisions dealing with terrorism and TF as producing a "Super *Criminal Code*." Almost any charity, particularly one conducting overseas operations, could find itself caught by the provisions.<sup>243</sup> Carter also suggested that the "learning curve" for charities to understand the anti-TF regime was very high.<sup>244</sup> He had not encountered any charity whose officials knew of the requirements for charities carrying out international activities.<sup>245</sup>

Professor Sidel commented in his paper about the difficulties that many charities face in complying with American best practices. He explained how the US Treasury was required to withdraw guidelines drafted in 2002 because of widespread concerns that they created unrealistic standards. New guidelines were issued in 2005, but the nonprofit community "...remained deeply concerned that these so-called 'voluntary best practices' were in fact stealth law."<sup>246</sup>

There is some support for new guidelines for Canadian charities. For example, Carter recommended as follows:

<sup>241</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10891.

<sup>242</sup> Treasury Board of Canada Secretariat, "Voluntary Sector Initiative," online: Treasury Board of Canada Secretariat <[http://www.tbs-sct.gc.ca/rma/eppi-ibdrp/hrdb-rhbd/archive/vsi-isbc/description\\_e.asp](http://www.tbs-sct.gc.ca/rma/eppi-ibdrp/hrdb-rhbd/archive/vsi-isbc/description_e.asp)> (accessed March 3, 2009). See also Testimony of Blake Bromley, vol. 67, October 26, 2007, p. 8448.

<sup>243</sup> Carter Paper on Impact of Anti-terrorism Legislation on Charities in Canada, pp. 6-24.

<sup>244</sup> Testimony of Terrance Carter, vol. 67, October 26, 2007, p. 8397.

<sup>245</sup> These requirements are set out in the US Department of the Treasury paper on best practices for US-based charities and have been incorporated by reference into the CRA's requirements for charities in Canada. Testimony of Terrance Carter, vol. 67, October 26, 2007, p. 8401; *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. – Based Charities*, online: US Department of the Treasury <[http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines\\_charities.pdf](http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf)> (accessed March 3, 2009).

<sup>246</sup> Sidel Paper on Terrorist Financing and the Charitable Sector, p. 180.

In consultation with the charitable sector, the Canada Revenue Agency [should] develop and put into effect “made-in-Canada” best practice guidelines to provide assistance to applicants for charitable status and registered charities in their due diligence initiatives.<sup>247</sup>

The House of Commons Subcommittee on the Review of the *Anti-terrorism Act* made a very similar recommendation:<sup>248</sup>

Such best practice guidelines would be based on the experience of Canadian applicants and registered charities in carrying out due diligence assessments in the Canadian context, especially when such organizations have limited resources and expertise to carry out such examinations. These best practice guidelines should suggest both general policies and checklists that could be administered by applicants and registered charities in carrying out their due diligence assessments.<sup>249</sup>

#### 6.8.4 CRA Outreach and Education

The CRA has relationships with both national and international charities. As a result, it is in a unique position to acquire information to help in the fight against terrorism and TF. There appear to be no legislative constraints preventing the Charities Directorate from conducting further outreach activities in vulnerable communities and helping to strengthen existing bonds.

Even though the Charities Directorate, due to constitutional limitations, does not have a broad range of tools, it could, as is the case with the Charity Commission of England and Wales, become more involved at the “ground level,” and possibly be seen more as an ally that can provide appropriate and timely information to the public. A “hands-on” outreach program, especially in communities that are more vulnerable to TF and to possible exploitation, might lessen the chances of community members being co-opted to assist extremists.<sup>250</sup>

#### 6.8.5 More Extensive Disclosure by the CRA

At present, section 241(3.2) of the *ITA* permits the CRA to publish certain information about current or previously registered charities. Duff suggested that it would be appropriate for information about applicants for charitable status to be disclosed.<sup>251</sup> The CRA could then publish, on its website or elsewhere, the

<sup>247</sup> Carter Paper on Impact of Anti-terrorism Legislation on Charities in Canada, p. 43.

<sup>248</sup> See Recommendation 28 in House of Commons Report on the *ATA*, p. 36.

<sup>249</sup> House of Commons Report on the *ATA*, p. 36.

<sup>250</sup> See Bromley Paper on Funding Terrorism and Charities, p. 17.

<sup>251</sup> Testimony of David Duff, vol. 85, November 29, 2007, p. 10906.

same information about applicants for charitable status that it now publishes about registered charities. This would make more information available to the public and to overseas communities in Canada. In turn, individuals and communities, not only the CRA, could then monitor applicants for charitable status, just as they are now able monitor registered charities.